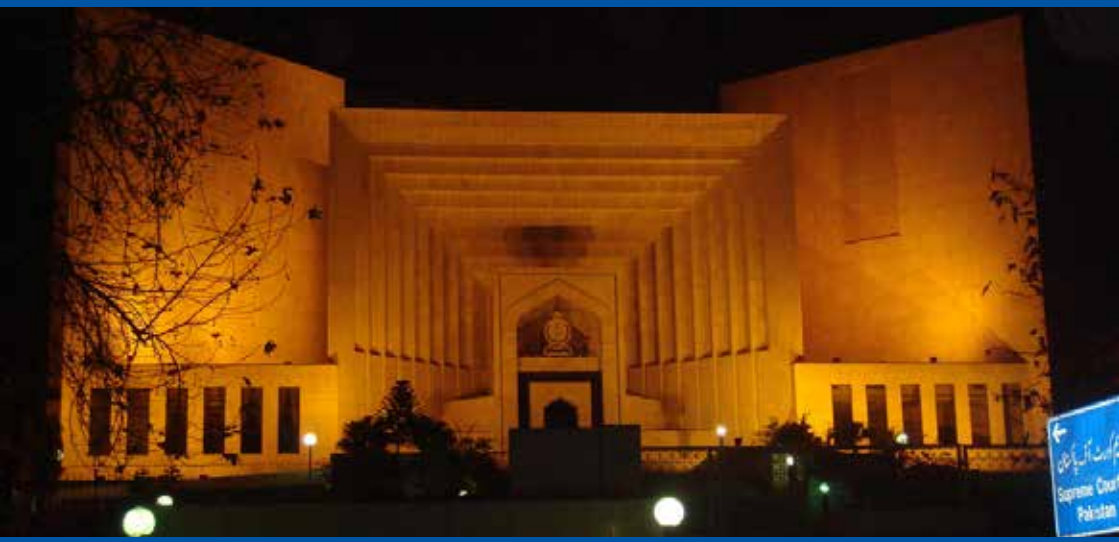
Authority without accountability: The search for justice in Pakistan



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The law and facts are stated as at 1 October 2013.

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List of abbreviations

AACPR	Actions (in aid of civil power) Regulations, 2011
ATC	Anti-terrorism Court
BHC	Balochistan High Court
CAT	Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
CBI	Central Bureau of Intelligence
CNG	Compressed Natural Gas
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIMP	Commission of Inquiry for Missing Persons
CRC	Convention on the Rights of the Child
DG	Director General
DIG	Deputy Inspector General
FATA	Federally Administered Tribal Areas
FC	Frontier Corps
FIA	Federal Investigation Agency
FIR	First Information Report
HRCP	Human Rights Commission of Pakistan
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISI	Inter-Services Intelligence
JI	Jamaat-i-Islami

JIT	Joint Investigation Team
KPK	Khyber Pakhtunkhwa
LHC	Lahore High Court
LNG	Liquefied Natural Gas
MI	Military Intelligence
NAB	National Accountability Bureau
NICL	National Insurance Company Limited
NRO	National Reconciliation Ordinance
OGRA	Oil and Gas Regulatory Authority
PATA	Provincially Administered Tribal Areas
PCO	Provisional Constitutional Order
PML(Q)	Pakistan Muslim League (Quaid)
PML(N)	Pakistan Muslim League (Nawaz)
PPO	Provisional Police Officer
PPP	Pakistan People's Party
PSMC	Pakistan Steel Mills Corporation
PTI	Pakistan Tehreek-Insaaf
SC	Supreme Court
SJC	Supreme Judicial Council
UNWGEID	United Nations Working Group on Enforced or Involuntary Disappearances
VBMP	Voice of Baloch Missing Persons

Introduction and summary

The present day judiciary is looked upon as one institution which is delivering the services to the people [of Pakistan] in an active manner. Therefore, it is incumbent upon the judiciary to come up to the people's expectations and become a role model for all other institutions to follow.

- Chief Justice Iftikhar Muhammad Chaudhry, November 2012

The Supreme Court is expected to fill the gaps left by a dysfunctional system of governance. The problem is that it creates expectation that the Supreme Court will solve everything, which is simply impossible, as not all issues faced by Pakistan are of a judicial nature and other State institutions must play their part.

- Gabriela Knaul, United Nations Special Rapporteur on the independence of judges and lawyers, Mission to Pakistan, April 2013

Chief Justice Iftikhar Muhammad Chaudhry's tenure as Chief Justice of Pakistan has witnessed an extraordinary chapter in the history of the Supreme Court of Pakistan.

In this Report, the third in a series of national studies focusing on *Authority without Accountability* in South Asia, the International Commission of Jurists (ICJ) assesses the Supreme Court's efforts to bring accountability to a government and military that have long failed to protect and respect the rights of millions of people in Pakistan. During his eight years as Chief Justice, Justice Chaudhry has helped transform the Supreme Court of Pakistan into a robust institution capable of exercising its power independently and impartially, safeguarding the Constitution and acting as a check on the power of other institutions of the State. One of the Supreme Court's main tools in this regard has been the rare authority to exercise its 'original jurisdiction' to hear important matters relating to human rights, even on its own initiative (so-called *suo motu* jurisdiction), as granted under Article 184(3) of the Pakistan Constitution.

The ICJ's close analysis of the Supreme Court's jurisprudence during Chief Justice Chaudhry's tenure shows that in some instances, the Supreme Court has been able to improve awareness of human rights violations and has strengthened the right of victims to achieve remedy and reparations. The Court has tried to provide some accountability for corruption and human rights violations by the civilian government and taken a firm stance against unconstitutional usurpation of power by the military. In doing so, the Court has brought Pakistan closer to fulfilling some of its obligations under international human rights law. This

Report has documented some of the strides made by the Supreme Court in these areas; needless to say, these cases are not exhaustive.

The ICJ emphasizes, as a core responsibility for members of the judiciary in the context of upholding the rule of law, the duty to assume an active role in safeguarding human rights and combating impunity. In this respect, the ICJ commends the Supreme Court for its efforts to uphold human rights and provide remedy and redress for some of those whose rights have been violated in Pakistan, at a time when many indicators suggest a serious deterioration in respect for civil, political, economic, social and cultural rights in the country.

There remain, however, areas of concern, particularly regarding the Supreme Court's exercise of its original jurisdiction under Article 184(3). As set out more fully below, ICJ's analysis shows that at times the Supreme Court has exercised its original jurisdiction, particularly its *suo motu* powers, in a manner that has not always been coherent or consistent with its own jurisprudence or with international human rights law. In some cases, the Supreme Court has acted swiftly to exercise its original jurisdiction in cases of human rights violations, facilitating victims' right to remedy and reparation. In other instances, however, the Court has not responded to urgent human rights issues, even when it has been directly petitioned. The opacity surrounding how, and why, the Court prioritizes some human rights issues over others has led to criticisms of arbitrariness that question the Court's actual, and perceived, impartiality and independence.

There are also some inadvertent yet predictable consequences of the expanded use of Article 184(3), which if left unchecked, may corrode the rule of law and undermine human rights. These include an increase in case-load leading to long delays faced by litigants; dispositions in cases that leave affected parties without any remedy or redress; influence on trial courts and interference with the presumption of innocence; blurring of institutional boundaries and violation of separation of powers; and the creation of a two-tier and arbitrary justice system.

In Pakistan, where there are many issues of public importance that relate to the enforcement of human rights, and in view of limited judicial resources, the Court must exercise and must be seen to exercise its extraordinary jurisdiction judiciously. As Pakistan's judiciary moves into a new phase, the ICJ encourages the Supreme Court to exercise its constitutionally mandated powers in a transparent manner that upholds and promotes judicial independence, accountability, separation of powers, human rights and rule of law, thus building on the important judicial precedents of the recent past and strengthening the ability of the Pakistan government to do a better job of protecting and promoting the rights of those living in Pakistan.

New hope for human rights?

For decades, millions of people in Pakistan have lived with little or no redress for violations of their human rights. Thousands of people in the northwestern Tribal Areas and Khyber Pakhtunkhwa suffer from attacks by armed groups, indiscriminate and at times brutal actions by government forces, and strikes by United States pilotless drones. Hundreds, if not thousands, of persons remain subjected to enforced disappearance, particularly in the restive western province of Balochistan. Religious minorities and even smaller Muslim denominations regularly face targeted killings, bombings, and systematic discrimination. Violence against women, in the form of honor killings, domestic violence, acid attacks and sexual assault, continues unabated. Sixty percent of the population lives below the poverty line. And the literacy rate and infant mortality rate are among the lowest in South Asia and the world. With a frequently ineffective government, and under a repressive and overbearing military, many people in Pakistan saw the Supreme Court, led by Chief Justice Chaudhry, as a beacon of hope.

This Supreme Court's new standing is remarkable given the history of Pakistan's judiciary as often overpowered by, if not subservient to, the Executive branch and Pakistan's powerful military. Pakistan has witnessed extra-constitutional rule by various military regimes, spanning almost three decades. Martial law was imposed four times – October 1958, March 1969, July 1977 and October 1999 – and there were three successful military takeovers. On all occasions, the Supreme Court provided legal cover to the military takeover.

By 2005, the situation looked different. The Supreme Court, and in particular Chief Justice Chaudhry, asserted its independence from the Executive and demanded responses from Pakistan's President, General Pervez Musharraf, on a number of violations of the country's Constitution and obligations under international human rights law. Musharraf unlawfully dismissed Chief Justice Chaudhry in March 2007, (and again in November 2007) but a popular movement led by lawyers, students and members of civil society eventually led to Musharraf's resignation in 2008 and, ultimately, the reinstatement of the Chief Justice by the new Pakistan People's Party government in March 2009. With the Chief Justice's restoration, many Pakistanis expressed their hopes and expectations that the Court would help improve government accountability and the rule of law.

The Supreme Court's expanding jurisdiction

During the course of Chief Justice Chaudhry's tenure, and in particular since his reinstatement in 2009, the Supreme Court has increasingly exercised its original jurisdiction over matters it views as important (rather than responding as a court of last appeal to cases winding their way through the legal system). In doing so, the Court has often garnered public acclaim for demanding government accountability. But the Court has also come in for national and international criticism due in large part to the lack of guidelines governing how the Court takes up and prioritizes cases taken up using its original jurisdiction. At times, the Supreme Court has exercised its jurisdiction on the basis of media reports; at times it has responded to partisan petitions by political parties. Without transparent guidelines on how the Supreme Court takes up cases using its original jurisdiction, the Court's decision to give priority to certain cases involving human rights violations over others at times appears arbitrary, giving rise to concerns that the Court has sometimes exercised its original jurisdiction in a political and partisan manner.

Article 184(3) of the Constitution of Pakistan gives the Supreme Court the extraordinary power to assume jurisdiction over any 'question of public importance with reference to the enforcement of any … Fundamental Rights…'. The Supreme Court may assert jurisdiction either on the basis of a petition made to the Court by any party, or on its own motion – referred to as *suo motu* notice. Pakistani courts had in the past interpreted this authority quite narrowly and rarely exercised it, reserving it only for exceptional circumstances.

After Chief Justice Chaudhry's reinstatement in 2009, the Supreme Court began to expand the use of Article 184(3), notably its *suo motu* powers, to respond to a variety of matters including allegations of human rights violations, abuse of power and corruption. The number of petitions under Article 184(3) rose exponentially. According to media reports, compared to 450 petitions made in 2004, the Supreme Court received more than 90,000 petitions between April 2010 and December 2011. The Supreme Court's own records state that the Supreme Court continues to receive approximately 250 applications daily under Article 184(3).

Inconsistency and opacity

The ICJ's 2012 report on its mission to Pakistan raised concerns that the Supreme Court was using its Article 184(3) powers excessively, and recommended that its original jurisdiction be used more restrictively and on the basis of transparent criteria. After undertaking a more in-depth study of the Court's jurisprudence in

the present Report, the ICJ continues to be concerned that the Supreme Court's interpretation of what are 'public importance' and 'fundamental rights' has at times been inconsistent and has sometimes failed to comply with recognized international law and standards.

The ICJ's review of the Supreme Court's recent jurisprudence demonstrates a notable lack of consistency in matters taken up by the Court. For example, the Court took *suo motu* notice when a female Member of Parliament slapped a woman polling officer because it 'brought shame to the country'. Similarly, the Court took *suo motu* notice of the treatment of expatriate Pakistanis at airports, observing that even though expatriates send back billions of dollars to the country every year, the Civil Aviation Authority did not even extend normal courtesy to them. But the Court remained silent when an anti-terrorism court sentenced six labour movement leaders to 10 years imprisonment for protesting against the refusal of power loom owners to increase their wages as per governmental policy. And the Court chose not to take action when hardline Muslim clerics in Rawalpindi organized a rally chanting threatening slogans against the religious minority Ahmadiyya community. These cases are not offered as definitive contrasts—rather, they point out the lack of consistency in the matters over which the Court has asserted original jurisdiction.

Criticisms about the lack of clear criteria on what the Supreme Court considers issues of 'public importance' also arose in the context of corruption allegations made against Chief Justice Chaudhry's son, Arsalan Iftikhar, by business tycoon Malik Riaz. In June 2012, the Supreme Court took *suo motu* notice of the allegations under Article 184(3), considering the matter to be of public importance relating to human rights. However, in the course of the next six months, the Court reversed its position at least three times. Finally in December 2012, the Court disposed of the case and held that it was only a personal matter between Arsalan Iftikhar and Malik Riaz and was, therefore, not of 'public importance'.

In asserting jurisdiction of matters under Article 184(3), the Supreme Court has also sometimes interpreted fundamental rights in a manner that is inconsistent with international human rights law. This issue arose prominently in the 'memogate' case, which involved allegations that Pakistan's ambassador to the United States, Hussain Haqqani, had written a memorandum to a senior US military figure asking for assistance to Pakistan's civilian government against a potential military coup d'etat. In response to a petition brought by opposition political parties, the Court accepted jurisdiction under Article 184(3) by interpreting the individual's right to life—protected under the Pakistan Constitution and international human rights law—to include the right to dignity

and, thus, Pakistan's right to sovereignty and an 'honorable existence'. In essence, the Supreme Court interpreted the right to life to address a political dispute about foreign relations. The Court's ruling diverged from interpretations of the applicability of the right to life and opened up the Court to criticism that it has exercised its human rights jurisdiction based on political considerations rather than a legal interpretation of 'fundamental rights'.

Failure to address major human rights issues

The Supreme Court has acted swiftly in some matters, addressing a significant number of human rights petitions particularly relating to the administration of justice in criminal cases, women's rights and the rights of transsexuals. But the Court has been reluctant to use measures at its disposal in other instances, such as providing accountability for the country's ongoing crisis of enforced disappearances, resolving the conditions of more than 7000 people on death row, and ending the ability of security forces to detain suspects arbitrarily and with impunity.

Enforced disappearances

The prevalence of enforced disappearances has been a major human rights problem in Pakistan and a source of significant political tension, including between the Supreme Court and General Musharraf. The Supreme Court has done well to denounce the practice of enforced disappearance and locate a number of disappeared persons. Nevertheless, the Supreme Court has failed so far in ensuring members of the military and security agencies allegedly responsible for enforced disappearances are held to account and providing effective remedy and reparations to the hundreds, if not thousands, of victims of enforced disappearance. The case of the 'Adiala 11' is a striking example of the Supreme Court's failure to ensure accountability, remedy and reparations for arbitrary detention and enforced disappearances.

In May 2010, an anti-terrorism court acquitted 11 men of terrorism charges and ordered their release from Adiala prison. Instead of being released, however, they were allegedly subjected to enforced disappearance by members of the armed forces. The Supreme Court took up a petition filed under Article 184(3) by the families of the detainees and ordered the intelligence forces and military to locate the 'missing' men.

In December 2010, it came to light that the 11 men were being detained under the Army Act in connection with 'terrorist activities'. Between August 2011 and January 2012, four of the eleven men died in custody under suspicious

circumstances. Lawyers for the detainees claimed they died after being subjected to torture. Since then, the remaining seven detainees have been brought before the Court twice; however, the Supreme Court has not ordered their release or determined whether their detention is lawful.

The lingering threat of the death penalty

The Court has not responded to at least two petitions under Article 184(3) to commute death sentences, which gave the Supreme Court the opportunity to uphold and safeguard the right to life and bring Pakistan into compliance with international law and standards regarding the death penalty.

There are now more than 7000 people on death row in Pakistan. The ICJ considers the death penalty to violate the right to life and constitute a form of cruel and inhuman punishment. Under Article 6(2) of the ICCPR, the death penalty may only be imposed for the most serious crimes (offences in which there was an intention to kill and there was a loss of life) following a proceeding that affords the accused all of the rights guaranteed under the ICCPR, including the right to a fair trial before an independent, impartial and competent court. The imposition of the death penalty for offences other than the most serious crimes or where the accused's rights have been violated contravenes the right to life.

In Pakistan, the death penalty is prescribed for 27 different crimes, many of which do not meet the threshold of *most serious crimes* stipulated by Article 6 of the ICCPR, such as blasphemy, sexual intercourse outside of marriage, kidnapping or abduction, rape, assault on modesty of a woman and stripping of her clothes, smuggling of drugs, arms trading and sabotage of the railway system.

Impunity of armed forces for arbitrary detention

The Court has also failed to respond to a petition to review the *Actions (in Aid of Civil Power) Regulations (AACPR) 2011,* which grants sweeping powers to members of armed forces to detain suspects without charge or trial. Individuals may be detained for an unspecified period of time without any right to be brought before a court of law or challenge the legality of detention. The Regulations further confer wide immunity to armed forces for any conduct taken pursuant to the Act. Using its powers under Article 184(3), the Supreme Court could review, and if required, invalidate sections of the AACPR that are incompatible with Pakistan's obligations under international human rights law. As of October 2013, the Court has yet to do so.

Inadvertent consequences

While the ICJ commends and supports the Court in its use of its judicial authority to promote rule of law and human rights, the ICJ is also concerned that there are some inadvertent consequences of the expanded use of Article 184(3), which if left unchecked, may erode the rule of law and undermine human rights. These include an increase in case-load leading to long delays faced by litigants; dispositions in cases that leave affected partied without any remedy or redress; influence on trial courts and interference with the presumption of innocence; blurring of institutional boundaries and violation of separation of powers; and the creation of a two-tier and arbitrary justice system.

As mentioned earlier, there has been an unprecedented rise in petitions by individuals seeking remedy and reparations for human rights violations from the Court under Article 184(3) of the Constitution. Whereas in 2004, 450 petitions were filed, between April 2010 and December 2011, over 90,000 petitions were made to the Court. According to the Supreme Court Registrar's report, 250 petitions are received daily under Article 184(3). The ICJ is concerned whether a caseload of this magnitude is manageable or sustainable and recommends a clear set of vetting guidelines to manage the high volume of petitions and applications.

Moreover, such an enormous increase in caseload will inevitably exacerbate the already long delays faced by litigants. More than 20,000 cases are pending before the Supreme Court alone, including more then 1000 appeals by prisoners on death row. This hinders the realization of the right to a hearing in criminal cases without unreasonable delay, which is an essential component of the right to a fair trial.

Second, the Supreme Court's disposition in Article 184(3) cases has at times had far-reaching consequences, which have inadvertently drawn in persons who would not have originally anticipated being affected by the case. Because 184(3) judgments cannot be appealed, the consequence has been to leave aggrieved or affected parties without redress or remedy.

A judicial policy that aims to ensure that those who may be aggrieved or are likely to be directly affected by a case taken up under the Court's powers of original jurisdiction have an opportunity to become parties to the proceedings and make submissions in the matter would help resolve this problem.

Third, in some instances, the Supreme Court's decision to exercise its original jurisdiction, particularly when it takes *suo motu* notice of cases, has hurt the presumption of innocence and the right to a fair trial. In some cases, the Supreme Court makes comments on matters against individuals who, at the time, are not formally charged with an offence. The Supreme Court then refers a matter to a trial court for prosecution—raising concerns about whether it is possible for an individual to receive a fair trial before an independent and impartial trial court when the highest court has already taken cognizance of the matter and made public remarks on the facts of the case and the guilt of the accused.

The expanded use of Article 184(3), has sometimes led to friction between the Court and other branches of the State. Notably, the Supreme Court has intervened and at times usurped the jurisdiction of administrative agencies including institutions such as the Election Commission, the National Accountability Bureau and even the Parliament. The ICJ cautions the Supreme Court to take greater care to respect the separation of powers in a manner that is consistent with the constitutionally mandated powers of the legislature and executive.

Finally, the excessive reliance on Article 184(3) threatens to displace the proper functioning of the criminal justice system, particularly regarding high profile cases, creating a two-tier system of justice. This extraordinary mechanism should not be exercised in lieu of the regular criminal process, and in most instances, it cannot on its own fulfill victims' right to remedy and reparation. The Supreme Court's original jurisdiction must be exercised in a manner that is complementary to the criminal process.

Contempt of Court

Rising concerns and criticisms about the Supreme Court's exercise of its original jurisdiction have coincided with an unprecedented increase in the judiciary's use of contempt of court powers. As set out in the Report, since 2009, the Court has handed down contempt notices to many lawyers, politicians, journalists and media houses for allegedly scandalizing or ridiculing the judiciary, interfering with and, at times even violating, individuals' right to freedom of expression and freedom of the press. The ICJ is concerned that the threat of contempt could have a chilling effect on debate and criticism of the judiciary and the judicial system; undermine, if not contravene, the right to freedom of expression; and open the judiciary up to questions about of abuse of power.

Conclusion and recommendations

The Supreme Court's original jurisdiction, allowing it to act on issues of public importance affecting human rights, is an important and powerful mechanism that if exercised judiciously and in a manner that respects the separation of powers, can be used to combat impunity, ensure effective redress and adequate and reparation, enhance protection of human rights and advance respect for the rule of law.

This Report sets out recommendations that if implemented would enable the Supreme Court to use its Article 184(3) powers in a manner that promotes and protects human rights and is in compliance with international law and standards.

With a view to encouraging the Supreme Court to continue exercising its original jurisdiction in a transparent manner that upholds and promotes judicial independence, rule of law, accountability and human rights, the International Commission of Jurists offers the following recommendations:

(1) The Supreme Court should exercise its powers under Article 184(3) of the Constitution in a manner that complies with Pakistan's obligation under international law to promote, protect and respect human rights, maintain rule of law and uphold separation of powers;

(2) The Supreme Court should adopt transparent yet flexible criteria to govern how cases are selected under Article 184(3), and in particular taken up under the Court's *suo motu* jurisdiction, and develop criteria to guide how 'public importance' and 'fundamental rights' are interpreted. Such criteria should take into account that *suo motu* procedures are an exceptional exercise of power;

(3) The Supreme Court should adopt transparent rules to determine the order in which cases under Article 184(3) are heard and the composition of the bench to hear cases;

(4) The Supreme Court must ensure that parties who may be affected by the Court's exercise of its 184(3) jurisdiction have an adequate opportunity to request to intervene in the case before a decision is rendered or the matter is disposed of; and

(5) The Supreme Court should ensure that all dispositions or actions ordered, in cases taken up under Article 184(3) are themselves consistent with rule of law, separation of powers and human rights, and do not leave persons whose rights are foreseeably likely to be directly and adversely affected without redress or remedy.

International legal framework

Pakistan is a party to many of the core UN human rights treaties: (1) the *International Covenant on Civil and Political Rights* (ICCPR);[1] (2) the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);[2] (3) the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT);[3] (4) the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD);[4] (5) the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW);[5] (6) the *Convention on the Rights of the Child* (CRC),[6] and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;[7] and the *Convention on the Rights of Persons with Disabilities* (CRPD).[8] As a member State of the United Nations,[9] Pakistan is bound by the resolutions of the Security Council. Pakistan must also act to give effect to resolutions of the General Assembly and authoritative legal standards of the United Nations. Pakistan may not invoke provisions of its domestic law to justify non-compliance with its treaty obligations.[10]

The scope and content of Pakistan's human rights obligations have been elaborated in commentaries by treaty-monitoring bodies, jurisprudence from treaty-monitoring bodies and regional human rights courts, and authoritative standards. These sources include: authoritative interpretative texts of treaty-monitoring bodies about particular treaty obligations, known variously as

1 *International Covenant on Civil and Political Rights* (ICCPR), 999 U.N.T.S. 171, entered into force 23 March 1976, Pakistan ratified on 23 June 2010.
2 *International Covenant on Economic Social and Cultural Rights* (ICESCR), 993 U.N.T.S. 3, entered into force 3 January 1976, Pakistan acceded on 17 April 2008.
3 *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT), 465 U.N.T.S. 85, entered into force 26 June 1987, Pakistan acceded on 23 June 2010.
4 *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), 66 U.N.T.S. 195, entered into force 4 January 1969, Pakistan ratified on 21 September 1966.
5 *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), U.N.G.A. Resolution 34/180, 34 U.N. GAOR Supp. (No. 46), p 193, UN Doc. A/34/46, entered into force 3 September 1981, Pakistan acceded on 12 March 1996.
6 *Convention on the Rights of the Child* (CRC), U.N.G.A. Resolution 44/25 Annex, 44 U.N. GAOR Supp. (No. 49) at 167, UN Doc. AA/44/49 (1989), entered into force 2 September 1990, Pakistan ratified on 12 November 1990.
7 *Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography*, U.N.G.A. Resolution 54/263, Annex II, 54 UN GAOR Supp. (no 49) p 6, UN Doc. A/54/49, Vol. III (2000), entered into force 18 January 2002, Pakistan acceded on 5 July 2011.
8 *Convention on the Rights of Persons with Disabilities* (CRPD), 2515 U.N.T.S. 3, entered into force 3 May 2008, Pakistan acceded on 5 July 2011.
9 *Declaration of Acceptance of the Obligations contained in the Charter of the UN – Admission of States to Membership in the UN in accordance with Article 4 of the Charter*, U.N.G.A. Resolution 108(II), 30 September 1947, 8 U.N.T.S. 57.
10 Article 27, *Vienna Convention on the Law of Treaties* (Vienna Convention), 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980; UN Human Rights Committee, 'General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)', UN Doc. CCPR/C/21/Rev.1/Add.13 (UNHRC General Comment 31), para 4.

General Comments or General Recommendations; concluding observations of the treaty-monitoring bodies following their examination of periodic reports of Pakistan and other States Parties regarding their implementation of treaty obligations; jurisprudence from treaty-monitoring bodies and regional human rights courts arising from their examination of individual or inter-state petitions; and commentary and recommendations from UN experts mandated by the UN Human Rights Council and its predecessor body, the Commission on Human Rights (including following country visits and on general themes). There are also a number of non-treaty standards, including declarations, principles and guidelines, as well as resolutions adopted by the UN or other intergovernmental bodies, such as the General Assembly and the Human Rights Council. These clarify and expound upon the content of treaty provisions and human rights principles as well as State parties' corresponding obligations in upholding those rights.

The duty to guarantee human rights is grounded in both international treaty law[11] and customary international law. Pakistan must take the necessary measures to implement its international rights obligations at the national level by enacting compliant domestic laws; refraining from violating human rights either by act or omission; adopting measures aimed at guaranteeing the enjoyment of human rights; and protecting persons from the impairment of the enjoyment of human rights by third parties, such as private actors. In addition to taking measures to prevent human rights violations, upon receipt of complaints or information about alleged human rights violations, Pakistani authorities must ensure the initiation of independent, impartial and thorough investigations. The authorities must also ensure that those responsible for human rights violations are held accountable, and where the human rights violation constitutes a crime under domestic law or international law, those responsible must be held criminally responsible.[12] Furthermore, as detailed further below, the authorities in Pakistan must ensure that victims of human rights violations have access to effective remedies and adequate reparation.

These duties are reflected, among other things, in the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*, a set of standards accepted by the international community, evidenced in its unanimous adoption by the General Assembly in 2005.[13] These standards clarify that:

11 Article 2, ICCPR; Article 6, ICERD; Article 2(c), CEDAW.
12 UNHRC General Comment 31, *supra* fn. 10, para 15.
13 U.N.G.A. Resolution 60/147, 21 March 2006, UN Doc. A/RES/60/147.

> *The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:*
>
> *(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;*
>
> *(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;*
>
> *(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice… irrespective of who may ultimately be the bearer of responsibility for the violation; and*
>
> *(d) Provide effective remedies to victims, including reparation…*[14]

(A) The State's obligation to provide a remedy for human rights violations

As noted above, the right of victims to a remedy for human rights violations is a well-established principle under international law that is guaranteed in international human rights treaties and is reflected in other international standards, instruments and resolutions adopted by the international community.[15]

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14 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution adopted by the General Assembly*, 21 March 2006, UN Doc. A/RES/60/147 (*UN Basic Principles and Guidelines on the Right to a Remedy*), para 3.

15 Article 2.3, ICCPR; Article 13, CAT; Article 6, ICERD; Articles 12, 17.2(f) and 20, *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED), U.N.G.A. Resolution 61/177, 23 December 2010, UN Doc. A/61/488; Article 6.2, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime*; Article 6.2, *Universal Declaration of Human Rights*; Articles 9 and 13, *Declaration on the Protection of All Persons from Enforced Disapparances,* U.N.G.A. Resolution 47/133, UN GAOR Supp (No. 49) at 207, UN Doc. A/47/49 (1992), adopted by General Assembly Resolution 47/133 of 18 December 1992 (*Declaration on the Protection of All Persons from Enforced Disappearance*); Principles 4 and 16, *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989 (*UN Principles on Extra-Legal Executions*); Principles 4-7, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of P*ower; Article 27, *Vienna Declaration and Programme of Action*; Articles 13, 160-162 and 165, the *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*; Article 9, the *Declaration on Human Rights Defenders*; Article 13, *European Convention on Human Rights*; Article 47, *Charter of Fundamental Rights of the European Union*; Article 7.1(a) and 25, *American Convention on Human Rights*; Article XVIII, *American Declaration of the Rights and Duties of Man*; Article III(1), *Inter-American*

An effective remedy is not only a right in itself; it is a mechanism by which all other rights are realized.

The UN Human Rights Committee describes the right to a remedy as 'a treaty obligation inherent in the [International] Covenant [on Civil and Political Rights] as a whole': even in times of emergency, 'the State party must comply with the fundamental obligation, under Article 2, paragraph 3 of the Covenant to provide a remedy that is effective'.[16]

The UN Human Rights Committee has also clarified that the obligation to provide a remedy is binding on all branches of State – the executive, legislative and judiciary – at the national, regional and local levels.[17] As part of the duty to ensure a remedy, States must establish appropriate judicial and administrative mechanisms that are both effective and accessible throughout the country for investigating allegations of rights violations promptly, independently and impartially.[18] Effectiveness means the remedy is practical and provides real access to justice.[19]

The duty to provide a remedy to victims of human rights violations also requires the State to ensure that victims receive adequate, effective and prompt reparation.[20] Forms of reparation, which must be provided where appropriate and proportionate to the circumstances in each case include restitution, rehabilitation, compensation, guarantees of non-repetition (including changes in relevant laws and practices), and measures of satisfaction, such as public apologies, public memorials, as well as bringing to justice perpetrators of human rights violations.[21]

Convention on Forced Disappearance of Persons; Article 8.1, *Inter-American Convention to Prevent and Punish Torture*; Article 7(a) *African Charter of Human and Peoples' Rights*; and Article 9, *Arab Charter on Human Rights*.

16 UN Human Rights Committee, 'General Comment 29, States of Emergency (2001),' UN Doc. CCPR/C/21/Rev.1/Add.11 (UNHRC General Comment 29), para 14; see also International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*: a Practitioner's Guide, Geneva, December 2006 (International Commission of Jurists, *Remedies and Reparations*), p 44.

17 UNHRC General Comment 31, *supra* fn. 10, para 4.

18 *Ibid*., para 15.

19 European Court of Human Rights, judgment of 9 October 1979, *Airey v. Ireland*, Series A, No 32, para 24.

20 UNHRC General Comment 31, *supra* fn. 10, para 16; *UN Basic Principles and Guidelines on the Right to a Remedy*, *supra* fn. 14, para 3(d).

21 UNHRC General Comment 31, *supra* fn. 10, para 16; *UN Basic Principles and Guidelines on the Right to a Remedy*, *supra* fn. 14, paras 18-23.

(B) The State's duty to ensure accountability for human rights violations

Intrinsically tied to the right to a remedy and part of the duty to ensure reparation, is the obligation on the State to ensure accountability for human rights violations.

Pakistan is obligated, including under the ICCPR, to ensure that allegations of human rights violations are promptly, independently, impartially and thoroughly investigated and that those responsible for human rights violations are brought to justice in fair proceedings and are punished in a manner that is proportionate to the gravity of the crime committed.[22]

Similarly under the CAT, Pakistan must promptly and impartially investigate all allegations of torture and other ill-treatment,[23] even in the absence of a complaint,[24] whenever there are reasonable grounds to believe that such an act has taken place in its territory or by persons subject to or in its jurisdiction. Those responsible for torture or other ill-treatment must be brought to justice and punished in a manner that is proportionate to the gravity of the offense.

In its most recent and in previous unanimous resolutions on the prohibition of torture and other ill-treatment, the UN General Assembly stressed the importance of holding State officials accountable, bringing those responsible to justice, and imposing a punishment that is commensurate with the severity of the offense.[25]

The *UN Basic Principles and Guidelines on the Right to a Remedy* reflect these obligations with respect to cases of gross violations of human rights and serious violations of international humanitarian law:

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22 Article 2, paragraph 3, ICCPR; UNHRC General Comment 31, *supra* fn. 10, paras 15-16; *UN Basic Principles on the Right to a Remedy*, *supra* fn. 14, para 3; *United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 (*Updated Set of Principles to Combat Impunity),* Principle 1; UN Human Rights Committee, case of *Bautista de Arellana v. Colombia,* Communication No. 563/1993, views of 14 June 1993, UN Doc. CCPR/C/55/563/1993 (1995), para 8.6; UN Human Rights Committee, case of *Jose Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel Maria Torres Arroyo and Antonio Hugues Chaparro Torres v. Columbia*, Communication No. 612/1995, views of 14 June 1994, UN Doc. CCPR/C/60/D/612/1995, para 8.8; UN Human Rights Committee, case of *Maria Fanny Suarez de Guerro v. Colombia*, Communication No. 45/1979, views of 31 March 1982, UN Doc. CCPR/C/15/D/45/, para 13.3; see also European Court of Human Rights, judgment of 26 March 1985, *X and Y v. the Netherlands*, Application No. 8978/80, para 27; see also European Court of Human Rights, judgment of 4 December 2003, *M.C. v. Bulgaria*, Application no. 39272/98, para 153; *Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights*, para 60.

23 Article 12, CAT, Committee Against Torture, 'General Comment 2, Implementation of Article 2 by States Parties (2007),' UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (CAT General Comment 2).

24 Inter-American Court of Human Rights, judgment of 29 July 1988, *Velasquez Rodriguez v. Honduras,* para 177; European Court of Human Rights, Judgment of 18 December 1996, *Askoy v. Turkey*, Reports 1996-VII, para 99.

25 U.N.G.A. Resolution 66/150, *Torture and Other Cruel, Inhumane and Degrading Treatment*, 27 March 2012, UN Doc. A/RES/66/150, para 7.

> *In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.*[26]

The *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* similarly reflect the obligations of States to

> *…undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.*[27]

(C) An independent and impartial judiciary

An independent judiciary is indispensible to maintaining a free society governed by rule of law.[28] It is a *sine quo non* of the right to a fair trial, enshrined in customary international law and Article 14 of the ICCPR, which requires that civil and criminal proceedings are conducted before competent, independent and impartial tribunals established by law. All branches of the State must respect and must guarantee this right without exception.[29]

Respect for the independence and impartiality of the judiciary requires that judges 'decide matters before them on the basis of facts and in accordance with law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.[30]

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26 *UN Basic Principles and Guidelines on the Right to a Remedy*, *supra* fn. 14.
27 *Updated Set of Principles to Combat Impunity, supra* fn. 22, Principle 19.
28 International Commission of Jurists, *Congresses and major conferences*, Geneva, 1952-2012 (ICJ, *Congresses and major conferences*), p 40.
29 UN Human Rights Committee, 'General Comment 32, Right to equality before courts and tribunals and to a fair trial (2007),' UN Doc. CCPR/C/GC/32 (UNHRC General Comment 32), para 19.
30 *UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (*UN Basic Principles on the Independence of the Judiciary*).

Independence of the judiciary does not, however, mean a judge has unfettered freedom to act in any manner he or she pleases. In its 1959 Delhi Congress Report, the International Commission of Jurists stressed that

> *…freedom from interference by the executive or legislature with the exercise of the judicial function…**does not mean that the judge is entitled to act in an arbitrary manner**. His duty is to interpret the law and the fundamental principles and assumptions that underlie it.*[emphasis added][31]

Judges and the judiciary must not only be independent, they must be impartial. Impartiality is defined as the absence of any actual or perceived bias, animosity or sympathy towards the parties to a case.[32]

According to the UN Human Rights Committee, there are both objective and subjective tests for impartiality

> *First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, **the tribunal must also appear to a reasonable observer to be impartial**.* [emphasis added][33]

(D) The independence of the judiciary and the separation of powers

Respect for the rule of law and independence of the judiciary requires respect for the separation of powers by the three branches of State: the executive, the parliament and the judiciary.

The Commonwealth *Principles on the Accountability of and the Relationship between the Three Branches of Government* (Latimer House Principles)[34] underscore that

31 ICJ, *Congresses and major conferences*, *supra* fn. 28, p 40.
32 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors - A Practitioners Guide*, Practitioners Guide No. 1, Geneva, 2007 (International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*).
33 UNHRC General Comment 32, *supra* fn. 29.
34 Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government, agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Anuja Nigeria 2003, (*Latimer House Principles*), accessed at: http://www.cpahq.org/cpahq/cpadocs/Latimer%20House%20Principles.pdf

I) …Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

IV) (d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

While the executive and legislature must respect in the independence of the judiciary, respect for the rule of law and separation of powers requires the judiciary act within its competence.

The 1995 *Beijing Statement of Principles on the Independence of the Judiciary*,[35] which the Chief Justice of Pakistan signed, affirmed this principle:

> *It is the duty of the Judiciary to respect and observe the proper objective and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary.*[36]

The *Latimer House Principles* further emphasize that:

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and parliament should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.[37]

35 The Statement of Principles on the Independence of the Judiciary originated out of a statement of principles formulated by the Law Association for Asia and the Pacific (LAWASIA) Human Rights Standing Committee and a small number of Chief Justices and other Judges at a meeting in Tokyo (known as the 'Tokyo Principles'). A first draft of the Statement was presented at the 5th Conference of Chief Justices in Asia and the Pacific in 1993 in Sri Lanka. The Statement was then adopted by Chief Justices from 20 countries in the Asia Pacific at the 6th Conference in 1995. A revised version was presented (which is now considered the final version) at the 7th Conference of Chief Justices in Manila in 1997. The Beijing Statement has now been signed onto by 32 countries in the Asia Pacific Region. The Honorable Mr Justice Sajjad Ali Shah signed the Beijing Statement in 1995 (*Beijing Principles on the Independence of the Judiciary)*, accessed at: http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf.

36 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, *supra* fn. 32, pp 215-216.

37 Principle II, *Latimer House Principles*, *supra* fn. 34.

The *Latimer House Principles* also underscore that

> *[e]ach institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.*[38]

Further, the *Latimer House Principles* stress that

> *The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function…*[39]

In summary, respect for the rule of law and the separation of powers in a functioning democracy presupposes mutual respect and cooperation between the three branches of State. The executive and legislature must actively promote and ensure the independence of the judiciary, and take active measures to enforce and implement decisions of the judiciary. In turn, the judiciary must endeavor to act impartially and constrain itself to judicial decisions, applying and interpreting the law in a manner consistent with international human rights, not encroaching on the functions which lay properly within the domain of the legislature or executive.

38 *Ibid.*
39 *Ibid*.

Political background

Since its independence in 1947, Pakistan has been under military rule for over three decades. There have been three military *coup d'etats*[40] and martial law has been imposed four times.[41] Until March 2013, a civilian government had never completed a full term in office.

The most recent period of military rule, under Army General Pervez Musharraf ran from October 1999 to February 2008. To provide a better understanding of the judiciary's relationship with the military and civilian government, it is instructive to consider some events of that period.

(A) The October 1999 Military Coup d'Etat

On 12 October 1999, Chief of Army Staff, General Pervez Musharraf overthrew Prime Minister Nawaz Sharif's Government after a military coup. General Musharraf immediately established his authority as Chief Executive of Pakistan[42] and suspended the 1973 Constitution.[43] Courts and tribunals were prevented from questioning the authority of the military regime[44] or issuing any judgments, decrees, writs or orders against the Chief Executive.[45]

Some three months later, in January 2,000 General Musharraf issued an order to all judges, requiring them to swear an oath to the military regime, overriding their previous oath to uphold the 1973 Constitution.[46] The Order came days before the Supreme Court was to hear a petition on the legality of the 1999 *coup d'état*[47] and just before the criminal trial against Prime Minister Nawaz

40 (1) In 1958 Major General Iskander Mirza dismissed the Constituent Assembly of Pakistan and Prime Minister Feroz Khan Noon. He was later deposed by General Ayub Khan, the Commander in Chief of the Pakistan Army; (2) On 4 July 1977, General Zia-ul-Haq arrested Prime Minister Zulfikar Ali Bhutto, suspended the Constitution and dissolved the National Assembly of Pakistan and all provincial assemblies; (3) On 12 October 1999, Army General Pervez Musharraf arrested Prime Minister Nawaz Sharif and his ministers, and suspended the Constitution.

41 The armed forces have imposed martial law on four occasions: (1) October 1958; (2) July 1977; (3) March 1969; (4) October 1999. Every time martial law was challenged before the Supreme Court, it was condoned as a necessary extra-constitutional step taken by the army. The doctrines of revolutionary legality and state necessity were used; see *State v. Dosso* (PLD 1958 SC 533), *Begum Nusrat Bhutto v. Chief of Army Staff* (PLD 1977 SC 657),
Syed Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869), and *Tikka Iqbal Khan v. Pervez Musharraf* (PLD 2008 SC 178). General Yahya Khan's martial law was declared unconstitutional, but only long after the military regime ended, see *Asma Jilani v. Government of the Punjab*, (PLD 972 SC 139).

42 Provisional Constitution Order No. 1 of 1999, 15 October 1999, accessed at: http://www.supremecourt.gov.pk/web/user_files/File/JR_Constitution_Petition_No._15_17-24_and_512_of_2002.pdf

43 General Musharraf issued the 'Proclamation of Emergency' on 14 October 1999.

44 Provisional Constitutional Order No. 1 of 1999, Article 4(1).

45 *Ibid*., Article 4(2).

46 It was not the first time the Pakistani judiciary had been asked to take oath on a Provisional Constitutional Order. General Zia's military regime issued a similar order in March 1981.

47 International Commission of Jurists, *Pakistan – Attacks on Justice*, 11th edition, accessed at: http://www.icj.org/dwn/database/pakistan.pdf, pp 271-2.

Sharif was to commence.[48]

A majority of high court and Supreme Court judges, including Justice Rana Bhagwandas, Justice Falak Sher, Justice Khalil-ur-Rehman Ramday, Justice Jawwad S. Khawaja, and the current Chief Justice Iftikhar Muhammad Chaudhry, took the oath and swore allegiance to General Musharraf's military regime.

The few judges that refused to do so,[49] including the then Chief Justice of the Supreme Court, Saiduzzaman Siddiqui, were dismissed. Following the removal of Chief Justice Siddiqui, a new Supreme Court was constituted under Chief Justice Irshad Khan.

Unsurprisingly, the newly constituted Supreme Court affirmed the legality of the 1999 military coup and the orders issued by General Musharraf establishing the authority of the regime.[50] The Court's ruling relied on its interpretation of the 'doctrine of necessity,' which it held permitted the Constitution to be suspended when it is deemed 'necessary' in the interest of the State and for the welfare of the people.[51]

(B) Justice Iftikhar Muhammad Chaudhry is appointed Chief Justice of the Supreme Court

On 30 June 2005, Iftikhar Muhammad Chaudhry was appointed Chief Justice of the Supreme Court of Pakistan by General Musharraf.[52] Almost immediately, Chief Justice Chaudhry began taking steps to improve access to justice,[53] dealing with court backlogs and increasing the use of the Court's original jurisdiction (including *suo motu* powers) under Article 184(3) of the Constitution to address matters of public importance with reference to human rights. Under Article 184(3) of the Constitution, discussed further below, the Supreme Court may assume original jurisdiction of any matter of public importance relating to the enforcement of Fundamental Rights enshrined in the Constitution.[54]

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48 In July 2000, Prime Minister Nawaz Sharif was found guilty of hijacking and terrorism, after he attempted to prevent President Musharraf's plane from landing in Karachi on 12 October 1999. Prime Minister Nawaz Sharif was sentenced to 14 years imprisonment. In December 2000, however, Mr Sharif was granted a presidential pardon and exiled to Saudi Arabia.

49 Justice Nasir Aslam Zahid, Justice Mamoon Kazi, Justice Wajeehuddin Ahmed, Justice Kamal Mansoor Alam and Justice Khalilur Rehman.

50 *Zafar Ali Shah v. Federation of Pakistan* (PLD 2000 SC 869).

51 *Begum Nusrat Bhutto v. Chief of Army Staff* (PLD 1977 SC 657).

52 Profile of the Chief Justice of Pakistan, accessed at: http://www.supremecourt.gov.pk/web/page.asp?id=204

53 In 2005, the Supreme Court dealt with approximately 30,000 cases, up from 10,000 cases in 2004. Tobias Charles Berkman, 'Note: The Pakistani Lawyers Movement and the Popular Currency of Judicial Power'. *Harvard Law Review*, (2010) Vol 123, p 1711.

54 Article 184(3) allows the Supreme Court to assume jurisdiction of any matter relating to the enforcement of Fundamental Rights enumerated under Chapter I of Part II of the Constitution.

Article 184(3)
Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article.

(C) The Supreme Court begins to assert its independence

In 2006, the Supreme Court took a bold step, passing a judgment that blocked the privatization of Pakistan's largest industrial enterprise – Pakistan Steel Mills Corporation (PSMC). Pakistan Steel Mills was being sold at a grossly undervalued price in a corrupt deal to a three-party consortium, which included army generals.[55] A nine-member bench of the Supreme Court, led by Chief Justice Chaudhry, intervened exercising original jurisdiction, claiming '…a constitutional court would be failing in its duty if it [did] not interfere to rectify the wrong, more so when valuable assets of the nation are at stake'.[56]

The Court again asserted its independence in taking *suo motu* notice of enforced disappearances in the country in 2005, followed by taking up a petition filed by a national human rights organization, the Human Rights Commission of Pakistan (HRCP), on behalf of 'disappeared' persons, many of whom were from Balochistan.[57] In an unprecedented show of independence, Chief Justice Chaudhry, leading the bench, summoned high-level military intelligence officials before the Supreme Court and ordered them to explain the legal basis for the detention of the 'disappeared' persons. The Court also ordered the military to physically produce the 'disappeared' persons before the Court.

General Musharraf responded to the Supreme Court's uncharacteristic show of independence with decisive ire. On 9 March 2007, General Musharraf summoned the Chief Justice to the Pakistan Army House in Rawalpindi and demanded his resignation. The Chief Justice flatly refused—an unprecedented assertion of independence that signaled a new chapter in the history of Pakistan's judiciary.[58]

55 National Lawyers Guild, *Defending Dictatorship: U.S. Foreign Policy and Pakistan's Struggle for Democracy*, January 2008, National Lawyers Guild Delegation to Pakistan and LUMS Rule of Law Project (National Lawyers Guild, *Defending Dictatorship*), p 9; Human Rights Watch, *Destroying Legality*, *Pakistan's Crackdown on Lawyers and Judges*, December 2007 (Human Rights Watch, *Destroying Legality*), accessed at: http://www.hrw.org/sites/default/files/reports/pakistan1207web.pdf

56 *Wattan Party v. Federation of Pakistan* (PLD 2006 SC 697), paras 75, 74 and 82.

57 National Lawyers Guild, *Defending Dictatorship supra* fn. 55, p 9.

58 International Commission of Jurists, 'ICJ concludes mission to assess developments related to reference against Chief Justice Chaudhry'; 26 April 2007, accessed at: http://www.icj.org/icj-concludes-mission-to-assess-developments-related-to-reference-against-chief-justice-chaudhry/

(D) Chief Justice Chaudhry is suspended from the Supreme Court

With key cases pending before the Supreme Court, notably relating to General Musharraf's right to hold the Presidency, General Musharraf took steps to remove the Chief Justice. After he refused to resign, Chief Justice Chaudhry was kept at the Army House for nearly five hours virtually incommunicado.[59] In those five hours, General Musharraf swore in a new Chief Justice, Justice Javed Iqbal;[60] immediately ordered a meeting of the Supreme Judicial Council (the disciplinary committee led by the Chief Justice, established under Article 209 of the Constitution); and issued disciplinary proceedings (in the form of a reference), citing allegations of misconduct against Chief Justice Chaudhry.

When Chief Justice Chaudhry was finally allowed to leave the Army House, his protocol was withdrawn;[61] he was not allowed to return to chambers; and he was placed under house arrest. Chief Justice Chaudhry was denied access to legal counsel and his communications were closely monitored.[62] The Supreme Judicial Council issued a public statement 'ordering' Chief Justice Chaudhry to cease functioning in his role as Chief Justice and a judge of the Supreme Court until the allegations of misconduct against him could be investigated.

The incident sparked a mass movement, led by lawyers and judges, demanding the reinstatement of Chief Justice Chaudhry and the return of constitutional order.[63] Doctors, engineers, professors, religious scholars and political activists joined together with lawyers in what became known as 'the Lawyers' Movement'. Protests went on for months and on 20 July 2007, the movement prevailed with the Supreme Court setting aside the Supreme Judicial Council's investigation into the alleged misconduct and restoring the Chief Justice to the bench.

(E) The Lawyers' Movement and the 2007 State of Emergency

The success, however, was short lived. General Musharraf remained in power and on 3 November 2007, imposed a second Provisional Constitutional Order (PCO). A state of emergency was declared, the 1973 Constitution was suspended again and rule without judicial oversight was put in place. General Musharraf again demanded that judges of the high courts and Supreme Court swear a new oath to uphold the (second) PCO. Those judges who refused were deposed.

59 *Ibid.*
60 *Ibid*.
61 Protocol means official flags and title as Chief Justice.
62 International Commission of Jurists, 'ICJ concerned over suspension of Chief Justice Chaudhry and the use of force against protesting lawyers,' 13 March 2007, accessed at: http://www.icj.org/pakistan-icj-concerned-over-suspension-of-chief-justice-chaudhry-and-the-use-of-force-against-protesting-lawyers/
63 Muneer A. Malik, 'The Pakistan Lawyers' Movement: an Unfinished Agenda', *Pakistan Law House*, Islamabad, 2008, p 49.

This time, however, the Supreme Court, with Chief Justice Chaudhry at its helm, defied General Musharraf, immediately passing a Court order declaring the PCO unconstitutional and prohibiting judges, military and government officials, from taking any action pursuant to it.

General Musharraf responded by dismissing Chief Justice Chaudhry and placing him under house arrest.

Approximately 63 other judges of the Supreme Court and high courts followed the Supreme Court order and refused to swear an oath to uphold the (second) Provisional Constitutional Order. All of the judges were deposed and many were also placed under house arrest.[64]

During the days that followed, security forces cracked down on protesters. By 10 November 2007, 5,400 people had been arrested. Journalists were arrested and news channels were closed for weeks. There were also allegations that security forces were subjecting many prominent lawyers to torture and other ill-treatment.[65]

In spite of such adversity, the Lawyers' Movement persisted, with opposition political parties joining, collectively demanding the return of constitutional order and the restoration of the judiciary.

On 28 November, General Musharraf yielded to international and domestic pressure, resigning from his position as Chief of Army Staff and lifting emergency rule on 15 December 2007.

Elections were held on 8 February 2008. And on 18 August 2008, General Musharraf stepped down as President of Pakistan.

(F) The transition to democracy and the return of the Chief Justice

The battle for an independent judiciary, however, did not end with the February 2008 elections. The newly formed Government led by the Pakistan People's Party (PPP) and headed by former President Zardari, capitulated in its promise to restore the Chief Justice. The PPP's reticence, it was believed, came in part from fear that Chief Justice Chaudhry would overturn an immunity deal that shielded former President Zardari and other prominent politicians from corruption charges. The deal had been struck between General Musharraf and the PPP in the last months of the regime.

64 International Commission of Jurists, 'Further dismantling of rule of law: amended laws undermine civilian judiciary and consolidate military control', 13 November 2007, accessed at: http://www.icj.org/further-dismantling-of-rule-of-law-amended-laws-undermine-civilian-judiciary-and-consolidate-military-control/

65 Human Rights Watch, *Destroying Legality*, *supra* fn. 55.

It would take more than a year and a political stand-off between former President Zardari and Nawaz Sharif, Chairperson of the opposition political party, Pakistan Muslim League (Nawaz) (now Prime Minister) before Chief Justice Chaudhry and the other deposed judges of the Supreme Court would be restored on 17 March 2009.[66]

When Chief Justice Chaudhry was finally reinstated, he was met with exuberant praise and extraordinary expectations. Crowds chanted 'Chief teray jaan nisar, beshumar beshumar' ('countless people are willing to sacrifice their life for you, Chief Justice') and expectations were high that the Supreme Court – in particular Chief Justice Chaudhry – would resolve the many crises faced by Pakistan.

(G) The beginning of a new era of the independence of the judiciary in Pakistan

The Supreme Court's popular appeal was largely a public rebuke to a government that was viewed as corrupt, ineffectual and unresponsive to the basic needs of the people of Pakistan.

In the absence of an effectively functioning government, the people saw the Supreme Court and particularly the Chief Justice as their beacon of hope. The Supreme Court embraced this new role. Shortly after his reinstatement, in May 2009, the Chief Justice remarked

> *The 170 million people of this country have pinned hopes on the judges and lawyers and they have to prove their mettle in all fairness and with faithfulness so that people get rights guaranteed to them under conventions and statutes.*[67]

In the years following Chief Justice Chaudhry's reinstatement in 2009, the Supreme Court pioneered a new era of independence of the judiciary in Pakistan. Led by Chief Justice Chaudhry, the Supreme Court took steps to use its independence to promote rule of law, address corruption and restore respect for the Constitution.

Before turning to the Supreme Court's efforts to address human rights, the primary subject matter of this Report, it is helpful to consider the Court's efforts to improve accountability and rule of law in other areas of administration and governance in Pakistan.

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66 'The lion unleashed: Nawaz Sharif, Pakistan's opposition leader, scores a big victory,' *The Economist*, 16 March 2009, accessed at: http://www.economist.com/node/13311048

67 Mohammad Hussain Khan, 'Chief Justice warns against corruption', *Dawn News,* 9 May 2009, accessed at: http://dawn.com/news/463254/cj-warns-against-corruption

(i) The Supreme Court addresses corruption

Following its judgment in the Pakistan Steel Mills case in 2006, the Supreme Court began to increase its use of original jurisdiction under Article 184(3) of the Constitution to address rampant and systemic corruption in Pakistan. The achievements of the Supreme Court were notable: the Court's orders resulted in high-level members of the civilian government being brought to account, ending decades of impunity enjoyed by those in power.

Soon after Chief Justice Chaudhry was restored as Chief Justice in March 2009, the Supreme Court struck down the National Reconciliation Ordinance (NRO).[68] The Court declared the NRO unconstitutional on grounds that the Ordinance violated, among others, the right to equal protection of the law.

The NRO had been adopted as part of a political deal between General Musharraf and the late Benazir Bhutto, signed in the last months of General Musharraf's regime. The Ordinance gave immunity to more than 8,000 persons accused of corruption and other offences. Those who benefitted included government ministers, landlords, civil servants and politicians. The NRO expressly protected the late Benazir Bhutto and former President Zardari from a pending money laundering case in Switzerland.

As part of its judgment, the Supreme Court directed the Government to restore Pakistan's position as an interested party in the money laundering proceedings in Switzerland against former President Zardari. This direction became a major issue of contention between the Supreme Court and the Government, eventually leading to a contempt of court conviction being entered against former Prime Minister Gillani for failing to enforce the Court's order. Former Prime Minister Gillani was consequently disqualified from Parliament.

In another set of proceedings, in April 2010, the Court took *suo motu* notice of a Government contract with a French company regarding the import of Liquefied Natural Gas (LNG). Following a number of hearings, the Court annulled the contract, ruling that Pakistan's Ministry of Petroleum had not followed the required process for awarding the contract and the transaction lacked transparency.

Similarly, in March 2012, the Supreme Court struck down the 'rental power plant agreements' for lack of transparency. The Court noted that Government officials, notably the Minister for Water and Power Raja Parvez Ashraf (who later served as Prime Minister) may have indulged in corruption by securing the rental power plants deal.

68 *Dr Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265).

In other matters related to corruption, the Supreme Court closely supervised investigations, requiring regular updates from and providing guidance to investigators. The Court took such action in relation to investigations of the National Insurance Company Limited (NICL) scam involving allegations that high profile political figures had engaged in embezzlement and in relation to the Hajj Corruption scam, in which senior government officials, including former Minister of Religious Affairs Syed Hamid Saeed Kazmi, were implicated.

(ii) Supreme Court restricts military rule

Another notable achievement of the Supreme Court is its attempts to limit the military's direct political influence.

Almost immediately after its reinstatement, the Supreme Court delivered a judgment in a 184(3) petition, sending a powerful and clear message against military rule

> *[M]ilitary rule, direct or indirect, is to be shunned once and for all. Let it be clear that it was wrongly justified in the past and it ought not to be justified in [the] future on any ground, principle, doctrine or theory whatsoever…Unless such an approach is firmly entrenched into the body politic and the jurisprudence of this country, military takeovers previously in the name of martial law, and later in the garb of proclamation of emergency will continue to recur as heretofore, there will be nothing stopping…*[69]

The Supreme Court continued to reaffirm this position in later judgments as well as public speeches.[70] In January 2012, the Chief Justice declared publicly that the Supreme Court had closed the door to martial law.[71] And in October 2012, the Supreme Court passed a judgment in the *Asghar Khan* case,[72] marking the first time in Pakistan's history that a civilian court held high-level military officials accountable for their actions.

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69 PLD 2009 SC 879, para 56.

70 Qaiser Zulfiqar, 'Constitutionalism 101: 'Armed Forces Can only Work on Government Directions'', *Express Tribune*, 13 November 2011, accessed at: http://tribune.com.pk/story/291107/constitutionalism-101-armed-forces-can-only-work-on-govt-directions/; and 'Any Unconstitutional Step by Army Tantamount to Sedition', *Paktribune*, 13 November 2011, accessed at: http://paktribune.com/news/Any-unconstitutional-step-by-army-tantamount-to-sedition-245045.html; See also press releases incorporating the Chief Justice's speeches and statements at http://www.supremecourt.gov.pk/web/page.asp?id=230

71 Abdul Hafeez, 'Path to Martial law Blocked by SC: Chief Justice', *The News Tribe,* 21 Jan 2012, accessed at: http://www.thenewstribe.com/2012/01/21/path-to-martial-law-blocked-by-sc-chief-justice/

72 *Asghar Khan*, Human Rights Case No.19 of 1996.

In 1996, Air Marshal Asghar Khan had written a letter to the Supreme Court alleging that former Army Chief General Mirza Aslam Beg had distributed money, with the help of the Inter-Services Intelligence (ISI) and the President of Mehran Bank, to politicians with the objective of ensuring the Pakistan People's Party lost the 1990 elections. The letter had been converted into a petition under Article 184(3). After a few hearings, consideration of the case had been postponed indefinitely until 29 February 2012 when the Supreme Court under the leadership of Chief Justice Chaudhry resumed hearings.

The Supreme Court delivered its judgment in the case on 19 October 2012. In the judgment, authored by Chief Justice Chaudhry, the Supreme Court held that Generals Aslam Beg and Asad Durrani violated the constitution by interfering in the 1990 elections and ordered the Government to take measures to hold them accountable; ordered the Federal Investigation Agency (FIA) to investigate and prosecute any politicians who received money from the Army chiefs or the Inter-Services Intelligence (ISI) during the 1990 elections; reaffirmed the supremacy of civilian governments and the subservient role of armed forces; and ordered the disbanding of any election or political cells established in the Presidency or the ISI or Military Intelligence (MI).

Conclusion

The Supreme Court's assertion of independence in 2006 constituted a marked departure from the Court's previous conduct, beginning a new chapter in the history of the Supreme Court of Pakistan. Before 2006, judicial review was rarely used to challenge the executive or legislature. The Supreme Court, for the most part, remained deferential towards decisions taken by the executive and legislature, enabling widespread impunity to pervade all levels of government and throughout the infrastructure of the State. Under the leadership of Chief Justice Chaudhry, particularly since his reinstatement in 2009, the Supreme Court has been able to distance itself from other branches of State, taking meaningful steps to establish the rule of law.

While few would deny the success of the Supreme Court in addressing corruption, there have concerns about populism, arbitrariness and a lack of transparency in the Court's conduct, especially in exercise of its original jurisdiction.[73]

73 Babar Sattar, 'Hubris as Justice', *Dawn News,* 30 July 2013, accessed at: http://dawn.com/news/1032941/hubris-as-justice; Feisal Naqvi, 'The Uncertainty Principle and Judicial Intervention', *Express Tribune,* 9 October 2013, accessed at: http://tribune.com.pk/story/615717/the-uncertainty-principle-and-judicial-intervention/; and Osama Siddique, 'A Society Without Meaningful Dissent', *Express Tribune,* 19 August 2013, accessed at: http://tribune.com.pk/story/592294/a-society-without-meaningful-dissent/; Interview of Aitzaz Ahsan in BBC's Hard Talk, 7 August 2012, accessed at: http://news.bbc.co.uk/2/hi/programmes/hardtalk/9743074.stm

Part I: The Supreme Court's interpretation of Article 184(3)

Part I examines the manner in which the Supreme Court has used its original jurisdiction under Article 184(3) of the Constitution. An expansive and at times contentious interpretation of the criteria of 'public importance' and 'fundamental rights', along with the seemingly selective and inconsistent application of *suo motu* powers, has made the Supreme Court's exercise of its original jurisdiction appear arbitrary in some cases. The Human Rights Commission of Pakistan, the UN Special Rapporteur on the Independence of Judges and Lawyers,[74] as well as the ICJ, have urged that the Court adopt clear principles guiding the use of its Article 184(3) powers.

In the Constitutional framework of Pakistan, the Supreme Court has three distinct jurisdictions: 'appellate', advisory' and 'original'. Article 185 of the Constitution relates to its appellate jurisdiction, making the Supreme Court the highest appellate court in the country, with the authority to hear appeals from lower courts. Article 186 lays down the Court's advisory jurisdiction, through which the President may refer a question of law that he or she considers to be of public importance to the Court. Article 184 deals with the original jurisdiction of the Court. Article 184(1) gives the Court exclusive authority to hear disputes between two or more governments in Pakistan and Article 184(3) enables the Supreme Court to assume jurisdiction,* inter-alia *of matters involving a question of 'public importance' with reference to the 'enforcement of any of the fundamental rights'[75] of the citizens of Pakistan. It may do so either on the application of party (a petition) or of its own accord (commonly referred to as* suo motu*).

74 UN Special Rapporteur on the Independence of Judges and Lawyers, Preliminary observations on the official visit to the Islamic Republic of Pakistan, 29 May 2012, accessed at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12194&LangID=E

75 In the Constitution of Pakistan, 1973, human rights recognized by the Constitution are called Fundamental Rights.

(A) What is Article 184(3)?

Article 184(3) is a rare provision. India accords similar jurisdiction to its Supreme Court, but few other written constitutions provide for such broad powers to the highest judiciaries for the enforcement of human rights. For example, currently in Pakistan 'any party' may petition the Supreme Court under Article 184(3), whereas Article 102(1) of the Constitution of Bangladesh and Article 126 of the Constitution of Sri Lanka mandate applications by aggrieved parties only. In addition, the provision allows the Supreme Court to take *suo motu* notice of matters of public importance relating to human rights.

The Supreme Court in Pakistan for many years interpreted its original jurisdiction in a restrictive manner, in line with Anglo-Saxon principles and practices, adversarial proceedings and the requirements of *locus standi*. It was only after the Supreme Court of India started challenging the rigid boundaries of its own judicial domain of power in the 1970s and 1980s through public litigation cases that Pakistan also started exploring the ambit of its powers under Article 184(3).

(i) Historical evolution of Article 184(3)

In a series of judgments in the 1970s and 1980s, the Supreme Court of India held that the rules governing a person's competence to bring a legal action (*locus standi)* were a legacy of India's colonial past and unsuitable for the social and cultural setting of the subcontinent. The Supreme Court of India began relaxing these rules of standing to achieve the ends of justice, especially in cases involving unlawful exercise of power by the State.[76]

The Supreme Court of Pakistan followed suit in the 1988 landmark judgment *Benazir Bhutto v. Federation of Pakistan*[77]

> *This rule of standing is an essential outgrowth of Anglo-Saxon jurisprudence in which only the person wronged can initiate proceedings of a judicial nature for redress against the wrong doer… the rationale of this procedure is to limit it to parties concerned and to make the rule of law selective to give protection to the affluent or to serve in aid for maintaining the status quo of the vested interests. This is destructive of the rule of law, which is so worded in Article 4 of the Constitution as to give protection to all citizens.*

76 See for example *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai* (AIR 1976 SC 1455); *Sunil Batra v. Delhi Administration* (AIR 1978 SC 1675); and *S.P. Gupta v. Union of India* (AIR 1982 SC 149).

77 PLD 1988 SC 416.

The Supreme Court of Pakistan has since then taken the position that the Court under Article 184(3) may be moved by any party, regardless of whether the petitioner is personally aggrieved by the violation of law in question.

In addition and particularly in recent years, the Supreme Court has exercised its original jurisdiction on its own motion (*suo motu*) in the absence of a petition by any interested party. Under Pakistani law, an individual judge may take *suo motu* notice of a matter on behalf of the Supreme Court. Since its reinstatement, however, it has generally been Chief Justice Chaudhry who has exercised *suo motu* notice on behalf of the Supreme Court.[78]

(B) The Supreme Court increases its use of extraordinary jurisdiction under Article 184(3)

In the past, the Supreme Court cautioned against the excessive use of the Court's original jurisdiction, warning that easy access to the highest court should not be used to bypass or undermine the lower courts.

In 1998, the Pakistan Supreme Court held in *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*

> *There is no doubt that the Supreme Court cannot, as a matter of course, entertain a Constitutional petition under Article 184(3) of the Constitution and bypass the High Court which has jurisdiction under Article 199 of the Constitution, inter alia, to enforce fundamental rights under clause (2) thereof. Indeed, Supreme Court should be discreet in selecting cases for entertaining under Article 184(3) of the Constitution and only those cases should be entertained which in fact and in law involve questions of fundamental rights… a balanced, considered and indiscriminate policy is to be evolved by the Supreme Court.* [79]

The Supreme Court further held that in exercising their powers, courts must not act contrary to judicial norms, in aid of administrative policy or executive authority or as social reformer. Instead, courts must confine themselves within the domain of law and mandate of the Constitution.[80]

78 ICJ's interview with the Registrar of the Supreme Court, Dr Faqir Hussain, Islamabad, 17 June 2013.
79 PLD 1998 SC 1263.
80 PLD 2009 SC 217.

Since Chief Justice Chaudhry's restoration in 2009, the Supreme Court of Pakistan has moved away from earlier precedents, significantly increasing the use of its original jurisdiction. Between 2009 to 2011 the Court disposed of 149 cases under Article 184(3), compared to 23 cases taken up from 2001 to 2008.[81]

The increase in the Supreme Court's exercise of its powers of original jurisdiction can be attributed to its elastic interpretation of the two criteria under Article 184(3), 'public importance' and 'fundamental rights'.

(i) Public Importance

In the past, the Pakistan Supreme Court had not set out clear criteria to determine 'public importance', leaving room for the particular bench hearing the case to use its discretion in deciding to assume jurisdiction under Article 184(3) while emphasizing that this extraordinary jurisdiction should only be used when absolutely necessary. Supreme Court jurisprudence stressed that injudicious exercise of this power could result in grave and serious consequences such as frivolous public litigation cases and usurping the jurisdiction of lower courts.[82] This lack of clear criteria has enabled the Supreme Court to adopt an elastic interpretation of 'public importance,' facilitating the expansion of the use of Article 184(3). This approach, however, has invited criticisms of inconsistency and opacity in the Court's exercise of original jurisdiction.

(1) Arsalan Iftikhar case (2012)

The Supreme Court's decisions in relation to the *suo motu* case involving the allegations made against Mr Arsalan Iftikhar, the Chief Justice's son, demonstrate an apparently inconsistent interpretation of the concept of 'public importance' under Article 184(3).

In June 2012, several social networking sites carried allegations that the Chief Justice's son, Arsalan Iftikhar, had used his father's position to gain undue favors from business tycoon Malik Riaz. Initially there was speculation that the Chief Justice had known or was involved in the wrong-doing. Noting the implications of such speculation on the perception of the independence of the judiciary, the Chief Justice decided to take *suo motu* notice under Article 184(3) to investigate the matter further (implicitly finding the issue to be one of public importance with reference to the enforcement of human rights). The Chief Justice initially headed the three-member bench constituted to hear the case, but after intense public criticism, recused himself from the bench following the second hearing.

81 Case lists provided by the Registrar of the Supreme Court of Pakistan to the ICJ. Hardcopies on file with the ICJ.

82 *Nusrat Batool v. Federation of Pakistan* (1999 SCMR 2811).

After several hearings, it became clear that the Chief Justice was not implicated in the allegations. On this basis, the Supreme Court ruled that the matter was not of 'public importance'. However, instead of dismissing the case and leaving the parties to file a complaint with the police, the Court directed the Attorney General to investigate the allegations against the Chief Justice's son.

The Attorney General then referred the matter to the National Accountability Bureau (NAB), which in turn established a Joint Investigation Team to investigate the allegations.

In response to the Attorney General's actions, Arsalan Iftikhar filed a review petition with the Supreme Court to review its order, alleging that the Joint Investigation Team appointed by NAB was biased.

Responding to Arsalan Iftikhar's petition, the Supreme Court reviewed its earlier order under 184(3) and ruled that the investigation team constituted by the NAB had in fact been prejudiced. On 31 August 2012, the Court ordered a one-person judicial commission, headed by Shoaib Suddle, (known as the Suddle Commission), to be established to investigate the allegations against Arsalan Iftikhar.

It is unclear why or on what basis the Supreme Court agreed to review its earlier order when it had already decided the matter was not of public importance and thus not within the purview of its jurisdiction under Article 184(3). It is equally unclear why the Court ordered the appointment of a commission in a matter that could have been handled through the National Accountability Bureau or the regular police force.

In responding to Arsalan Iftikhar's application for review, the Supreme Court seemed to go against its earlier ruling that the matter was not of public importance.

The Supreme Court apparently changed its position again on the question of 'public importance' after the Suddle Commission's interim report of 6 December 2012 found that Arsalan Iftikhar had admitted before the Commission that he had availed himself of two of the three foreign visits alleged by Malik Riaz. The report also incriminated Malik Riaz for tax evasion that amounted to US dollars 1.2 million.[83]

83 Syed Irfan Raza, 'Arsalan concedes he made two foreign visits', *Dawn News,* 7 December 2012, accessed at: http://www.dawn.com/news/769462/; and Hasnaat Malik, 'SC dissolves Shoaib Suddle commission', *Daily Times,* 8 December 2012, accessed at: http://www.dailytimes.com.pk/default.asp?page=2012%5C12%5C08%5Cstory_8-12-2012_pg1_1

On 7 December 2012 the Supreme Court dissolved the Suddle Commission, finding that the judiciary was not involved and the matter was between two individuals, thus, not of 'public importance'. [84]

Thus, over the course of six months, the Supreme Court appeared to change its views at least three times with no clear justification on the issue of whether allegations of corruption against the Chief Justice's son – and initially the Chief Justice himself – were of 'public importance' and hence maintainable under Article 184(3).

(ii) Interpretation of Fundamental Rights

Part II of the Constitution of Pakistan, entitled 'Fundamental Rights and Principles of Policy', enshrines a number of human rights.[85] The Fundamental Rights chapter, however, does not enumerate all of Pakistan's rights obligations as a State party to international human rights treaties. Many civil and political rights as well as economic, social and cultural rights are absent in the Fundamental Rights Chapter of the 1973 Constitution of Pakistan. For example, the Constitution does not expressly guarantee the right to form and join trade unions; the right to equal pay for equal work; or the equality of rights and responsibilities of spouses to marriage, during marriage and at its dissolution.

84 'Arsalan-Riaz Case: SC Dissolves Shoaib Suddle Commission', *Dawn News*, 7 December 2012, accessed at: http://dawn.com/2012/12/07/sc-dissolves-shoaib-suddle-commission-probing-arsalan-riaz-case/

85 'Fundamental Rights' are enumerated under Articles 8 to 28 of the Constitution and include the following: Security of person (Article 9); Safeguards as to arrest and detention (Article 10); Right to a fair trial (Article 10A); Prohibition against slavery and forced labour (Article 11); Protection against retroactive punishment (Article 12); Protection against double punishment and self-incrimination (Article 13); Inviolability of dignity of man (Article 14); Freedom of movement (Article 15); Freedom of assembly (Aarticle 16); Freedom of association (Article 17); Freedom of trade, business or profession (Article 18); Freedom of speech (Article 19); Right to information (Article 19A); Freedom to profess religion and to manage religious institutions (Article 20); Safeguard against taxation for purposes of any particular religion (Article 21); Safeguard to educational institutions in respect of religion (Article 22); Protection of property rights (Article 23); Equality of citizens (Article 25); Right to education (Article 25A); Non-discrimination in respect of access to public places (Article 26); Safeguards against discrimination (Article 27); Preservation of language, script and culture (Article 28).

Some fundamental rights enshrined in part II of the constitution of Pakistan

Article 9 - Security of person
No person shall be deprived of life or liberty save in accordance with law.

Article 10-A - Right to fair trial
For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

Article 14 - Inviolability of dignity of man, etc.
(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.

An important aspect of public interest litigation in Pakistan has been to expand the ambit of 'fundamental rights' under Article 184(3) of the Constitution.

The ICJ commends the Supreme Court for providing a more expansive interpretation of constitutional rights in a manner consistent with Pakistan's obligations to respect, protect and fulfill human rights under international law.

For example, in 1994, the Supreme Court in *Shehla Zia v. WAPDA*[86] held that the right to life guaranteed by Article 9 of the Constitution of Pakistan included the right to a healthy environment. The Court justified this interpretation by viewing the Constitution as a living document, demanding legal principles to be construed broadly to meet the needs of an evolving society. The ICJ commends such an approach to interpreting rights under the Constitution.

However, there are concerns that in some more recent cases the Court has exercised its original jurisdiction based on political considerations rather than a *bona fide* and appropriate (even if expansive) legal interpretation of 'public importance' or the identification or clarification of 'fundamental rights'.

Such inconsistent or incoherent exercise by the Court of its original jurisdiction, including on the basis of broad interpretations of 'fundamental rights', could foster the appearance of arbitrariness in the Court's exercise of its powers under Article 184(3). In Pakistan, where there are many issues of public importance which relate to the enforcement of human rights, and in view of available judicial resources, the Court must exercise and must be seen to exercise its extraordinary jurisdiction judiciously, as well as in a manner that is consistent with rule of law, separation of powers and respect for human rights.

86 PLD 1994 SC 693.

(1) 'Memogate' case (2012)

The Supreme Court's decision to exercise *suo motu* jurisdiction under Article 184(3) in what became known as the 'memogate' case was one of the more controversial uses of Article 184(3) jurisdiction because it seemed to expand the notion of the right to life in an unprecedented manner that is inconsistent with human rights law.

On 10 May 2011, a memorandum allegedly containing promises of greater cooperation with the United States Government in counter-terrorism operations from the PPP-led Government in exchange for support from the United States to subvert a potential military *coup d'état* was reportedly delivered by a Pakistani source to the U.S. Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen. An American-Pakistani businessperson, Mansoor Ijaz, leaked news of the memo to the media in early October 2011. Mansoor Ijaz claimed the alleged memorandum had been dictated to him by Hussain Haqqani, Pakistan's Ambassador to the United States, on orders from former President Zardari. In November 2011, Hussain Haqqani was recalled to Islamabad and he resigned from his diplomatic post.

On 23 November 2011, the Chairperson of Pakistan Muslim League (Nawaz) (PML(N)), at the time the PPP-led Government's main political opponent, petitioned the Supreme Court to take up the matter under Article 184(3) of the Constitution. In the interim, the Government tasked the Parliamentary Committee on National Security to investigate the allegations made by Mansoor Ijaz.

Notwithstanding the ongoing investigation by the Parliamentary Committee, on 30 December 2011, the Supreme Court, in a short order, held that the petition was maintainable and established a judicial commission to probe into the origin, authenticity, and purpose of the memo. The case became known as the 'memogate' case.

The Supreme Court accepted jurisdiction under Article 184(3) invoking a novel interpretation of Article 9 of the Constitution,[87] whereby it reasoned that the right to life included 'life with dignity'. The Court held that a threat to 'security, sovereignty and independence' of the State compromised the collective dignity of the people of Pakistan, who deserved an 'honorable' existence in the comity of nations.[88] The Court further reasoned that the content of the memorandum, if found to be authentic, was tantamount to threatening Pakistan's sovereignty,

87 Article 9 of the Constitution: 'No person shall be deprived of life or liberty save in accordance with law'.

88 Constitutional Petition No. 77 TO 85 & 89 OF 2011, para 41.

security and independence and thus held that the petition was within the purview of fundamental rights under Article 184(3).

(2) Muhammad Yasin v. Federation of Pakistan (2012)

In *Muhammad Yasin v. Federation of Pakistan*[89] petitioners challenged the basis for the appointment of the Chairman of OGRA (Oil and Gas Regulatory Authority). The Supreme Court agreed to exercise its original jurisdiction in this case reasoning that all citizens had to bear the burden of indirect taxes, which in turn fund regulatory authorities such as OGRA. The Court held that appointing individuals to important publicly funded posts not on the basis of merit violated an individual's right to life, dignity, property, freedom of profession, and protection to property.

According to Justice Jawwad S. Khawaja

> *When…poor parents in a small town spend their savings traveling to a nearby town, or to buy a pair of shoes for their toddler or to put bangles on the dainty arms of their little girl on a chand raat, even they are not spared. A contribution is automatically and compulsorily exacted from them and passed on to the State exchequer by levies such as Sales Tax etc. It needs to be realized that it is contributions like these, together with fees collected by OGRA in a fiduciary capacity in the name of the people of Pakistan, which pay for the salaries, up- keep and running of OGRA…if taxes or fees are spent in violation of law it would amount to breach of Articles 3, 4 and 5(2) of the Constitution, and would also constitute denial of the citizens' fundamental rights guaranteed by Articles 9, 14, 18, 23 and 24. These rights would also be adversely affected if inter alia, the Chairman or other members of OGRA are appointed though they are not eligible*.[90]

Economic and social rights, including the right to an adequate standard of living, food, clothing and housing are enshrined in the ICESCR for which Pakistan is a State Party and is thus obliged to respect, protect and fulfill. However, the nexus between the enforcement of the economic social and cultural rights and the appointment of the OGRA chairperson, such as to trigger jurisdiction of the Court under Article 184(3), was not apparently obvious from the judgment and thus exposed the Court to criticisms of arbitrariness.

89 PLD 2012 SC 132.
90 PLD 2012 SC 132, para 17.

(3) Revision of Presidential Elections case (2013)

Recently, the Supreme Court took up a petition under Article 184(3) filed on behalf of the ruling party, the Pakistan Muslim League (Nawaz), seeking to change the date of the Presidential elections. The Court took up the petition on the basis of protecting and promoting the right to religion, but its ruling in the case did not elaborate or provide any sufficient reasoning to show how holding elections on the original date that had been set by the Electoral Commission implicated the right to religion.

The Election Commission of Pakistan had scheduled Presidential elections for 6 August 2013. Raja Zafarul Haq, Chairman of the Pakistan Muslim League, Nawaz (PML-N) applied to the Election Commission to revise the election date to 30 July 2013. The PML-N claimed that elections should not be held in the last ten days of the holy month of Ramadan as some parliamentarians may choose to go for *Umra*[91] and some may also choose to go on *Aitekaf*.[92] The Election Commission rejected the application, claiming that the choice of some parliamentarians to observe non-obligatory religious practices is not a sufficient reason to warrant the date of the Presidential elections to be changed.

Raja Zafarul Haq then petitioned the Supreme Court under Article 184(3) seeking to have the election dates changed claiming that the right of all parliamentarians to participate in non-obligatory religious practices[93] would be violated if elections were held in the last ten days of Ramadan. The petition also claimed that the Court was required to take measures to ensure that all parliamentarians had the opportunity to vote in the Presidential elections. The Court agreed to exercise its original jurisdiction over the petition under Article 184(3) of the Constitution and on 25 July 2013, after a single hearing, and ordered the Election Commission to change the election date to 30 July 2013.

The right to observe religious practices is recognized by Article 20 of the Pakistani Constitution and international human rights law, notably Article 18 of the ICCPR. However, in its five-page order, the Supreme Court did not provide any reasoning to explain why holding elections on the original date would violate the right to profess religion.

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91 Muslim pilgrimage to Makkah that can be undertaken at any time of the year.
92 Seclusion in the last ten days of Ramadan for prayer.
93 Article 20 of the Constitution: Freedom to profess religion and to manage religious institutions. – Subject to law, public order and morality –
(a) every citizen shall have the right to profess, practice and propagate his religion; and
(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

In changing the election date, the Supreme Court appears to have adopted an interpretation of freedom of religion that requires the State to ensure that all individuals, including parliamentarians, have a right to observe non-obligatory religious practices, which cannot be disturbed either for the purposes of elections or any other reason.

Such an interpretation could have a number of practical implications. For example, Friday is considered a holy day in Islam. Would it violate a parliamentarian's right to observe his or her religion if sessions of Parliament prevented them from non-obligatory prayers on holy days? Similarly, many Muslims consider it auspicious to fast on Thursdays. Would it violate an individual's right to observe the non-obligatory practice of fasting if elections were held on a Thursday?

The Supreme Court's decision in the Presidential Elections case demonstrates some of the concerns over interpreting rights with unclear parameters. Such an interpretation has left the law in a state of uncertainty, and provided little guidance to lower courts on how such rights should be interpreted and implemented in future cases.

Conclusion

The Supreme Court, in its interpretation of the criteria of 'public importance' and 'fundamental rights' has not always been coherent or consistent with its own jurisprudence or with international human rights law. This has fostered the appearance of arbitrariness in the Court's exercise of its original jurisdiction under Article 184(3). It has also opened the Court up to criticism that it has exercised its human rights jurisdiction based on political considerations rather than a *bona fide* and appropriate (even if expansive) legal interpretation of 'public importance' or the identification or clarification of 'fundamental rights'.

The development by the Court (including within its jurisprudence), of guidelines for the exercise of its original jurisdiction under Article 184(3) would assist in ensuring consistency of the use of this extraordinary power. It could bolster public confidence that this extraordinary jurisdiction was being used judiciously and in accordance with the Constitution to ensure respect for human rights in a manner that is consistent with the separation of powers and the rule of law.

(C) Need for guidelines on the composition of benches hearing Article 184(3) cases

The Supreme Court has yet to establish any criteria or guidelines to govern how it composes its benches to hear cases under its Article 184(3) jurisdiction. The lack of such guidelines has exposed the Court, at times, to accusations of politicization and impropriety.

The Special Rapporteur on independence of judges and lawyers in the report of her May 2012 Mission to Pakistan highlighted with concern that '[t]he Chief Justice was accused of selectivity in composing the benches for *suo motu* inquiries, thereby concealing political aims'.[94]

A notable example occurred when the Chief Justice decided to take *suo motu* jurisdiction under Article 184(3) of the allegations against his son, Arsalan Iftikhar.[95] Quite surprisingly the Chief Justice himself initially headed the three-member bench constituted to hear the case. This violated Article 4 of the Code of Conduct for judges in Pakistan,[96] as well as international standards on judicial conduct, namely Principle 4.4 of the *Bangalore Principles of Judicial Conduct*,[97]prohibiting judges from hearing cases in which family members are involved. It was only after criticism by a section of the Bar and the ruling party that the Chief Justice recused himself from the case following the second hearing.

The lack of clear guidelines on how benches are composed for *suo motu* inquiries invites accusations of politicization and ultimately creates a negative impression of the Court.

94 Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, *Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Pakistan*, 4 April 2013, UN Doc. A/HRC/23/43/Add.2 (*Report of the Special Rapporteur on the independence of judges and lawyers*), para 65.

95 See Part I B(i)(1).

96 Article 4, *Code of Conduct for the Judges of the Supreme Court and High Courts*: 'A judge must decline resolutely to act in a case involving his own interest, including those persons whom he regards and treats as near relatives or close friends,' accessed at: http://www.supremecourt.gov.pk/web/page.asp?id=435

97 *Bangalore Principles of Judicial Conduct*, the Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002 (*Bangalore Principles of Judicial Conduct*), Principle 4.4., accessed at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Bangalore_principles_EN.pdf

The UN Special Rapporteur warned that it is

> *…unfortunate when unfounded impressions of abuse of power are created. So as to avoid such negative perception, it would seem recommendable that a transparent system for selecting benches of the Court to be created, with clearly established rules.*

Similarly, the International Commission of Jurists in its April 2012 Mission Report to Pakistan on the independence of the judiciary also recommended to the Supreme Court to 'establish precise rules as to the composition and allocation of cases to Chambers'.[98]

Conclusion

The right to proceedings before a competent, independent and impartial court and the guarantee of judicial independence under international standards are indispensable for maintaining the rule of law and respect for human rights.

The guarantee of an independent judiciary requires, among other things, respect for the separation of powers and the rule of law.

It does not mean, however that judges enjoy unfettered freedom to act in any manner they please. As the International Commission of Jurists stressed in its 1959 Delhi Congress Report:

> *…freedom from interference by the executive or legislature with the exercise of the judicial function …**does not mean that the judge is entitled to act in an arbitrary manner**. His duty is to interpret the law and the fundamental principles and assumptions that underlie it.* [emphasis added][99]

The UN Secretary General has emphasized the need for legal systems to be certain and free from arbitrariness. The Secretary General defined the rule of law as

> *…measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, **legal certainty, avoidance of arbitrariness and procedural and legal transparency**.*[emphasis added]

98 International Commission of Jurists, 'Report on the ICJ Mission to Pakistan', April 2012, (ICJ, *Report on the ICJ Mission to Pakistan*), p 23, accessed at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Pakistan-ICJ-mission-fact-finding-mission-report-2012.pdf

99 ICJ, *Congresses and major conferences*, *supra* fn. 28, p 40.

Faced with criticism over the excessive use of its original jurisdiction (commonly referred to as public interest litigation), similar to that faced by the Supreme Court of Pakistan, the Indian Supreme Court created a set of 'Guidelines to be followed for entertaining letters/petitions received by it as PIL' in 1988. The Guidelines, based on the full-court decision of 1 December 1988, have been modified on the directions of the Chief Justice of India in 1993 and 2003. The Guidelines indicate that ordinarily letter/petitions must fall under one of ten categories if they are to be considered as public interest litigation. The ten categories include matters relating to bonded labor, scheduled classes, harassment of women, and environmental pollution.[100]

In preparing this Report, the ICJ wrote to the Registrar of the Supreme Court of Pakistan on two occasions and met with him in person on 17 June 2013, enquiring whether there were any transparent guidelines to govern how the Supreme Court exercises its original jurisdiction under Article 184(3). In his written response, the Registrar claimed that guidelines were not necessary as, '[t]he bare reading of the above provision makes it clear that it is open ended'.[101]

The International Commission of Jurists has both commended and cautioned the Supreme Court on its use of its original jurisdiction on previous occassions. In the 2011 *Report On the ICJ Mission to Pakistan*, it was noted that

> *The so-called suo motu proceedings are generally being used as a strong instrument to support the rule of law and protect fundamental rights. This is commendable as a matter of principle and* ***as long as the proceedings are used restrictively and on the basis of transparent criteria***. [emphasis added] [102]

The UN Special Rapporteur on the Independence of Judges and Lawyers voiced a similar concern in the Report on her mission to Pakistan

> *There are no clearly defined criteria determining when the Supreme Court should take up [in exercise of suo motu jurisdiction] an incident or not. This creates some level of uncertainty regarding the practice of suo motu, which seems difficult to reconcile with the rule of law*.[103]

100 The guidelines set by the Indian Supreme Court can be accessed at: http://supremecourtofindia.nic.in/circular/guidelines/pilguidelines.pdf

101 Registrar of the Supreme Court of Pakistan, Islamabad, received 13 April 2013. Hardcopy is on file with the International Commission of Jurists.

102 ICJ, *Report on the ICJ Mission to Pakistan*, *supra* fn. 98, p 22.

103 *Report of the Special Rapporteur on the independence of judges and lawyers*, *supra* fn. 94, para 65.

In the light of the above, the ICJ reiterates its recommendation that the Supreme Court should consider adopting clear and transparent guidelines for the exercise of its original jurisdiction which are consistent with the Constitution, the rule of law, the separation of powers, the independence of the judiciary and Pakistan's obligations under international human rights law. Such guidelines would be a useful step forward, quelling any concern about the arbitrary, inconsistent and opaque use of this extraordinary and important jurisdictional power, which is a vital tool in the protection and promotion of human rights and the rule of law.

Part II: The Supreme Court's human rights record

Millions of people in Pakistan have lived and continue to live with little or no redress for violations of their human rights. Attacks by armed groups and drone attacks are commonplace in the northwestern Tribal Areas and Khyber Pakhtunkhwa. Hundreds, if not thousands, of persons remain subjected to enforced disappearance, particularly in the restive western province of Balochistan. Targeted killings and suicide bombings against religious minorities and even smaller Muslim denominations are perpetrated regularly. Violence against women, in the form of honor killings, domestic violence, acid attacks and sexual assault, continues unabated. Sixty percent of the population lives below the poverty line. And the literacy rate and infant mortality rate are among the lowest in South Asia and the world.

With a frequently ineffective government, and under a repressive and overbearing military, many people in Pakistan saw the Supreme Court, led by Chief Justice Chaudhry, as a beacon of hope. They believed the Court would step in and fill the gap in governance, ending decades of nepotism and corruption and breaking the cycle of impunity for those in power. Individual petitions under Article 184(3) to the Supreme Court rose exponentially from 450 petitions in 2004 to more than 90,000 petitions between April 2010 and December 2011. In an interview with the Supreme Court Registrar in June 2013, the ICJ was told that the Human Rights Cell of the Supreme Court continues to receive approximately 250 applications under Article 184(3) daily.[104]

The Chief Justice, for his part noted

> *The present day judiciary is looked upon as one institution, which is delivering the services to the people in an active manner. Therefore, it is incumbent upon the judiciary to come up to the peoples' expectations and become a role model for all other institutions to follow*.[105]

As discussed in Part I, under Article 184(3) of the Constitution the Supreme Court can exercise original jurisdiction over matters of public importance that relate to the enforcement of human rights guaranteed under the Constitution. The Court can take notice of human rights cases *suo motu* or when it is petitioned by any party. Since Chief Justice Chaudhry's reinstatement in 2009, the Supreme

104 ICJ interview with Supreme Court Registrar, Dr Faqir Hussain, Islamabad, on 17 June 2013.
105 Hasnaat Malik, 'The SC is the ultimate watchdog, says CJP,' *Daily Times*, 16 November 2012, accessed at: http://www.dailytimes.com.pk/default.asp?page=2012%5C11%5C16%5Cstory_16-11-2012_pg1_1

Court has significantly increased its use of original jurisdiction to address human rights issues. Between 2009 and 2012, the Supreme Court's Human Rights Cell instituted and disposed of over 160,000 applications.[106]

Whether the increased use of original jurisdiction has translated into better access to justice, greater redress for violations of human rights and better protection for human rights, however, remains questionable.

This section examines the Supreme Court's use of its jurisdiction under Article 184(3) since its reinstatement in 2009: (1) Has the Supreme Court exercised its judicial authority to respect, ensure respect for and protect human rights? (2) Has the Court been an effective mechanism for redress of human rights violations, namely gross violations of human rights such as enforced disappearances? (3) To what extent has the Supreme Court used its judicial authority to safeguard and uphold human rights in the exercise of its functions, notably acting on petitions to review and if required, invalidate, legislation that contravenes international human rights law and standards?

While the Supreme Court, under the leadership of Chief Justice Chaudhry, has dealt with a significant number of human rights petitions, in fact more than any previous Supreme Court bench, it has squandered more than one opportunity to deliver redress on pressing human rights crises in Pakistan. Moreover, its actions, specifically its use of contempt of court powers, have at times directly interfered with individual human rights.

(A) The Supreme Court's notable achievements in promoting and protecting human rights

The Supreme Court has made some notable progress in protecting and promoting respect for human rights: (1) Providing redress to victims of serious crimes, including human rights violations, by ordering and monitoring criminal investigations and ordering prosecutions; (2) Promoting and protecting women's rights by taking up petitions and taking *suo motu* notice of situations involving violence against women in Pakistan; and (3) Protecting groups vulnerable to discrimination, notably transgender and transsexuals in its landmark ruling recognizing the rights of the *hijra* community.

106 Supreme Court of Pakistan Annual Report 2012-2013, accessed at: http://www.supremecourt.gov.pk.Links/Annual_Rpt_2012-13/index.html

(i) Criminal investigations and prosecutions

Extensive case backlogs, crowded court dockets and insufficient staff in the courts have caused significant delays in Pakistan's criminal justice system.[107] Inadequate training of members of the lower judiciary on human rights, combined with corruption and discrimination, especially against poor and vulnerable communities, further exacerbates barriers for victims seeking to access justice, an effective legal remedy and reparation for rights violations.

The Supreme Court, under Article 184(3), has intervened in a number of criminal cases involving human rights violations to ensure that victims have access to an effective legal remedy and reparations under international law.

(1) Public lynching of two brothers in Sialkot (2010)

On 15 August 2010, two brothers, Muneeb and Mughees Butt were publicly lynched by a mob in Sialkot in the presence of police officers. The Supreme Court took *suo motu* notice of the case.[108]

The initial first information report (FIR) in the case filed by police did not name any suspects in the killing of Muneeb Butt and Mughees Butt; rather it named the victims as suspects in a murder and robbery that occurred earlier that day. The initial FIR claimed that the victims' actions had precipitated the public violence. In contrast, a second FIR, lodged after the Supreme Court took up the case, accused 28 people, including police officials, for failing to intervene to protect Muneeb Butt and Mughees Butt and preventing the incident.

The Supreme Court appointed a Commission under the leadership of Justice Kazim, a retired judge, to investigate what happened. After Justice Kazim submitted the Commission's report to the Supreme Court, the Court directed that a Joint Investigation Team (JIT), comprised of reputable police officers, be constituted to investigate the killing. The report of the JIT concluded that one of the two brothers had allegedly killed two residents of Buttar village earlier that day and the public lynching was in retaliation for the killings.

The Supreme Court then directed an anti-terrorism court in Gujranwala to conduct a trial of the 28 accused in the killing of Muneeb Butt and Mughees Butt and decide the case within three months.

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107 International Crisis Group, 'Reforming Pakistan's Criminal Justice System,' 6 December 2012, accessed at: http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/196-reforming-pakistans-criminal-justice-system.aspx; see also Chapter 2, Human Rights Commission of Pakistan, *State of Human Rights in 2011*, accessed at: http://hrcp-web.org/pdf/areports/7.pdf

108 Suo Motu Case No. 14 of 2010.

On 20 September 2011, the anti-terrorism court convicted 22 accused, sentencing seven to death on four counts; six to life imprisonment on four counts; and nine policemen, including a former district police officer, to three years imprisonment. The remaining five co-accused were acquitted. One of the accused policemen reportedly died of a heart attack three days prior to the verdict.

The defense appealed the convictions to the Lahore High Court, claiming that the verdicts were handed down under pressure from media and the public. As of 1 October 2013, the appeal remained pending.

The Supreme Court's decision to exercise *suo motu* powers under its Article 184(3) jurisdiction appears to have ensured an investigation and prosecution of those responsible, including police officers, for the lynching of the two brothers whose death would have otherwise likely remained uninvestigated.

(2) Shooting of Sarfraz Shah (2011)

On 8 June 2011, Sarfaraz Shah was extra-judicially killed by Sindh Rangers in Karachi. The Supreme Court, viewing video footage that appeared in the media, took up *suo motu* jurisdiction of the incident on 9 June 2011.

The video footage showed six men in Rangers uniforms holding unarmed Sarfraz Shah by his hair. As Sarfraz Shah begged for his life, one of the Rangers could be seen shooting him at close range two times. Sarfraz Shah fell to the ground and pleaded to be taken to a hospital. The video showed that the Rangers did not provide immediate assistance, instead, they watched as he lay wounded and bleeding. An ambulance was eventually called; Sarfraz Shah was declared dead when he was admitted to the hospital.

On 10 June 2011, Chief Justice Iftikhar Chaudhry, writing the ruling for the Court, concluded that excessive force had been used against Sarfraz Shah. The Supreme Court remarked that this was a

> *…[c]lassical case of highhandedness of the law enforcing agencies and instead of feeling a sense of responsibility and showing uprightness and honesty, they are, even today, concealing the facts while appearing before this Court*.[109]

109 Suo Motu Case No. 10 of 2011, para 12.

Questioning the ability of law enforcement to 'properly and impartially' conduct an investigation, the Court ordered Mr Fayaz Ahmed Leghari, PPO (Provisional Police Officer) of Sindh and Mr Muhammad Ejaz Chaudhry, DG (Director General) Rangers of Sindh to be removed from their posts within three days. The Court then appointed Sultan Khawaja, Deputy Inspector General of Karachi, to take over the investigation from the two officers with the following mandate: (1) investigate all suspects and complete the investigation in seven days; (2) send up the challan (chargesheet) before the Court of competent jurisdiction; and (3) submit a progress report of the investigation to the Registrar of the Supreme Court.

The Court also ordered that the trial of the accused rangers be conducted on a continuous basis and completed in no more than 30 days. The Court further asked that the trial be conducted impartially, without being influenced by the *suo motu* notice taken by the Supreme Court.

On 12 August 2011, an anti-terrorism Court (ATC) convicted and sentenced to death Ranger Shahid Zafar for shooting Sarfraz Shah. The Court convicted five other Rangers, sentencing them to life imprisonment. A civilian, Afsar Khan, was also sentenced to life imprisonment for dragging Sarfraz Shah into the park and handing him to the rangers. The defence appealed the convictions to the Sindh High Court.

The Supreme Court's decision to take *suo motu* jurisdiction of the shooting of Sarfraz Shah again appeared to have ensured State officials who were responsible for the killing and who would have otherwise escaped accountability were investigated and brought to justice.

Earlier this year, on 15 May 2013, Sarfraz Shah's next of kin, his brother Salil Shah, pardoned the convicted men 'in the name of God' and made an application for settlement in the Sindh High Court.[110]

110 The Pakistani Government promulgated the Qisas and Diyat Ordinance in 1990 following a direction by the Shariat Appellate Bench of the Supreme Court. The Ordinance purported to amend Pakistani criminal law in accordance with Islamic law by allowing heirs of victims to accept blood money or pardon the accused in cases involving 'offences relating to the human body', including murder. See Tahir Wasti, 'The Application of Islamic Criminal Law in Pakistan: Sharia in Practice', Leiden, The Netherlands: Brill, 2009.

(ii) Gender-based violence

The Supreme Court has exercised its *suo motu* jurisdiction swiftly in a number of matters involving violence against women, such as stoning to death and honor killing,[111] often relying on media reports. The exercise of the Court's original jurisdiction and its orders in some cases have led to strengthening legislation on violence against women.

(1) Legislation on acid violence (2009)

In 2003, Irshad Hussain threw acid on 13 year-old Naila Farhat, permanently disfiguring her face. Relying on media reports, Chief Justice Iftikhar Muhammad Chaudhry took *suo motu* notice of Naila Farhat's case, holding that cases of acid violence in Pakistan constituted a matter of public importance relating to the enforcement of fundamental human rights as per Article 184(3).[112]

On 20 November 2009, the Supreme Court passed an order in the case. Writing the judgment, Chief Justice Chaudhry observed that the Government should pass legislation prohibiting acid attacks, provide heavier sentences for perpetrators of acid violence, and regulate the sale and purchase of acid. The Court looked to Bangladesh's legislation on acid violence, recommending the Government draft similar legislation for Pakistan. The Court also directed the Government to provide free medical treatment to survivors of acid attacks and to ensure their rehabilitation.

In response to the Supreme Court order, Parliament passed the *Acid Control and Acid Crime Prevention Acid Act* in December 2011.[113]

111 See for example 'Khanewal Stoning Episode: SC orders arrest of implicated men', *Express Tribune,* July 2012, accessed at: http://tribune.com.pk/story/411203/khanewal-stoning-episode-sc-orders-arrest-of-implicated-men/ and 'SC takes suo motu notice of Kohistan death decree', *Dawn News,* 4 June 2012, accessed at; http://dawn.com/2012/06/04/sc-takes-suo-motu-notice-of-kohistan-death-decree/

112 Human Rights Case No. 12912-P of 2009.

113 The Acid Control and Acid Crime Prevention Act widens the scope of existing criminal law provisions to include acid attack victims who are disfigured or defaced by an attack. It also inserts two new sections into the Pakistan Penal Code. Section 336A criminalizes the act of voluntarily causing hurt by dangerous means or substances, and Section 336B(1) sets out sentences for such crimes. The Act also regulates the retail sale of acid.

(2) Investigation and prosecution of rape (2012)

In 2012, 822 cases of rape and gang rape were reported in Pakistan.[114] The number of actual incidents is likely much higher given the multiple barriers preventing victims from accessing the criminal justice system and the reluctance to report rape for fear of societal stigma.[115]

In December 2012, the Supreme Court took up a petition under Article 184(3), issuing an order to the Punjab Government to implement measures that would improve the investigation and prosecution of rape.[116]

The Court strongly denounced the prevailing practice in trial courts of acquitting accused on the basis of out-of-court settlements between the accused parties and the rape survivors and their families. The Supreme Court declared that out of court settlements in matters involving rape were null and void. The Court further declared that acquittals of accused in such cases on the basis of out-of court-settlements amounted to a serious miscarriage of justice and abuse of law.

Some of the measures ordered by the Court included: (1) recording victims' statements through a female magistrate as soon as practicable after the incident; (2) using screens or other such barriers between the accused and victim or other vulnerable witnesses giving testimony; (3) presenting cross-examination questions to the Presiding Officer or Judicial Officer who would then present the question to the victim in a language that is clear and not degrading; (4) allowing victims, particularly juvenile rape victims, to testify remotely via video conferencing; (5) maintaining a list of organizations that provide legal assistance and counselling for victims at every police station that receives complaints of rape; (6) requiring the Investigating Police Officer, on receipt of information regarding an allegation of rape, to inform these organizations of the incident promptly; (7) requiring medical examinations, to preserve forensic and DNA evidence to be conducted mandatorily.

If implemented, many of the measures ordered by the Court could improve victims' access to justice by improving investigations and increasing prosecutions. Such measures could also potentially foster greater public confidence in the criminal justice system to handle sexual violence.

114 Aurat Foundation: *Annual Report on VAW: A Qualitative Review of Statistics*', 2012.
115 Aurat Foundation, *Gender Based Violence in Pakistan: A scoping study,* January 2011, accessed at: http://www.af.org.pk/gep/deskStudies/GENDER%20BASED%20VIOLENCE%20-%20R%20PARVEEN%20(2).pdf
116 *Salman Akram Raja and Tahira Abdullah v. The Government of Punjab* (Constitution Petition No. 38 of 2012).

(iii) Rights of minority groups

The Supreme Court issued a landmark judgment in 2009, recognizing the rights of the *hijra*[117] community, which had long been subject to discrimination in Pakistan.

(1) Rights of Hijras (2009)

In 2009, after a police raid on a *hijra* colony in Taxila, Aslam Khaki, the Chairman of Islamic Welfare Trust petitioned the Supreme Court of Pakistan to protect the community's constitutionally guaranteed right to equal treatment before the law.

The petition stressed that the rights of the *hijra* community were being collectively violated by their families who rejected them and sent them to the 'Gurus'; by society in general, which discriminated against them, marginalized them, and shunned them; and by the government, whose coercive apparatus threatened, maltreated and harassed them. It asserted that this treatment was a violation of 'the right of dignity enshrined by Qur'an as well as Article 14 of the Constitution of Pakistan'.

In July 2009, the Supreme Court took up a petition under Article 184(3), ordering the social welfare secretaries of all four of the country's provinces to conduct surveys with a view to documenting the number of *hijras* across the country. The social welfare secretaries were also ordered to recommend measures that would fully integrate eunuchs into society.

Since its first landmark judgment issued in 2009, the Court has held more than 20 subsequent hearings to monitor the follow-up to the case, and has increased the ambit of its original judgment of July 2009 to include directions to the authorities to ensure the registration of *hijra* as a third sex,[118] the issuance of identification cards, and the opportunity to exercise the right to vote.

117 Hijras are comprised of three categories of persons: Khusras, who are hermaphrodites; Zananas, who are transvestites and transgenders, and Narbans who are transexuals. Hijras are a historic community with a unique culture spanning thousands of years in South Asia. They are mentioned in Hindu texts as having powers to bring good luck. Hijras played an important part in court administration as royal guards during Mughal rule in India. For many centuries, they have also performed the role of blessing births and weddings. There are approximately 800,000 hijras in Pakistan. See Sumaira Jajja, 'Unequal Citizens', *Herald,* 15 December 2011, accessed at: http://herald.dawn.com/2011/12/15/unequal-citizens.html

118 Before the Supreme Court's judgment, governments in Pakistan consistently refused to register transsexuals as its own gender or sex; instead, identification cards, passports, electoral votes and other official documentation identified *hijras* as men, and rarely, as women. The All Pakistan Eunuch Association (APEA) demanded that the *hijra* community should be legally recognized as what it truly is, but this demand was rejected or ignored.

(B) The Supreme Court's response to enforced disappearances

Enforced disappearances continue to be one of the most serious human rights crises facing Pakistan today. Since 2001, hundreds if not thousands of people have been subject to enforced disappearance, allegedly by members of the intelligence agencies.[119]

(i) International law relating to enforced disappearance

International law defines enforced disappearance as:

> *The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law*.[120]

An enforced disappearance is a complex crime which violates several provisions of the rights enshrined in the ICCPR notably: (1) Article 9 – the right to liberty; (2) Article 7 – the prohibition against torture and other ill-treatment; (3) Article 10 – the right to humane conditions of detention; (4) Article 16 – the right to be recognized as a person before the law; (5) Article 14 – the right to a fair trial; and, including in cases where the enforced disappearance results in the victim's death (6) Article 6 – the right to life. It is considered to be a continuing crime until the fate and/or whereabouts of the disappeared person are made known.

The widespread or systematic practice of enforced disappearance is a crime against humanity.[121] The prohibition against enforced disappearances is absolute:[122] it must be respected by States at all times under all circumstances. The prohibition against enforced disappearances is expressly set out in the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED), and the *United Nations Declaration on the Protection of All Persons from Enforced Disappearances*.[123]

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119 'We Can Torture, Kill or Keep You for Years': Enforced Disappearances by Pakistan Security Forces in Balochistan,' *Human Rights Watch*, July 2011, accessed at: http://www.hrw.org/sites/default/files/reports/pakistan0711WebInside.pdf

120 Article 2, ICPED.

121 Articles 1, 2 and 5, ICPED.

122 *Ibid.,* Article 1(s)*; see also* International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration*, Geneva 2008, (ICJ, *Legal Commentary to the ICJ Berlin Declaration)* pp36-7; see also Inter-American Court of Human Rights, Case of *Goiburu et al. v. Paraguay,* Judgment of 22 September 2006, Series C No. 153, para 84.

123 *Declaration on the Protection of All Persons from Enforced Disapparances.*

Pakistan is obligated under international law, including the ICCPR to: (1) take measures to prevent enforced disappearances; (2) investigate all cases of alleged enforced disappearance to ensure that the fate and whereabouts of victims are made known; (3) bring to justice those responsible for violating obligations in the Covenant; and (4) ensure reparation for victims, including surviving relatives.[124]

(ii) The Supreme Court exercises its 184(3) jurisdiction to take up the matter of 'missing persons'

The Supreme Court first assumed jurisdiction of enforced disappearances in December 2005, taking *suo motu* notice under Article 184(3) of a news report citing the growing numbers of enforced disappearances in the country.

On 8 March 2007, the Human Rights Commission of Pakistan (HRCP) petitioned the Supreme Court under Article 184(3) to take notice of enforced disappearances. The HRCP submitted a list of 148 'missing persons' – individuals subjected to enforced disappearance – to the Supreme Court, alleging that some of the individuals had informed the HRCP that they had been illegally detained and tortured by the intelligence agencies.

Asserting its independence, the Supreme Court under the new Chief Justice, Iftikhar Muhammad Chaudhry acknowledged evidence establishing that many of the 'disappeared' were in the custody of the security agencies. The Chief Justice committed the Supreme Court to 'deliberate on the role of agencies and pass a detailed judgment with regard to arbitrary and illegal arrests of persons' at a later stage in the proceedings.

Chief Justice Chaudhry also summoned high level military intelligence officials before the Supreme Court to explain the legal basis of the detention and to physically produce the detainees. The Supreme Court received public support for its actions, with prominent and favorable coverage in the Pakistan media. Consequently, however, relations were strained between the Supreme Court and the then military regime under General Musharraf. This unexpected assertion of independence is considered one of the major reasons behind Chief Justice Chaudhry's suspension from office in March 2007.

The number of cases of enforced disappearances pending in the Supreme Court gradually grew. The Supreme Court directed the Government to establish a Commission of Inquiry for Missing Persons (CIMP) to investigate enforced disappearances across Pakistan and to provide recommendations to curb the

124 Article 2(3), ICCPR; UNHRC General Comment 31, *supra* fn. 10, para 16; *UN Basic Principles on the Right to a Remedy and Reparations*, *supra* fn. 14, Principle 3.

practice. The Government complied with the Court's orders. The mandate of the CIMP, however, expired in December 2010.

On 1 March 2011, the Interior Ministry formed a new Commission (referred hereinafter as the 2011 Commission) to continue the work of the CIMP. The 2011 Commission was initially established for six months, but its mandate was extended for another three years.

(iii) The Supreme Court fails to ensure accountability for enforced disappearances

The Supreme Court should be commended for its repeated denouncing of enforced disappearances and its emphasis on locating 'disappeared' persons. It is, however of great concern that its orders have not also focused on ending impunity by issuing orders that, amongst other things, aim to ensure that the Government respects its obligations to bring those responsible to justice.

In September 2012, Chief Justice Chaudhry and chief justices of provincial high courts refused to meet the United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID) during its visit to the country, citing that such a meeting would be improper given that the 'missing persons' case was *sub judice*.[125]

The Supreme Court's weak response in the 'Adiala 11' case and its referral of cases to the 2011 Commission of Inquiry, despite concerns that the Commission does not comply with international human rights law and standards, calls into question its commitment to end disappearances.

(1) Adiala 11 (2010)

The case of the 'Adiala 11' is perhaps the most striking example of the Supreme Court's failure to ensure accountability, remedy and reparations for arbitrary detention and enforced disappearances.

In 2007 and 2008, 11 men were subjected to enforced disappearance in Punjab and Khyber Pakhtunkhwa (KPK). Authorities denied any knowledge of their detention until July 2008, when they admitted that the 11 men were being held in Adiala jail in connection with terrorist attacks on various military installations across Pakistan.

125 The United Nations Working Group on Enforced or Involuntary Disappearances visited Pakistan from 10-20 September 2012.

On 8 April 2010, an anti-terrorism court in Rawalpindi ruled that their detention was unlawful. The authorities, however, refused to release the men and instead issued preventive detention orders for each of them for thirty days under the Maintenance of Public Order Ordinance, 1960. These initial orders were followed by another set of preventive detention orders under the Anti-Terrorism Act, 1997.

The 11 men appealed their preventive detention orders in the Lahore High Court. On 27 May 2010, the Lahore High Court held that both sets of detention orders were unlawful and ordered their release. The men, however, were not set free. Two days later, on 29 May 2010, they were removed from Adiala Jail by armed personel, with the apparent collaboration of the prison authorities.

Families of the detainees instituted a *habeas corpus* petition in the Supreme Court under 184(3), alleging that prison authorities had handed the 11 men over to intelligence agencies instead of releasing them. The Supreme Court accepted their petition, and summoned the State security agencies to disclose the whereabouts of the Adiala 11.

In a hearing of this case held on 24 November, the Attorney General submitted in Court on behalf of the intelligence agencies that they did not have the prisoners in their custody.

In December 2010,[126] lawyers for the Adiala 11 stated that the eleven men were being detained under the Army Act in connection with 'terrorist activities'. On 7 January 2011, the Supreme Court disposed of the petition after counsel for the armed forces said that the Adiala 11 would be allowed to meet families.[127]

Between August 2011 and January 2012, four of the eleven men died under suspicious circumstances whilst in military custody. Mohammad Aamir died on 15 August 2011; Tahseen Ullah on 17 December 2011; Said Arab on 18 December 2011; and Abdul Satoor on 21 January 2012.[128] The military maintains that the four men died of 'natural causes'. Counsel for the men, however, claimed that they died after being subjected to torture.

126 Sohail Khan, 'Agencies admit custody of 11 missing Adiala inmates', *The News,* 10 December 2010, accessed at: http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=2570&Cat=13

127 Masood Rehman, 'SC disposes of case of 11 missing prisoners of Adiala Jail', *Pakistan Today,* 7 January 2011, accessed at: http://www.pakistantoday.com.pk/2011/01/07/news/national/sc-disposes-of-case-of-11-missing-prisoners-of-adiala-jail/

128 'From Adiala jail to agencies: Six minutes with 'missing' brothers', *Express Tribune,* 4 February 2012, accessed at: http://tribune.com.pk/story/331738/from-adiala-jail-to-agencies-six-minutes-with-missing-brothers/

On 6 January 2012, the mother of three of the detainees, Rohaifa bibi, filed a second *habeas corpus* petition before the Supreme Court under Article 184(3).

After learning of the four deaths the Supreme Court showed greater interest in the case and directed the Inter-Services Intelligence (ISI) to produce the remaining men before the Court. The Chief Justice stated that the Court would investigate the circumstances in which the four men had died and also fix responsibility at a later stage.[129] In February 2012, the ISI produced the seven detainees, who were visibly in poor health and had difficulty standing.

The lawyer for the 'Adiala 11' described the condition of the seven men

> *…when the Chief Justice asked them to get up and walk towards him at the rostrum to see them on their feet, some of them couldn't walk. They had to walk with support. One was even holding a urine bag in his hand. In those days it was winter and they were not even wearing the proper clothes for winter. They were such like skeletons and dead bodies.*[130]

The Supreme Court questioned the legal basis for the detention of the seven men and directed the military authorities to ensure they received medical treatment, but still did not order their release.

In subsequent proceedings, the lawyer for the military invoked *the Actions (in Aid of Civil Power) Regulations* (AACPR),[131] claiming they provided the Armed Forces with a lawful basis for continued detention of the seven surviving men as the regulations had been 'promulgated by the President... to cater for such situations'.

At that point, the Armed Forces appear to have actually moved the detainees to the Tribal Areas to allow them to attempt to use the AACPR to justify these violations.

In January 2013, the attorney representing the ISI reportedly stated before the Supreme Court that while the agencies did not have any evidence against the seven suspects, they were 'morally convinced' of their guilt.

129 Azam Khan, 'Adiala missing prisoners: Produce the seven men on Feb 13, says SC', *Express Tribune,* 10 February 2012, accessed at: http://tribune.com.pk/story/334444/court-to-wait-till-7pm-for-adiala-missing-prisoners/

130 Amnesty International, *'The Hands of Cruelty' – Abuses by Armed Forces and Taliban in Pakistan's Tribal Areas,* December 2012 (Amnesty International, *Hands of Cruelty),* p 29.

131 See Part II (C) (i).

After repeatedly disregarding further court orders to produce the remaining seven men in Court again,[132] the security agencies finally brought them before the Supreme Court on 14 May 2013. This time, the men were visibly in better health. Lawyers for the Adiala men continued to allege that the petitioners' right to a fair trial had been violated; they were not being informed of the charges and legal proceedings against them. In response, the Supreme Court directed to Attorney General to inquire whether the right to a fair trial was being guaranteed and ensure that the detained Adiala men had access to their families.[133]

As of 1 October 2013, the surviving 7 of the Adiala 11, continue to remain in detention, without charge or trial.

(2) Ineffectual commissions of inquiry on enforced disappearances

As noted above, the Ministry of Interior constituted the Commission of Inquiry on Enforced Disappearance on 1 March 2011 to continue the work of the earlier Commission that had been established in 2010 pursuant to the order of the Supreme Court.[134]

The Commission has two members: Justice (r) Javed Iqbal and Muhammad Sharif Virk, former Inspector General of Police. The Commission's powers include the power to summon alleged perpetrators, including State officials. If the Commission finds that law enforcement officials have been involved in a case of enforced disappearance, it may also register a criminal case against the individuals involved under Article 365 of the Criminal Code.

As of 1 October 2013, the 2011 Commission had traced the whereabouts of the disappeared persons in 473 cases; however, 804 complaints were still under investigation.[135]

Whether the work of the Commission of Inquiry on Enforced Disappearances has, in fact, been consistent with international standards requiring prompt, independent, impartial and effective investigations, remains questionable.

132 'Intelligence agencies busy, cannot produce Adiala missing prisoners, SC told', *Pakistan Today,* 19 May 2013, accessed at: http://www.pakistantoday.com.pk/2013/05/10/news/national/intelligence-agencies-busy-cannot-produce-adiala-missing-prisoners-sc-told/

133 Mudassir Raja, 'Adiala Jail: Seven missing prisoners presented before Supreme Court', *Express Tribune,* 14 May 2013, accessed at: http://tribune.com.pk/story/549178/adiala-jail-seven-missing-prisoners-presented-before-supreme-court/

134 Qaiser Zulfiqar, 'Judicial commission for missing persons formed' 4 May 2010, *Express Tribune,* accessed at: http://tribune.com.pk/story/10686/judicial-commission-for-missing-persons-formed/

135 'Enforced disappearances: Commission received 861 new cases in two years', *Dawn News*, 9 March 2013, accessed at: http://dawn.com/2013/03/09/commission-on-enforced-disappearances-received-861-new-cases-in-two-years/

The Commission has been heavily criticized for its lack of impartiality. Voice for Baloch Missing Persons (VBMP), an organization comprised of family members of so-called missing persons from Balochistan, has criticized the Commission for protecting the security agencies allegedly responsible for carrying out the enforced disappearances and has refused to appear before the Commission.

In an interview with the ICJ, Amina Janjua, Chairperson of Defence for Human Rights, also expressed frustration at the Supreme Court's referral of cases of enforced disappearance (including the Balochistan cases) to the Commission. According to Ms Janjua, the Commission is powerless as security agencies continue to defy its orders on a regular basis and its members are not sympathetic to the cause of families of the disappeared.

In June 2012, addressing a press conference, Justice (r) Javed Iqbal, one of the Commissioners, called the figures of disappeared persons given by human rights groups 'baseless propaganda', and claimed that foreign intelligence agencies who wanted to destabilize Pakistan were responsible for the 'missing persons'.[136]

Judges of the Supreme Court have further recently remarked that the Commission of Inquiry is incompetent and ineffectual,[137] making the Court,s decision to refer cases to the Commission – as a measure of investigation and remedy – all the more puzzling.

Despite the flaws in the Commission of Inquiry, the Supreme Court has continued to refer cases of enforced disappearances to the Commission. On 18 May 2013, the Supreme Court of Pakistan disposed of the 'missing persons' petition brought by the Human Rights Commission of Pakistan in March 2007 related to enforced disappearances in Balochistan. The half-page short order delivered by the Court suggested that the petitioners should pursue their case before the 2011 Commission. The HRCP subsequently filed for a review of the order, claiming that the Supreme Court had not adequately addressed the grievances set out in the original petition. As of 1 October 2013, the Supreme Court had not responded to the HRCP review petition.

136 'Foreign agencies behind missing persons: Justice Iqbal', *Dawn News,* 9 June 2012, accessed at: http://dawn.com/news/725187/foreign-agencies-behind-missing-persons-justice-iqbal

137 'Missing Persons Commission Incompetent: Justice Khawaja', *Pakistan Today,* 5 July 2013, accessed at: http://www.pakistantoday.com.pk/2013/07/05/news/national/missing-persons-commission-incompetent-justice-khawaja/

(3) Impunity for enforced disappearances

Despite overwhelming evidence implicating Pakistani security forces in enforced disappearances, to date no one has been brought to justice for their alleged involvement in enforced disappearances.

Multiple factors have enabled impunity for enforced disappearances: a compromised criminal justice system, inadequate witness protection laws, and the absence of civilian oversight of the military.

To respect its obligations under international law, all branches of the Pakistan Government must do more than just locate 'disappeared' persons.

The Supreme Court, as a branch of the State, must take measures within its competence, and in a manner that respects the separation of powers and the rights of victims, to complement the function of the lower courts, ensuring that those subjected to enforced disappearance are released or if charged with recognizable offence, are brought without delay before a court, given access to counsel and their families, and receive a fair trial within a reasonable time period before an independent and impartial civilian court; that the competent authorities conduct independent impartial, and thorough investigations into each case of enforced disappearance; that those responsible for enforced disappearance and other violations of the detainees rights are brought to justice in fair proceedings; and that the victims, including the persons subjected to enforced disappearance and their families, have access to effective remedies and receive adequate reparation.

Among other things, the executive and the legislature must also take all necessary measures to ensure accountability, redress, including effective remedies and reparation, to those who have been subjected to enforced disappearance and to prevent recurrence of this crime.

At a practical level, the Supreme Court could be doing more. For example, the Court could use its powers of contempt to compel authorities, both civil and military, to implement its orders. In recent years, the Court has not hesitated to use these powers against journalists, lawyers, and even former prime minister Yousuf Raza Gilani (causing his disqualification from office). Security agencies, however, have been largely spared of any contempt charges despite their defiant attitude and repeated failure to follow directions of the Court in cases of enforced disappearances.

The Supreme Court could also order agencies or authorities to institute criminal proceedings against members of security agencies implicated in enforced disappearances. The Supreme Court has frequently exercised this authority in corruption cases, but has rarely invoked this power to address enforced disappearances and other violations allegedly carried out by agencies of the armed forces.

Finally, the Supreme Court could review laws and regulations which are currently in force, that enable enforced disappearances and are incompatible with Pakistan's obligations under national and international human rights law. Recently, the court declared the Contempt of Court Act 2012, a law that sought to curtail the judiciary's contempt powers, void in less than two months after it was passed by parliament. However, as discussed in detail below, the Supreme Court has not acted on a petition calling for a review of the *Actions (in Aid of Civil Power) Regulations, 2011.*

(C) The Supreme Court fails to use its original jurisdiction to protect and safeguard human rights

It is a core responsibility for members of the judiciary, in the context of upholding the rule of law, to assume an active role in safeguarding human rights and combating impunity.[138] As part of its constitutional powers, the Supreme Court of Pakistan may review and if required, strike down laws that violate human rights using its 184(3) jurisdiction.[139] But the Court has failed to act on a number of petitions that called for the review of legislation contravening human rights.

(i) The petition challenging *the Actions (in Aid of Civil Power) Regulations 2011*

The *Actions (in Aid of Civil Power) Regulations (AACPR), 2011* authorize 'the armed forces to take certain measures for incapacitating the miscreants by interning them during the continuation of the actions in aid of civil power'.[140] The AACPR are applicable to the Federally Administered Tribal Areas (FATA) and the Provincially Administered Tribal Areas (PATA).

138 International Commisison of Jurists, *Legal Commentary to the ICJ Geneva Declaration,* Geneva, 2011, pp 4-5 (ICJ, *Legal Commentary to the Geneva Declaration),* pp 4-5.

139 The Supreme Court declared the Contempt of Court Act, 2012, unconstitutional in less than a month after it was passed by Parliament. The Court held that the Act undermined independence of the judiciary.

140 Preamble of The Actions (in Aid of Civil Power) Regulations, 2011, accessed at: http://www.isj.org.pk/the-actions-in-aid-of-civil-power-regulation-2011/#sthash.l12762bI.dpuf

The overly broad and vague wording of the AACPR gives sweeping powers to members of armed forces, namely to detain without charge or trial where it appears that such detention would be expedient for peace. Individuals may be detained for an unspecified period without any right to be brought before a court of law or to challenge the legality of detention before a court.[141] The Interning Authority under the AACPR may, on its own authority, or on a request from the victim or his relatives review the case of the person being held.[142] In addition, the Regulations provide that statement or depositions by members of the armed forces shall on their own be sufficient for convicting the accused.[143]

The AACPR has retroactive effect from 1 February 2008, providing wide immunity for armed forces for any action done, taken, ordered to be taken, or conferred, assumed or exercised by before or after the 1 February 2008.

The AACPR have often been used as the legal cover for illegal detention, enforced disappearances and extrajudicial killings in the Federally Administered Tribal Areas and the Provincially Administered Tribal Areas.

The Regulations violate Article 10(2) of the Pakistan Constitution and Article 9 of the ICCPR. The Pakistani Constitution requires that every arrested or detained person be brought before a magistrate within a period of 24 hours of the arrest or released; and Article 9(4) of the ICCPR provides all detained persons with the right to access a court to challenge the lawfulness of his or her or detention pursuant to habeas corpus or similar procedures.

In August 2011, the Jamat-e-Islami (JI), a political party, petitioned the Supreme Court under Article 184(3) to declare the AACPR unconstitutional. Another petition challenging the constitutionality of the Regulations was made to the Supreme Court in November 2012.

Using its powers under Article 184(3), the Supreme Court could review the AACPR and if required, invalidate sections that are incompatible with Pakistan's obligations under international human rights law. But as of 1 October 2013, there has been no progress on the petitions. The Court is yet to issue any interim order or judgment on the legality of the AACPR, leaving hundreds of victims of arbitrary detention, enforced disappearance and extrajudicial killing without remedy or reparations.

141 See Amnesty International, *Hands of Cruelty, supra* fn. 130; and International Crisis Group, 'Countering Militancy in PATA', Asia Report No. 242, 15 January 2013, accessed at: http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/242-pakistan-countering-militancy-in-pata.aspx

142 Actions (in Aid of Civil Power) Regulations, 2011, section 14.

143 *Ibid.,* section 19(2).

(ii) The petition to commute death sentences

There are more than 7000 people on death row in Pakistan. Capital punishment is prescribed for 27 different crimes, which include blasphemy, sexual intercourse outside of marriage, kidnapping or abduction, rape, assault on modesty of a woman and stripping of her clothes, smuggling of drugs, arms trading and sabotage of the railway system.

The ICJ considers the death penalty to be a violation of the right to life, and constitute cruel and inhuman punishment.

Under Article 6(2) the ICCPR, the death penalty may only be imposed for the most serious crimes[144] following a proceeding that affords the accused all of his rights under the ICCPR, including the right to a fair trial before an independent, impartial and competent court. The imposition of the death penalty for offences other than the most serious crimes or where the accused is not afforded his full rights under the ICCPR violates the right to life.

The UN Human Rights Council, of which Pakistan is currently a member, has called upon all States Parties '*to abolish the death penalty completely and, in the meantime, to establish a moratorium on executions*'.

The United Nations General Assembly has passed four resolutions starting in 2007 with its most recent in December 2012, calling upon member States to establish moratoria on executions '*with a view to abolishing the death penalty*'. The resolution emphasized that '*the use of the death penalty undermines human dignity'.* The December 2012 UNGA resolution is the fourth resolution in five years, condemning the use of capital punishment. Previous resolutions were passed in 2008, 2010 and 2012.

In June 2008, the Pakistan People's Party Government adopted a five-year informal moratorium on executions.[145]

144 Following an exhaustive study of the jurisprudence of the UN bodies, the Special Rapporteur on extrajudicial executions concluded that 'the death penalty can only be imposed in such a way that it complies with the stricture that it must be limited to the most serious crimes, in cases where it can be shown that there was an intention to kill which resulted in the loss of life,' *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alson*, 29 January 2007, UN Doc. A/HRC/4/20, para 53, 65; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 9 August 2012, UN Doc. A/76/275 (2012), para 67; see also ECOSOC Resolution 1984/50 of 25 May 1984, *Safeguards guaranteeing protection of the rights of those facing the death penalty*, para 1.

145 Notwithstanding the moratorium, on 15 November 2012, Pakistan carried out its first execution in four years, hanging Muhammad Hussain, a former military officer convicted of murder by a military court.

On 17 September 2012, the Supreme Court was petitioned by Barrister Zafarullah Khan under Article 184(3) to commute all sentences of death to life imprisonment. The petition called on the Supreme Court to affirm that the death penalty violated the right to life. The petition also warned that 'the corrupt criminal justice system' increased the likelihood of wrongful convictions and executions.[146] Unlike other petitions, including for example those regarding the rights of the *Hijra* community or the measures to improve the investigation and prosecution of rape, discussed above, the Court did not take prompt action to hear the petition.

On 30 June 2013, the new Government led by Pakistan Muslim League (Nawaz) indicated that it would not renew the moratorium on the death penalty. Immediately following the new Government's decision not to extend the moratorium on executions, Barrister Zafarullah Khan once again petitioned the Supreme Court to stay executions until the original petition seeking commutation of executions was decided. This second petition also did not prompt the Supreme Court into action.

On 13 July 2013, Pakistan's interior ministry wrote a letter to the President of Pakistan seeking permission to execute 400 prisoners. Former President Zardari put executions on hold until his term expired on 8 September 2013. The decision on renewing the death penalty moratorium now rests with the newly elected President, Mamnoon Hussain.

As of 1 October 2013, both petitions seeking commutation of the death penalty, however, still remained pending in the Supreme Court.

(D) The Supreme Court's use of contempt of court powers interferes with the right to freedom of expression

In stark contrast to its action to protect human rights, the Supreme Court's use of its contempt of court powers has interfered with and at times, even violated individuals' right to freedom of expression and freedom of the press.

Article 19 of the Constitution of Pakistan enshrines the rights to freedom of expression and freedom of the press.

146 'Plea moved for abolishing capital punishment from Pakistan', *Dawn News,* 17 September 2012, accessed at: http://beta.dawn.com/news/750037/plea-moved-for-abolishing-death-penalty-in-pakistan

Article 19 of the ICCPR

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

The UN Human Rights Committee has held that freedom of expression 'is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.[147]

Article 19 of the ICCPR lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.[148]

Restrictions on the rights protected by the ICCPR must not be overbroad. The UN Human Rights Committee has indicated that

147 UN Human Rights Committee, 'General Comment 34, Freedoms of opinion and expression (2011)', UN Doc. CCPR/C/GC/34 (UNHRC General Comment 34), para 3.

148 UN Human Rights Committee, case of *Velichkin v. Belarus*, Communications No. 1022/2001, views of 20 October 2005, UN Doc. CCPR/C/85/D/1022/2001 (2005).

> *Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.*[149]

The *Latimer House Principles* also stress that 'criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions'[150] and that 'the criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts'.[151]

Judges in the United Kingdom, notably Lord Denning whose judgments are extensively quoted by courts in Pakistan, warned against the use of contempt proceedings to silence criticism.

> *Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.*[152]

The frequent use of contempt of court powers may have a chilling effect upon expressions of concern about the functioning of the judiciary, and open the judiciary up to questions about of abuse of power.

The offence of contempt of court in Pakistan enjoys Constitutional protection. Article 204 of the Constitution states that

149 UNHRC General Comment 34, *supra* fn. 147, para 29; see also UN Human Rights Committee, case of *Rafael Marques de Morais v. Angola*, Communication No. 1128/20, views of 18 April 2005, UN Doc. CCPR/C/83/D/1128/2002 (2005); UN Human Rights Committee, case of *Patrick Coleman v Australia,* Communication No. 1157/2003, views of 10 August 2006, UN Doc. CCPR/C/87/D/1157/2003 (2006).

150 Objective VII(b), *Latimer House Principles*, *supra* fn. 34.

151 *Ibid.,* Principle VI(I)(b)(ii).

152 *R v. Metropolitan Police Commissioner exparte Blackburn* (No 2)[1968] 2 QB 150.

> *…A Court shall have power to punish any person who,- (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court; (b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt.*

The Contempt of Court Ordinance, 2003, defines contempt of court as a criminal offence is punishable by up to six months' imprisonment.

Further, Article 63(1)(g) of the Constitution of Pakistan disqualifies a person from serving in parliament if he or she

> *…has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan, unless a period of five years has elapsed since his release.*

(i) Contempt of Court – silencing criticism?

Proceedings in cases of contempt are commenced by the issuance of a notice to the alleged contemnor. Following the notice, the alleged contemnor may appear in court in person or through an advocate. If, after giving the alleged contemnor an opportunity of a preliminary hearing, the court is *prima facie* satisfied that the interest of justice so requires, it shall fix a date for framing a charge in open court and proceed to decide the matter either on that date, or on a subsequent date or dates, on the basis of basis of affidavits, or after recording evidence.[153]

In December 2011, the Supreme Court issued a contempt of court notice to Babar Awan, former law minister and senator of the Pakistan People's Party. The notice was issued in response to Babar Awan's remarks in a press conference that by accepting the 'memogate' petition and initiating a judicial probe into the matter, the Supreme Court had denied a bipartisan and bicameral parliamentary committee on national security its right to hold an inquiry into the scandal.[154]

153 Section 17, Contempt of Court Ordinance, 2003.

154 Faisal Shakeel, 'Memogate: SC questions Awan's statements against judiciary', *Express Tribune,* 19 December 2011, accessed at: http://tribune.com.pk/story/308724/memogate-sc-takes-strict-notice-of-awans-dec-1-press-conference/

In January 2012, Babar Awan was issued a second contempt of court notice for allegedly ridiculing the judiciary by responding to press questions about the first contempt of court notice with what has been perceived as a 'tongue in cheek' statement: 'Notice milya, kakh na hileya, kyun sohneyan da gila karan. Mai lakh wari bismillah karan'. (The notice was issued but nothing happened, why should I complain? I will always welcome such moves.)

Following the second notice, the Supreme Court suspended Babar Awan's license to practice in the courts and after refusing to accept his apology, indicted him for contempt of court in May 2011. Since then, Babar Awan has requested the court to accept his apology twice, citing the Contempt of Court Ordinance, 2003, that allows the alleged contemptor to offer an unconditional apology to the court at any stage of the proceedings.

Another series of contempt of court notices were handed down in connection to allegations made by a prominent businessperson, Malik Riaz, that the Chief Justice's son, Arsalan Iftikhar, had subjected him to blackmail to bribe him with large sums of money in order to have pending cases against him decided favorably.

More recently, the Supreme Court issued a contempt of court notice to Imran Khan, Chairperson of Pakistan Tehreek-e-Insaaf. In a press conference, Imran Khan had allegedly called the Supreme Court's inaction in response to allegations of rigging in the general elections 'shameful'. The Court discharged the contempt notice on 28 August 2013. Had Imran Khan been convicted, he would have been disqualified from his membership of the National Assembly.

Concern that the superior judiciary was using contempt powers to silence criticism was compounded when the provincial high courts of Islamabad and Lahore directed PEMRA to ban private television channels from broadcasting contemptuous and scandalous material against the judiciary or individual judges and restrained all television channels from airing programs,[155] press conferences and interviews in which guests made allegations against judges of superior courts or criticized the judiciary.[156]

155 'LHC Bars Media from Broadcasting Anti-Judiciary Programmes', *The Nation,* 17 October 2012, accessed at: http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/17-Oct-2012/lhc-bars-media-from-broadcasting-anti-judiciary-programmes

156 Faisal Kamal Pasha, 'IHC Bars Media from Printing Airing Anti-Judiciary Material', *The News,* 10 October 2012, accessed at: http://www.thenews.com.pk/Todays-News-13-18049-IHC-bars-media-from-printing-airing-anti-judiciary-material

The Supreme Court has at times also resorted to stifle criticism by openly reprimanding lawyers critical of the judiciary in court.[157]

Disproportionate resort to the use of contempt of court powers can chill debate and criticism about the judiciary – which is important in a society that respects the rule of law and the right to freedom of expression. It also makes the judiciary susceptible to allegations of abuse of power.

Conclusion

The State's obligation to uphold human rights falls on all branches of the State, including the judiciary.

The executive and legislature should review all draft legislation and the implementation of laws and regulations and ensure that laws that contravene Pakistan's national and international human rights obligations on their face or in their implementation are either repealed or amended.

However, as noted, while the Court has acted swiftly in some matters, addressing a significant number of human rights petitions relating to the administration of justice in criminal cases, women's rights and the rights of transsexual communities, the Court has been reluctant to take measures in other matters, notably in ensuring members of the military and security agencies allegedly responsible for enforced disappearances are held to account and providing effective remedy and reparations to the hundreds, if not thousands, of victims of enforced disappearance.

Similarly, while the Court has used its powers under Article 184(3) on more than one occasion to prevent human rights violations and stop ongoing violations, there have been other instances where the Court has been petitioned, yet has failed to respond to pressing human rights matters. For example, the petition to commute death sentences is an opportunity for the Court to uphold and safeguard the right to life – yet the Court has not responded. Equally the petition to review the ACCPR presents yet another opportunity for the Supreme Court to act on its commitment to uphold and safeguard human rights – yet, again the Court has not acted.

157 Jon Boone, 'Pakistan's chief justice Iftikhar Chaudhry suffers public backlash', *The Guardian,* 28 August 2013, accessed at: http://www.theguardian.com/world/2013/aug/28/pakistan-judges-backlash-ftikhar-haudhry

Finally the Court has, at times, used its contempt powers to stifle criticism in a manner that could have a chilling effect on debate and criticism of the judiciary and the court system, and in a manner that appears to be inconsistent with respect for the right to freedom of expression.

Part III: Further issues of concern arising from expansive use of original jurisdiction

The Supreme Court's increased use of original jurisdiction has given rise to some issues that, if left unchecked, could undermine the very principles and democratic institutions that the Court seeks to protect.

While the ICJ commends and supports the Court's use of judicial authority to promote rule of law and human rights, it cautions the Supreme Court to give greater circumspection to the unintended consequences that have arisen from the expanded use of Article 184(3).

This final Part discusses some of these issues, including: (1) the increased workload and added delays in cases pending before the Supreme Court; (2) the rights of affected parties to appeal or review decisions taken under Article 184(3); (3) the right of accused parties to the presumption of innocence and a fair trial; (4) the potential overlap of Supreme Court decisions under article 184(3) with constitutionally mandated powers of other branches of the State; and (5) the inadvertent displacing or by-passing of lower courts, creating a two-tier system for accessing justice.

(A) Unsustainable workload and backlogs in the Supreme Court

In a recent meeting with the Supreme Court Registrar, the ICJ learned that the Human Rights Cell of the Supreme Court receives on average about 250 applications for Article 184(3) jurisdiction daily.

To improve the Court's capacity and efficacy in dealing with 184(3) petitions, Chief Justice Chaudhry revived and expanded the Supreme Court's Human Rights Cell. Initially the Human Rights Cell of the Court was a small group, tasked with examining applications submitted to the Court under Article 184(3) of the Constitution by the general public.[158] However in 2009, the Human Rights Cell expanded significantly into a 'full fledged system' with a staff of 30 people.[159] The Director General of the Human Rights Cell is a retired Judge of the High Court. The Judicial assistants working in the Human Rights Cell are either lawyers or retired judges.[160]

158 Supreme Court of Pakistan, 'Human Rights Cell', *Annual Report of Pakistan Supreme Court,* 2010-2011, accessed at: http://www.supremecourt.gov.pk/Annual_Rpt/Human%20Rights%20Cell.pdf

159 Interview with Supreme Court Registrar, Dr Fakir Hussain and Assistant Registrar of the Human Rights Cell, Maqbool Ahmad Mangrio, Islamabad, 17 June 2013.

160 *Ibid.*

In an interview with the Registrar of the Supreme Court, Dr Fakir Hussain and the Assistant Registrar of the Human Rights Cell Maqbool Ahmad Mangrio on 17 June 2013, the procedure for processing petitions was described as follows:

(1) Judicial assistants review and prepare a brief summary of each application made to the Human Rights Cell.

(2) The summaries [as well as the original applications] are sent to the Chief Justice for his review.

(3) The Chief Justice goes over each application and decides what, if any, actions should be taken against concerned government agencies to redress the applicants' grievances.

(4) The Human Rights Cell, on behalf of the Chief Justice, then contacts the concerned government agencies and requests information or clarification on the particular issue in the application. Representatives from government agencies may also be required to present themselves at the Human Rights Cell to give more information or provide required documentation.

(5) After receiving information from the relevant government agencies, the judicial assistants then prepare an additional report updating the status of the application that is submitted to the Chief Justice for his review.

(6) The Chief Justice will go through the follow-up report and determine whether the grievances of the petitioner have been adequately addressed. If grievances are still outstanding, the Chief Justice may decide to exercise his jurisdiction under Article 184(3) of the Constitution and hold hearings on the matter.

(7) The Chief Justice may also decide to immediately take up the matter under Article 184(3), without seeking further clarification from government agencies if the matter is 'very serious'.

It is the Chief Justice alone who vets each application made to the Human Rights Cell, deciding whether the Court will exercise its jurisdiction under 184(3) to take up the matter as a petition for regular hearing.

In addition to the applications submitted through the Human Rights Cell, which are often in the form of letter or informal written statements by 'disadvantaged' groups who have limited access to lawyers, the Supreme Court also continues to receive formal petitions submitted to the Court under Article 184(3).

Also, as noted above in Part A (i), the Supreme Court may also exercise its power to take notice of human rights violations on its own motion, known as *suo motu* notice. While each judge sitting on the Supreme Court has the power to take *suo motu* notice of a matter, in practice, *suo motu* powers have been exercised exclusively by the Chief Justice. Often times, however, the Chief Justice will take *suo motu* notice of a matter at the request of other Supreme Court judges.

The cumulative effect of these different mechanisms to receive petitions and take up jurisdiction of a matter under Article 184(3) has led to a significant increase in the workload of the Supreme Court. Whereas in 2004, 450 petitions were filed, between April 2010 and December 2011, over 90,000 petitions were made to the Court.[161]

While the Supreme Court's dedication and commitment is laudable, if not inspiring, the ICJ questions whether such a high caseload is sustainable.

Moreover, the ICJ queries whether such a high caseload comes at the cost of increased delays to litigants awaiting judgment from the Supreme Court in other matters? By the end of 2013, there were close to 20,000 cases pending before the Supreme Court,[162] including more then 1000 appeals by individuals on death row.[163]

As part of its obligation under international law, Pakistan must take measures to ensure all parties have the right to have their case heard in a timely manner.

Article 14, paragraph 3 (c) of the ICCPR provides for the right of the accused to be tried without undue delay. The UN Human Rights Committee has noted that this protection is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.[164]

The Special Rapporteur on the Independence of Judges and Lawyers, in her Report on the Mission to Pakistan noted with concern.

161 Katharine Houreld, 'Pakistan's top court struggles to deliver justice', Chicago Tribune, 24 September 2012, accessed at: http://articles.chicagotribune.com/2012-09-24/news/sns-rt-us-pakistan-justice-courtsbre88n0zs-20120924_1_top-court-justice-system-chief-justice-iftikhar-chaudhry; Supreme Court Annual Report 2010-2011, 'Human Rights Cell', p 129, accessed at: http://www.supremecourt.gov.pk/Annual_Rpt/Human%20Rights%20cell.pdf

162 Press release by the Supreme Court, 27 September 2013, accessed at: http://www.supremecourt.gov.pk/web/page.asp?id=1659

163 Corporal Punishment: Petition in SC against deathpenalty filed, *Express Tribune,* 17 August 2013 accessed at: http://tribune.com.pk/story/591218/corporal-punishment-petition-in-sc-against-death-penalty-filed/

164 UNHRC General Comment 32, *supra* fn. 29, para 35.

> *The lack of clear criteria guiding the use of suo motu….**may jeopardize other pending cases from being considered in a timely manner by the Supreme Court.*** [emphasis added][165]

A clear and transparent set of guidelines to help the Human Rights Cell and the Supreme Court vet petitions made under Article 184(3) at the initial stages could assist in managing this very large caseload, while also helping to reduce any additional delay in other pending cases before the Supreme Court.

(B) Procedural concerns in the administration of Article 184(3) cases

(i) Rights of interested parties under Article 184(3) petitions and *suo motu* matters

The Court should ensure that any disposition given in a matter taken up under Article 184(3) is consistent with its jurisdiction, respect for human rights (including rights of affected parties), the separation of powers and the rule of law.

At times, the Supreme Court's disposition in 184(3) cases has had far-reaching consequences, which have inadvertently drawn in persons who would not have originally anticipated being affected by the case. Because 184(3) judgments cannot be appealed, the consequence has been to leave aggrieved or affected parties without redress or remedy.

(1) Difference between a review and an appeal

Since the Supreme Court is the highest court in the Pakistan judicial system, its judgments cannot be appealed to a higher court or tribunal.

The Constitution of Pakistan and the Supreme Court Rules, 1980, do however allow litigating parties a limited right of review of Supreme Court decisions. However, the Court's review jurisdiction is much more limited in scope than its appellate jurisdiction. Under the Supreme Court Rules, the Supreme Court may review its judgments and orders on the ground of 'an error apparent on the face of the record' or on discovery of new and important evidence.

Unlike appeals, the same judges who passed the original judgment or order sought to be reviewed may hear reviews.[166] The option of a review, therefore, is not tantamount to an appeal.

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165 *Report of the Special Rapporteur on the independence of judges and lawyers*, *supra* fn. 94, para 66.

166 Order XXVI, Supreme Court Rules, 1980, accessed at: http://www.supremecourt.gov.pk/web/user_files/File/The_Pakistan_Supreme_Court_Rules.pdf

In its preliminary observations, the ICJ mission on independence of the judiciary observed with concern that 'when the Supreme Court takes up cases the parties involved may be deprived of any possibility of appeal'.

On some occasions, such as in the PCO Judges case described below, aggrieved persons, who were not litigants in the petition but whose rights were negatively impacted by the Court's disposition of a case, have been denied the right to remedy or redress.

The ICJ recommends that the Supreme Court adopt a judicial policy that aims to ensure that those who may be aggrieved or are likely to be directly affected by a case taken up under the Court's original jurisdiction have an opportunity to become parties to the proceedings and make submissions in the matter. The ICJ also cautions the Court to ensure that its orders and dispositions given in matters taken up under Article 184(3) comply with international human rights standards, principles of separation of powers, the independence of the judiciary, and the rule of law. Where relevant and possible, among other things, the Court should consider the appropriateness of referring aspects of cases to competent, independent and impartial authorities or lower courts and in doing so, not leaving persons likely to be affected by a ruling without remedy or redress for possible violations of their rights.

(2) 'PCO Judges' case (2009)

The 'PCO Judges' case demonstrates the need to ensure that the Supreme Court, in exercising jurisdiction under Article 184(3), does not give a disposition that leaves affected parties with little or no opportunity for redress, either in appealing findings or seeking an alternate remedy.

On 31 July 2009, the Supreme Court passed a judgment in the *Sindh High Court Bar Association* case. In that judgment, the Supreme Court declared General Musharraf's proclamation of emergency and Provisional Constitutional Order (PCO), 2007, unconstitutional. The Court also ruled that all judicial appointments made by the 'de facto' Chief Justice Dogar, without the consent of the de jure Chief Justice Chaudhry, were unlawful and void.

As a result of the Supreme Court's ruling, Justice Bhinder and over 100 other judges appointed by de facto Chief Justice Dogar were subsequently dismissed from their offices as judges of the high courts and Supreme Court.

The deposed judges filed a review petition against the ruling in the *Sindh High Court Bar Association* case in the Supreme Court, challenging their dismissal. The judges argued that they were not made parties in the

Sindh High Court Bar Association case, and were therefore denied their right to make submissions and the right to review by a higher tribunal.

The Supreme Court refused to entertain the review petition. The Court held that because their judgments were *in rem*, there was no obligation to allow those who were affected by the outcome to make submissions or be involved in the proceedings.[167] Following from that, the Court also ruled that since the applicants were not parties to the original case, they did not have the right to bring an application for a review of the Court's findings.

The Supreme Court's disposition had the effect of dismissing the judges without due process- and undermined the authority of the Supreme Judicial Council, the body empowered under the Constitution to remove judges found guilty of misconduct.

Furthermore, the Court's decision contravened international standards for the independence of the judiciary. According to the *Beijing Statement of Principles on the Independence of the Judiciary*[168] and the *UN Basic Principles on the Independence of the Judiciary*,[169] any judge facing discipline, suspension or removal must be entitled to a fair hearing.[170] The disciplinary procedure must be fair and expeditious and determined in accordance with established standards of judicial conduct.[171] In all cases, any final decision to remove a judge must be subject to independent review.[172]

Justice Sardar Raza wrote a sharp dissent. He argued that the principle that no one should be condemned unheard was an essential component of a fair trial and natural justice. He said that because the *Sindh High Court Bar Association* case was heard under the Supreme Court's original jurisdiction, aggrieved parties did not have any right of appeal. By refusing to entertain their review petition, the majority judgment had barred the applicants from the only opportunity they had to challenge the ruling against them and was tantamount to grave injustice.

Article 209 of the Constitution of Pakistan allows judges to be removed from office only by the Supreme Judicial Council, a judicial body comprising of Supreme Court and high court judges. To ensure the judges were not deprived of a right to remedy, the Supreme Court could have referred their case to the Supreme Judicial Council for review. In line with earlier precedents, the Chief

167 *Justice Khurshid Anwar Bhinder v. Federation of Pakistan* (2009).
168 *Beijing Principles on the Independence of the Judiciary*, *supra* fn. 35, Principles 26 and 27.
169 *UN Basic Principles on the Independence of the Judiciary*, *supra* fn. 30, Principles 17, 18 and 19.
170 *Ibid.,* Principle 17.
171 *Ibid*., Principles 17 and 19.
172 *Ibid.,* Principle 20.

Justice could have also reviewed their appointments and reappointed the judges in accordance with law.[173]

(3) Revision of Presidential Elections (2013)

As noted above in Part I, the Supreme Court of Pakistan changed the date of Presidential elections, moving them up a week from 6 August 2013 to 30 July 2013. The Supreme Court order was given in a 184(3) petition brought by Pakistan Muslim League (Nawaz) on the basis that all parliamentarians had a right to observe non-mandatory religious practices, which should not deny them the opportunity to vote in the presidential elections. The Court accepted the petition and ordered the date of the elections to be changed after only the first hearing. Before passing the order, the Court did not notify any of the presidential candidates of opposition parties. Thus, none of the opposition parties or presidential candidates were able to become parties to the case or make submissions before the Court.

Raza Rabbani, the presidential candidate nominated by the leading opposition party, the Pakistan People's Party (PPP), strongly objected to the Supreme Court's order, arguing that the Court had curtailed his right to campaign for the elections and had passed the order without giving him or his party an opportunity to be heard.

Also, since the Supreme Court assumed jurisdiction of the case under its 184(3) jurisdiction, the opposition parties, who were unable to become parties to the case, were also denied any avenue to appeal the Court's order.

Following on from the order, the PPP boycotted the Presidential elections, which took place on 30 July 2013 as directed by the Court.

Under Article 14(5) of the ICCPR, individuals are entitled to a review by higher tribunal any criminal conviction or sentence. While this right has formally been reserved for criminal offences and deemed not applicable to constitutional motions, the United Nations Human Rights Committee has nonetheless warned that

173 *Al-Jehad Trust Case* (PLD 1996 SC 324).

> *Where the highest court of a country acts as first and only instances, the absence of any right to review by a high tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant…*[174]

In late November 2012, the Pakistan Bar Council expressed concern over the lack of any redress for parties directly affected by a 184(3) petition or *suo motu* matter.[175] The Supreme Court Bar Association reiterated that demand and also called on the Supreme Court to use its *suo motu* powers sparingly and only where prompt and urgent action was required for immediate prevention or redress of human rights violations.[176]

(ii) Right to an impartial hearing and the presumption of innocence

As discussed above in Part II, the Supreme Court has frequently exercised its powers of original jurisdiction under Article 184(3) in cases of human rights violations, often *suo motu*, including on the basis of reports in the media.

In many instances, the Supreme Court's decision to exercise its original jurisdiction, particularly when it takes *suo motu* notice of human rights violations, is significantly impacted by the tenor of the media coverage and public perceptions of the incident.

The Supreme Court's observations and public remarks in *suo motu* cases potentially undermine the presumption of innocence of individuals.

In the Sarfraz Shah case for example, the Supreme Court said in its judgment

> *The manner, in which the death of Sarfraz Ahmed deceased has occurred, clearly indicates barbarism because once he had been overpowered, as it is evident from the video clips, he was not to be fired upon in any case and at the best the Rangers personnel could have handed him over to the police, if there was an allegation of his being involved in the commission of some offence.*

174 UNHRC General Comment 32, *supra* fn. 29, para 47.
175 Hasnaat Malik, 'PBC demands right to appeal against suo motu judgments', *Daily Times,* 1 December 2012, accessed at: http://www.dailytimes.com.pk/default.asp?page=2012%5C12%5C01%5Cstory_1-12-2012_pg7_21
176 'SCBA asks judges to use suo motu sparingly', *The News,* 28 December 2012, accessed at: http://www.thenews.com.pk/Todays-News-13-19781-SCBA-asks-judges-to-use-suo-moto-sparingly

It must be remembered that the Supreme Court is not a trial court in Pakistan. The Supreme Court made these comments on the basis of media reports against individuals who were, at the time, not formally charged with an offence.

The ICJ further questions whether it is possible for an individual to receive a fair trial before an independent and impartial trial court when the highest court has already taken cognizance of the matter and made public remarks on the facts of the case and guilt of the accused.

Where the Supreme Court orders the police to register a First Information Report (FIR) to investigate allegations against suspects, and in some cases directs trial courts to complete hearings and decide the case within a certain time period, further issues arise.

Under international law, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The UN Human Rights Committee has noted that fairness of proceedings entails

> *the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, 'the defendant in the criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court…or is exposed to other manifestations of hostility with similar effects'.*

The UN Human Rights Committee has also noted that

> *It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.*

The Supreme Court has received praise for actively assuming jurisdiction of matters pertaining to human rights violations, but its actions and orders in proceedings under Article 184(3), particularly *suo motu* proceedings, and any criminal prosecutions which follow should be carried out in a manner that fully respects the right of individuals who are accused to the presumption of innocence and a fair trial before an independent and impartial court.

(C) Respect for the separation of powers – usurping the powers of the legislature and executive

Since its restoration in March 2009, the Supreme Court has stressed the importance of the 'separation of powers',[177] including in underscoring the importance of its independence from the legislative and executive branches of the State. The orders and pronouncements of the Supreme Court, however, in the context of the exercise of its original jurisdiction in some cases appears to have encroached on the constitutional powers of the legislative and executive branches. In that respect, the Court has been open to criticism of acting *ultra vires*.

(i) Challenging the legitimacy of the Balochistan Government

The Balochistan High Court Bar Association petitioned the Supreme Court under Article 184(3) to take notice of the deteriorating human rights situation in Balochistan, notably the increase in 'targeted killings', kidnappings, and enforced disappearances. The petitioners requested the Court to make orders to ensure that the fundamental rights of members of the Bar Association and the public at large were protected. This case became known as the Balochistan law and order case.

On 12 October 2012, in an interim order in the Balochistan law and order case, the Supreme Court held that '…as far as Provincial Government of Balochistan is concerned it had lost its constitutional authority to govern the Province because of violation of fundamental rights of the people of Pakistan'.[178]

The Supreme Court's order triggered debate over the legal status of the Balochistan Government and the provincial assembly. On 31 October 2012, during another hearing of the case, the Supreme Court took issue with the conduct of the Federal Government, questioning why the Balochistan Government was still spending funds from the national exchequer despite the Court's interim order.[179]

The governance crisis in Balochistan intensified following the Supreme Court's 12 October order. On 2 December 2012, citing the Supreme Court's ruling, the Speaker of the Balochistan Assembly, Mir Aslam Bhootani, stated that the Government was unconstitutional and refused to chair any further sessions of the Assembly. In response, the ruling coalition tabled a no-confidence

177 See *Sindh High Court Bar Association* case (PLD 2009 SC 978).
178 *President Balochistan High Court Bar Association v. Federation of Pakistan* (Constitutional Petition No.77 of 2012), para 48.
179 Azam Khan, 'Law and order case: Why is the Balochistan govt still in place?', *Express Tribune,* 1 November 2012, accessed at: http://tribune.com.pk/story/459093/law-and-order-case-why-is-the-balochistan-govt-still-in-place/

motion against Mir Aslam Bhootani for sabotaging the democratic process and obstructing a session of the assembly. The motion of no confidence was passed on 26 December 2012.

Under the Constitution of Pakistan, elected members of the provincial legislature have the prerogative to form government. As long as the Chief Minister and the provincial government command the confidence of the legislature, they have the constitutional right to complete their tenure.[180] The only exception is set out in Article 234 of the Constitution, which allows the President of Pakistan to assume functions of the provincial government if he or she is satisfied that affairs of the province cannot be carried on in accordance with the Constitution.[181]

The Constitution of Pakistan does not empower the Supreme Court to dismiss a provincial government or legislature on any basis, even if they are incapable of addressing serious human rights violations.

(ii) Supervision of National Accountability Bureau (NAB) investigations

In the absence of an independent investigative institution, the Supreme Court has often closely monitored investigations undertaken by the National Accountability Bureau (NAB). On 28 January 2013, while he was the chairperson of NAB, Admiral I Fasih Bokhari expressed concerns that the Supreme Court was trespassing into the functions of NAB in a letter to President Zardari. In the letter, Fasih Bokhari alleged that the tight deadlines to submit progress reports set by the Supreme Court were putting NAB officials under immense pressure and compromising their independence. He further wrote

> *There is even a danger that NAB personnel could lose their independence and are unable to carry out their investigations in an independent manner due to the pressure being exerted on them by the Honorable Supreme Court to proceed along lines which seem to be desired by the SC. In relieving this pressure, to safeguard their jobs, and so as not to displease the Honorable Court, there is danger of unfair investigation being resorted to. This phenomenon is observable in the investigation of very senior politicians of the government where orders, to even arrest them, have been issued on investigation reports*

180 *Mian Muhammad Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473), in which the Supreme Court of Pakistan held that the right to form a political party included the right to complete tenure once elected into government.

181 The President may do so on receipt of a report from the Governor of the province or by resolutions passed by each house of Parliament.

> *of regional investigators that had yet to reach the Executive Board Meeting at NAB Headquarters that is chaired by me. This could be construed as a clear violation of the powers of the Chairman NAB, and to some degree circumventing the NAO (National Accountability Bureau Ordinance) which I am required by law to follow*.[182]

The extent to which the judiciary can monitor or direct investigations continues to be the subject of debate in India, where in 2011, the Supreme Court of India directed that a Special Investigating Team be set up to monitor the investigation into the issue of 'black money' involving high-profile politicians. The Court relied on the 1994 *Jain Hawala* case,[183] in which the Indian Supreme Court issued an order of *continuous mandamus,* directing the Central Bureau of Investigations (CBI) to submit periodic reports of its investigation directly to the Court. One of the authors of the judgment, late Justice Verma, warned against the judiciary's participation in investigations

> *The judiciary is required to oversee public authority and persons in public office and direct them to perform their functions when a case comes to court, not take over their functions. You make the authority perform but not take over and when you do so, you erode the separation of powers which is part of our political and constitutional scheme*.[184]

(iii) Disqualification of Yousaf Raza Gillani (2012)

On 26 April 2012, a seven-member bench of the Supreme Court convicted former Prime Minister Yousaf Raza Gilani of contempt of court after he had refused to implement the Court's orders in the NRO judgment.[185]

The Court in its findings held that the Prime Minister had brought the Supreme Court and thus the judiciary into 'ridicule' by willfully flouting its order to the Prime Minister to write a letter to the Swiss Government, expressing Pakistan's intention to become a civil party in a corruption case pending in Switzerland against former President Zardari.

However, even though the Court indicated that the conviction for contempt of court might have other adverse consequences, it did not hold that Yusaf Raza

182 Text of the letter can be accessed at: http://pakpotpourri.wordpress.com/2013/01/28/text-of-letter-by-chairman-nab-to-president-zardari/
183 *Vineet Narain v. Union of India* (1998) 1 SCC 226.
184 Interview of Justice Verma by Anuradha Raman, *Outlook India,* 25 July 2011, accessed at: http://www.outlookindia.com/article.aspx?277669
185 *Muhammad Azhar Siddique v. The Federation of Pakistan* (PLD 2012 SC 660).

Gillani would be disqualified from parliamentary membership pursuant to Article 63 (1)(g) of the Constitution in its judgment passed on 26 April 2012 for 'bringing the judiciary into ridicule'.

Article 63(1) enumerates the various conditions under which a person is disqualified from holding membership in Parliament. Article 63(1)(g) states that a person must be disqualified from holding membership in the Parliament, if

> ***[H]e has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to…. the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary***

The Speaker of the National Assembly ruled that the conviction for contempt did not disqualify Prime Minister Gillani from membership of Parliament as he had not been convicted for defaming or bringing the judiciary into ridicule.[186]

Shortly after, Khawaja Muhammad Asif (at the time, a member of the opposition party PML(N)) and PTI chief Imran Khan petitioned the Supreme Court pursuant to Article 184(3) challenging the Speaker's ruling. The petitioners demanded that the Speaker's ruling should be declared unconstitutional and that the question of Yousaf Raza Gillani's disqualification should be referred to the Election Commission.

On 19 June 2012, the Supreme Court disqualified Yousaf Raza Gillani from membership of the National Assembly as from 26 April 2012, the date of his conviction for contempt of court.

It should be noted that Article 63(3) of the Constitution confers final authority to the Election Commission to determine the disqualification of a Member of Parliament.

The doctrine of separation of powers is a prerequisite to a functional democracy and provides the necessary checks and balances against power. The separation of powers has been described as a vital component for upholding rule of law and promoting human rights.

186 The Speaker's ruling can be accessed here: http://dawncompk.files.wordpress.com/2012/05/ruling-speaker-na.pdf

The Human Rights Committee has warned that a 'lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy'.[187]

The UN Secretary-General highlighted the link between separation of powers and rule of law:

> *For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,* ***separation of powers,*** *participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*[emphasis added][188]

Justice (retired) Fakhruddin G. Ebrahim, former Chief Election Commissioner of Pakistan, has observed that

> *…The superior courts may successfully cure many of the nation's evils only by taking a deliberate approach to addressing injustices in its society through a legal framework that respects the balance of power and can be expanded on by jurists to come*.[189]

Chief Justice of India S.H. Kapadia has emphasized on more than one occasion that judges should not ignore the principle of separation of powers and should accept that they do not have the mandate or the competence to make policy decisions. In a lecture to the Bar Association of India, Chief Justice Kapadia warned

187 UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Slovakia', 4 August 1997, UN Doc. CCPR/C/79/Add.79, para 3.

188 Report of the UN Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, UN Doc. S/2004/616.

189 Masood Rehman, 'Suo motu notices may reduce people's grievances', *Pakistan Today,* 18 September 2011, accessed at: http://www.pakistantoday.com.pk/2011/09/18/city/islamabad/suo-motu-notices-may-reduce-people's-grievances/

> *…courts [should] not substitute their social and economic beliefs for the judgment of legislative bodies, which are elected to enact laws. We are not concerned with the wisdom, need or appropriateness of the legislation. We must refuse to sit as a super-legislature to weigh the wisdom of legislation*.[190]

One reason put forward to justify the Supreme Court's incursion into legislative and administrative functions is that other branches of government in Pakistan are unable or unwilling to fulfill their obligations.

The ICJ Mission on the Independence of the Judiciary in Pakistan noted

> *Parliament and Government are weak, which leads to the Supreme Court filling the gap by intervening in matters germane to the administration. This occurs to the extent that the Supreme Court even challenges constitutional amendments and intervenes to strengthen its own and particularly the power of the Chief Justice as far as the appointment of judges is concerned. A concern in respect of the balance of powers thereby arises.*

The United Nations Special Rapporteur on the Independence of Judges and Lawyers had similar concerns in her recent Mission to Pakistan

> *The Special Rapporteur is concerned that the role of the Supreme Court seems to have become very politically sensitive. By several accounts, at the time of the mission, the Chief Justice, who had become a major pole of institutional power, was the most popular public figure in Pakistan. According to several sources, the superior judiciary is the only arm of the State that is working at the moment, which is why it has so much visibility and so much hope is placed in the person of the Chief Justice and in the Supreme Court.* ***The Supreme Court is expected to fill the gaps left by a dysfunctional system of governance. The problem is that it creates expectations that the Supreme Court will solve everything, which is simply impossible, as not all issues faced by Pakistan are of a judicial nature and other State institutional must play their part.*** [emphasis added][191]

190 J Venkatesan, 'Beware Overreach Kapadia Tells Judges', *The Hindu,* 16 April 2011, accessed at: http://www.thehindu.com/news/national/article1701729.ece

191 *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* fn. 94, para 64.

The ICJ commends robust judicial review of legislative and executive performance, and reiterates that judges retain the authority as final arbiters to state what the law provides. However, the judiciary must also ensure that it constrains itself to the scope of its jurisdiction and does not trespass into the domains of the executive and parliament.

The separation of powers is important in maintaining public perception of the judiciary as an independent and impartial institution. The Supreme Court has, at times, risked eroding public perception of its ability to perform its tasks impartially and independently, by trespassing into the constitutional domain of the executive and legislative branches.

In the long run, the perception that the Supreme Court is exceeding its powers could expose the Court to criticisms of bias, undoing some of the hard-won successes of the Lawyers' Movement and restoration of an independent Supreme Court.[192]

(D) Creating a two-tier justice system – bypassing the lower courts

The ICJ cautions that excessive reliance on Article 184(3) including the Court's *suo motu* powers could distract from the larger issues facing Pakistan's justice system.

As discussed in Part 1, Article 184(3) of the Constitution of Pakistan confers 'extraordinary jurisdiction' to the Supreme Court. Because Article 184(3) enables some aggrieved persons to directly access the highest courts of the country, the Supreme Court in Pakistan has in the past interpreted this provision strictly. The Supreme Court has held that judges should be 'discreet in selecting cases for entertaining under Article 184(3)' and develop 'a balanced, considered and indiscriminate policy' to govern the exercise of the Supreme Court's original jurisdiction.

The rationale for this seems clear. Excessive reliance on 184(3) powers, particularly *suo motu* powers, may inadvertently lead to a degree of arbitrariness in the administration of justice, notably in victims' access to justice. Aggrieved parties that are able to attract enough media attention are able to enjoy quick and effective access directly to the Supreme Court, whereas the majority of other individuals who are unable to do so have to make do with the ordinary criminal justice system, which is rife with delays, incompetence, corruption and discrimination.[193]

192 See Saleem Safi, 'Supreme Court ka Faisla – Kon Jeeta Kon Hara? (The Winners and Losers of the Supreme Court's Judgment)', *Daily Jang,* 29 April 2012, accessed at: http://jang.com.pk/jang/apr2012-daily/29-04-2012/col4.htm

193 International Crisis Group, 'Reforming Pakistan's Criminal Justice System', South Asia Report No.

This can inadvertently lead to a two-tier justice system that is arbitrary and uncertain.

The Supreme Court should continue exercising its original jurisdiction where serious human rights violations have occurred and are occurring. However, the Supreme Court should not exercise its powers under Article 184(3) in a manner that would displace the proper functioning of the criminal justice system.

The Supreme Court's original jurisdiction may assist Pakistan in meeting its obligation to ensure that those responsible for human rights violations are brought to justice. However, this extraordinary mechanism should not be exercised in lieu of the regular criminal process, and in most instances, it cannot on its own fulfill victims' right to remedy and reparation.

In other words, the Supreme Court's original jurisdiction must be exercised in a manner that is complementary to the criminal process, and should not be used to displace or substitute the normal jurisdiction of competent authorities over criminal investigations and prosecutions.

All branches of the State, including the Supreme Court of Pakistan, the legislature and the executive must ensure that weaknesses and institutional flaws of the justice system are addressed so that victims and alleged perpetrators alike can obtain justice as of right.

Conclusion

The Supreme Court's original jurisdiction, allowing it to act on issues of public importance relating to human rights, is an important and powerful mechanism that if exercised judiciously and in a manner that respects the separation of powers, can be used to combat impunity, ensure effective redress, enhance protection of human rights and advance respect for the rule of law.

However, the ICJ warns that an excessive use of the Supreme Court's powers of original jurisdiction, particularly *suo motu* powers, may have unintended consequences that in the long run could undermine democracy and rule of law. Some of these consequences include an increased and unmanageable case load; undermining an accused's right to a fair trial; and trespass into constitutional powers and roles of other institutions and branches of the State. The Supreme Court should be mindful of these adverse ramifications in the exercise of its powers, particularly when it takes notice of cases *suo motu.*

196, 6 December 2010 (ICG, *Reforming Pakistan's Criminal Justice System*), accessed at http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/196%20Reforming%20Pakistans%20Criminal%20Justice%20System.pdf

These unintended consequences also detract from the Supreme Court's many human rights successes, and make the Court susceptible to criticism of acting arbitrarily and being politically motivated.

Conclusions and Recommendations

Since its restoration in 2009, the Supreme Court of Pakistan has emerged as an independent and powerful institution. Led by Chief Justice Iftikhar Muhammad Chaudhry, the Court has actively asserted its independence from other branches of the State and has stepped into new territory by actively checking excesses by the civilian government and taking a firm stance against unconstitutional usurpation of power by the military. In doing so, the Court has helped Pakistan better meet its commitment to the rule of law and has brought Pakistan closer to fulfilling some of its obligations under international human rights law. This Report has documented some of the strides made by the Supreme Court in these areas; needless to say, these cases are not exhaustive.

There remain, however, areas of concern, particularly regarding the Supreme Court's exercise of its original jurisdiction under Article 184(3) of the Constitution. The ICJ's perusal of the Supreme Court's jurisprudence from the last five years has shown that the use of the Supreme Court's original jurisdiction, particularly its *suo motu* powers, appears to have been exercised, at times, arbitrarily and inconsistently with its own case law and international human rights law.

While in some cases the Supreme Court's exercise of original jurisdiction has led to changes of law and practice in a manner consistent with human rights or has opened doors to redress and reparation for victims of human rights violations, in many other instances - including in matters which are the subject of petitions pending before the Court - the Court has not acted to protect human rights and ensure accountability for human rights violations.

The ICJ is also concerned that an there are some inadvertent consequences of the expanded use of Article 184(3), which if left unchecked, may corrode the rule of law and undermine human rights. These include an increase in the Supreme Court's case-load leading to long delays faced by litigants; dispositions in cases that leave affected partied without any remedy or redress; influence on trial courts and interference with the presumption of innocence, blurring of institutional boundaries and violation of separation of powers; and the creation of a two-tier and arbitrary justice system.

With a view to encouraging the Supreme Court to exercise its original jurisdiction in a transparent manner that upholds and promotes judicial independence, rule of law, accountability and human rights, the International Commission of Jurists offers the following recommendations:

To the Judiciary

(1) The Supreme Court should exercise its powers under Article 184(3) of the Constitution in a manner that complies with Pakistan's obligation under international law to promote, protect and respect human rights, maintain rule of law and uphold separation of powers;

(2) The Supreme Court should adopt transparent yet flexible criteria to govern how cases are selected under Article 184(3), and in particular taken up under the Court's *suo motu* jurisdiction, and develop criteria on how 'public importance' and 'fundamental rights' are interpreted. Such criteria should take into account that *suo motu* procedures are an exceptional exercise of power;

(3) The Supreme Court should adopt transparent rules to determine the order in which cases under Article 184(3) are heard and the composition of the bench to hear cases;

(4) The Supreme Court must ensure that parties who may be affected by the Court's exercise of its 184(3) jurisdiction have an adequate opportunity to request to intervene in the case before a decision is rendered or the matter is disposed of; and

(5) The Supreme Court should ensure that all dispositions or actions ordered, in cases taken up under Article 184(3) are themselves consistent with rule of law, separation of powers and human rights, and do not leave persons whose rights are foreseeably likely to be directly and adversely affected without redress or remedy.

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