BUILDING JUDICIAL INDEPENDENCE

IN PAKISTAN

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BUILDING JUDICIAL INDEPENDENCE IN PAKISTAN

EXECUTIVE SUMMARY AND RECOMMENDATIONS

On the three occasions since independence when military coups have ended democratic rule in Pakistan the judiciary not only failed to check extra-constitutional regime change, but also endorsed and abetted the consolidation of illegally gained power. The Musharraf government has deepened the judiciary's subservient position among national institutions, ensured that politics trumps the rule of law, and weakened the foundations for democratic rule. Substantial changes in the legislative framework for appointments, promotions and removals of judges, as well as the jurisdiction of the ordinary courts, are needed to restore confidence in the judiciary. But judicial independence from political influence and financial corruption cannot be restored by mere technical, legislative corrections. Reform depends upon a credible commitment by the government to respect the rule of law as much as upon legislated change.

Since 1955, Pakistan's courts have played a critical political role by reviewing the legitimacy of changes of government. To eliminate potential judicial challenges, the present military government, like previous ones, has devised ways to keep the judiciary weak.

The executive exercises control over the courts by using the system of judicial appointments, promotions and removals to ensure its allies fill key posts. In the immediate aftermath of the October 1999 coup, the judiciary was purged of judges who might have opposed the military's unconstitutional assumption of power. The purge was accomplished by requiring judges to take an oath to President Musharraf's Provisional Constitutional Order -- an oath that required judges to violate oaths they had all previously taken to uphold the 1973 Constitution. Fear that another oath will be used to remove more judges now limits the bench's freedom. Moreover, new judges must be wary because the executive can remove them after one or two years by declining to "confirm" their appointments.

Political allies now fill key judicial positions, particular the posts of Chief Justice of the Lahore and the Sindh High Courts. The Chief Justices of High Courts wield critical administrative powers over the allocation of cases to judges and the assignment of judges to courts across a province. The executive's power, via certain Chief Justices, to direct a case to pliant judges undermines lawyers' and litigants' expectation of a fair trial when the executive is a party. The executive also has improper influence over the electoral process via certain Chief Justices because the latter appoint the returning officers for elections from among the ranks of the subordinate judiciary.

Compromised by this political chicanery, the superior judiciary is unable to address creeping financial corruption within its own ranks. Dysfunction in the superior judiciary also impedes reform in the subordinate judiciary, which comprises the trial courts in which the mass of ordinary judicial business is transacted. Appalling under-resourcing and endemic corruption in the subordinate judiciary lead to agonising delays in the simplest cases and diminish public confidence in the judiciary and the rule of law.

In some subject-areas and in some territories, the government simply bypasses the ordinary courts by establishing parallel judiciaries. Since August 1947, the Federally Administered Tribal Areas (FATA) and the Northern Areas have had *sui generis* legal systems, more or less independent of Pakistan's ordinary judiciary. Little justification exists, as even the government seems to recognise, for the essentially colonial regimes preserved in these enclaves. Further, in 1997 and 1999 respectively, the government established separate anti-terrorism and accountability courts. Those tribunals contain

procedural shortcuts that make them too attractive to overzealous police and prosecutors.

In the absence of a government visibly committed to following constitutional ground-rules and statutory laws, judges will continue to lack security of tenure and necessarily will make decisions with an eye to the government's agenda.

RECOMMENDATIONS

To the Government of Pakistan:

1. Establish, by proposing and urging adoption of a constitutional amendment, a transparent system of judicial appointments to the High Courts that expands accountability for such appointments beyond the executive and Chief Justices to include parliamentarians and bar councils and associations; prior to the adoption of such an amendment, involve the bar and parliamentarians in public discussions of candidates for posts on the High Courts.
2. End deviations from the seniority rule in the promotion of High Court judges to the posts of Chief Justice, establish by statute a seniority rule for promotions from the High Courts to the Supreme Court, and when filling vacancies on the High Courts and Supreme Court, promote female judges who are qualified candidates under the seniority rule.
3. End the practices of not confirming additional judges and of awarding government positions to retired judges; establish public audits of all members of the superior judiciary and close family members to ensure that only statutory benefits are awarded and corruption is avoided.
4. End the practice of selectively offering new oaths to judges, and renounce publicly the use of the judicial oath as a mechanism for purging the judiciary.
5. Institute new internal administrative mechanisms for the prevention of corruption and the removal of corrupt High Court judges, with oversight from a judicial commission that includes members of the bars and parliamentarians, and ensure that women and minorities are adequately represented in these mechanisms.
6. Institute administrative reforms that curtail Chief Justices' power over the assignment of cases and of judges, and establish professional, managerial divisions within the courts to fulfil this task.
7. Absorb the anti-terrorism and accountability courts into the ordinary judiciary, jettisoning procedural variations in bail, plea-bargaining, and the physical circumstances of trials that presently characterise those proceedings.
8. Institute courts within Pakistan's ordinary judicial hierarchy, with review in the Peshawar High Court and the Supreme Court, for the FATA, and conform courts' jurisdictions, judges' tenure and judges' privileges in the judiciary of the Northern Areas, including the new Court of Appeals, to practices in the ordinary courts.
9. Endeavour to ensure that judicial decisions at all levels respect international human rights, including the rights of women, and make efforts to eliminate traditional and religious practices imposed by tribal and village councils that are harmful to women.

To the United States, the European Union, and Other Members of the International Community:

10. Treat the independence of the judiciary, in particular the manipulation of appointments, promotions and removals in the superior judiciary, as a measure of democratic development in Pakistan.
11. Call upon the government of Pakistan to cease manipulation of the appointment and promotion of judges, and to commit to ending the practice of purging the bench through new oaths.

To the Asian Development Bank and Other Donor Agencies:

12. As a policy condition for further tranches of the structural adjustment loan under the Access to Justice Program, insist on reform of the appointments and promotions system for the superior judiciary and a strict adherence to the seniority rule for promotions.
13. Introduce measures to identify and remove from the superior and subordinate courts those judges engaged in financial corruption.
14. Promote meaningful in-service judicial training on gender sensitisation and the treatment in court of religious minorities, in particular Ahmadis and Christians, and press the government to implement reserved seats for women in key subordinate and superior judiciary positions.

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BUILDING JUDICIAL INDEPENDENCE IN PAKISTAN

I. INTRODUCTION

Promises of an independent judiciary are embedded deep in Pakistan's constitutional fabric. In March 1949, Prime Minister Liaquat Ali Khan moved, and the nation's new Constituent Assembly passed, a resolution on the "Aims and Objects of the Constitution", popularly known as the Objectives Resolution. That document explained that in the new state of Pakistan, "the independence of the judiciary shall be fully secured".[1] Fifty years later -- and just five days after Pakistan's most recent military takeover -- General Pervez Musharraf announced his seven-point agenda; point four, guaranteeing law and order and speedy justice, once more turned on building a well-functioning judiciary.[2]

Rather than supporting the judiciary, however, General Musharraf's government has sought aggressively to co-opt or disable it by removing independent judges, placing allies in key Chief Justice positions, and rewarding judges who issue judgments favourable to the executive. In weakening the judiciary, General Musharraf has applied tactics tested by his military predecessors, particularly the use of a new oath to purge the bench of judges disinclined to tow the military's line.[3]

Political scientists argue that "judicial independence raises complex normative issues on which there neither is nor may ever be a consensus". But the measures used by the present government to interfere in the judiciary, including "political directions of judicial decision making, bribery, [and] corruption", indisputably corrode judges' capacity for independent thought and judgment.[4] Moreover, politicising the senior tier of the judiciary undermines prospects for reform of the trial courts, which are presently overburdened, under-resourced and almost unfailingly corrupt.

The present government's efforts at influencing the judiciary are only the most recent in a series of assaults on that institution beginning in the 1950s. Since 1955, the judiciary has had a pivotal role in assessing the legitimacy of political change.[5] The present government, like predecessor military governments, has undermined judicial independence because it lacked confidence that judges would endorse its extra-constitutional seizure of power, which short-circuited the democratic procedures of the 1973 Constitution.[6] Its tolerance for judicial independence remains contingent and instrumental, a

[1] Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi, 2002), pp. 91-92 (quoting Objectives Resolution). Pakistan's other founding document, the 23 March 1940 Lahore Declaration, speaks to the issue of minorities and commits the unborn state to "the protection of their religious, cultural, economic, political, administrative, and other rights and interests", a project that is difficult to envisage in the absence of courts capable of enforcing constitutional rules. Ibid., p. 54.

[2] Ibid., p. 934. This agenda was announced on 17 October 1999.

[3] ICG has documented other ways Pakistan's present military government has emulated the tactics of its predecessors in consolidating power. See ICG Asia Report N°77, *Devolution in Pakistan: Reform or Regression?*, 22 March 2004.

[4] Peter H. Russell, "Towards a General Theory of Judicial Independence", in Peter Russell and David M. O'Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville, 2001), pp. 1, 5.

[5] Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defense* (Lahore, 1999), p. 206.

[6] As one academic has observed, General Musharraf's coup "must be regarded as *prima facie* utterly illegal, being in direct contravention of the Constitution of 1973". Martin Lau, "The Islamisation of Laws in Pakistan: Impact on the Independence of the Judiciary", in Eugene Cotran and Mai Yamani, eds., *The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process* (London, 2000), p. 163.

concession to international pressure for a minimally democratic façade. Erosions in judicial independence are thus a symptom of the broader failure of democratic, constitutional governance.

This report examines how the higher courts in particular are subject to political pressure. The report considers the consequences of politicising the higher judiciary for the subordinate judiciary, where a heavily funded reform effort is presently underway. It also analyses the fragmentation of the subordinate courts' jurisdiction, a tactic that predates the present military government.

II. THE STRUCTURE AND HISTORY OF PAKISTAN'S JUDICIARY

A. THE STRUCTURE OF PAKISTAN'S JUDICIARY

Pakistan's courts are constructed around a basic hierarchy.[7] At the hierarchy's base are civil judges and judicial magistrates, who hear minor civil and criminal disputes.[8] In each district, a district and sessions judge supervises those judges. The district and sessions judge acts as an appellate tribunal in some matters and as a trial courts in others. He or she also supervises additional district and sessions judges, who otherwise are at the same level of the judicial hierarchy. Appeals from district and sessions judges go to one of the four High Courts, which are located in the provincial capitals.[9] At the apex of the entire system lies the seventeen-judge Supreme Court. That tribunal hears appeals from the High Courts, as well as having some original jurisdiction. The Supreme Court, however, exercises no administrative supervision over the High Courts.[10] A distinction is commonly drawn between the High Courts and the Supreme Court, which together make up "the superior judiciary", and the remaining courts, which collectively are known as "the subordinate judiciary".

Until recently, this hierarchy was not free of direct executive control. Rather, a British scheme dating from the 1935 Government of India Act, which commingled executive and judicial powers, prevailed. Instead of a district and sessions judge, a District Commissioner/District Magistrate enjoyed both executive and judicial powers. In 1994, the Supreme Court, in the Sharaf Faridi case, required that district-government officials be divested of judicial powers under Article 175(3) of the Constitution.[11] Formally

[7] ICG interviews with judges, Islamabad, August 2004.
[8] According to an Asian Development Bank (ADB) study, there are 838 such judges across Pakistan. Asian Development Bank, *Law and Policy Reform at the Asian Development Bank* (Manila, March 2004), p. 44.
[9] The number of judges for each High Court varies with the size of the province: Punjab has 50, Sindh 28, Baluchistan 6, and North West Frontier Province (NWFP) 15. Ibid.
[10] ICG interview with Justice Nazim Hussain Siddiqui, Chief Justice of Pakistan, Islamabad, 31 August 2004; 1973 Constitution of Pakistan, Articles 184 and 185.
[11] Government of Sindh v. Sharaf Faridi, PLD 1994 Supreme Court 105. The 1973 Constitution provides in Article 175(3) for a judiciary "separated progressively from the Executive within fourteen years" of the Constitution's adoption. When drafted, that clause contained a five-year limitation. General

then, a separation of executive and judiciary, as mandated by the 1973 Constitution, has been achieved.[12] Not all personnel linkages between the executive and the judiciary, however, have been eliminated. Judges from the subordinate judiciary still work in "ex cadre" posts as bureaucrats within the executive, usually for stints of up to three years.[13] Indeed, in 2003, 72 district and sessions judges were working in ex cadre posts in the Punjab as opposed to 35 in judicial positions.[14]

Outside this hierarchal structure are a series of courts with specialised subject matter. The Federal Shariat Court, for example, was established by General Zia-ul-Haq in 1980 and has jurisdiction to review laws for repugnancy with Islamic injunctions.[15] Even though its judgments are binding on the High Courts, the Federal Shariat Court's limited jurisdiction means it has had relatively little impact on the day-to-day functioning of the ordinary courts.[16] In addition, a vast number of administrative tribunals and special courts with specialised subject matter have been created by legislation. These include labour courts; service tribunals, which hear disciplinary and employment-related matters for civil servants; anti-terrorism courts; and accountability courts, which adjudicate criminal corruption charges against bureaucrats and politicians.[17] Appeals from most of these tribunals are available in the High Courts and the Supreme Court. In addition, two areas of the country -- the Federally Administered Tribal Areas (FATA) and the Northern Areas -- have unique judicial systems almost entirely divorced from the ordinary court system.

B. COURTS AND POLITICS: PRE-1999 ENTANGLEMENTS

Since Pakistan's first decade, superior courts, particularly the Supreme Court, "have literally judged the state, ruling on constitutional issues directly affecting national sovereignty, political participation and government organisation".[18] Throughout this long political engagement, the courts have been persistently unwilling to confront executive authority. Pakistan's constitutional jurisprudence, rather than being characterised by inquiries into the validity of executive action, is a series of elaborate jurisprudential efforts to vindicate and facilitate military interventions into democratic politics. The courts have never placed any constraint upon their coequal branch, the executive. The cost of repeated judicial ratifications of extra-constitutional action has been borne by the constitutional fabric and by the courts' legitimacy. Both are increasingly threadbare. Often cast aside or illegally amended, the Constitution of 1973 now barely qualifies as a rule of law, as opposed to a discretionary guideline that executive officials can follow if and when it is convenient.[19]

The courts' acquiescence to executive authority antedates the initial adoption of a Constitution in Pakistan in 1956. The judiciary first intervened in politics in 1955 during a conflict between the Constituent Assembly, which was the body tasked with drafting Pakistan's initial Constitution, and the executive, then Governor-General Ghulam Mohammad. This conflict yielded a pivotal 1955 trilogy of cases that continues to provide a jurisprudential justification for executive overreach.

Zia-ul-Haq amended the language in 1985 to fourteen years. See Zain Sheikh, ed., *The Constitution of the Islamic Republic of Pakistan* (Karachi, 2004), p. 95, n. 1.

[12] In the Federally Administered Tribal Areas (FATA) and the Northern Areas, however, no such separation exists. See supra, Sections VI C & D.

[13] ICG interview with district and sessions judge, NWFP, August 2004.

[14] *Lahore High Court Annual Report 2003* (Lahore, 2004), p. 17.

[15] Khan, op. cit., p. 640

[16] ICG interview with Justice (r) Nasir Aslam Zahid, former Supreme Court and Federal Shariat Court judge, 17 August 2004. The Federal Shariat Court did render one important judgment concerning interest, or *riba*, only to have that judgment overturned by the Supreme Court. See Charles H. Kennedy, "Judicial Activism and Islamisation After Zia: Toward the Prohibition of Riba", in Charles H. Kennedy, ed., *Pakistan 1992* (Boulder, 1993), pp. 57-69.

[17] See generally National Judicial Policy Making Committee, *Administrative Tribunals and Special Courts, Annual Report 2003* (Islamabad, 2003).

[18] Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi, 1995), pp. 11-12. The Supreme Court recently complained that "ever since the dissolution of the Constituent Assembly by Governor General Ghulam Muhammad in 1954 till the takeover of the government by General Pervez Musharraf in October, 1999, all political questions which should have been dealt with and resolved elsewhere, have been brought to this Court". Hussain Ahmed v. Pervez Musharraf, PLD 2002 Supreme Court 853.

[19] Within any legal system, officials of that system must regard laws "as common standards of official behaviour and appraise critically their own and each other's deviations as lapses" in order for that system to work. H.L.A. Hart, *The Concept of Law* (2nd ed., Oxford, 1997), p. 117. In present-day Pakistan, it cannot be said that the most senior executive officials *in practice* accept the 1973 Constitution as a common standard of official behaviour and treat deviations from the Constitution as lapses when matters of their own authority are at stake.

On 25 October 1954, Governor-General Ghulam Mohammad dissolved the Constituent Assembly when the latter attempted to strip him of the power to dismiss ministers. Justifying this move by what he described as "parliamentary bickering", the Governor-General declared a state of emergency.[20] The President of the Constituent Assembly, Moulvi Tamizuddin Khan, subsequently challenged the Governor General's action in court, and, in February 1955, won before the Sindh Chief Court.[21] The Governor-General, however, secured a private commitment from the Chief Justice of the Federal Court, as the Supreme Court was then known, Chief Justice Muhammad Munir, that the Sindh court's judgment would not stand.[22] True to his word, Justice Munir led a four-judge majority in holding that the Sindh court had erred.[23] In a subsequent decision, the Court was forced to recognise that its judgment in Tamizuddin Khan's case limited the Governor-General's authority to promulgate laws.[24] To allow continued governance in the absence of a Constituent Assembly and to forestall anarchy, the Court in a third decision "had to fall back upon the doctrine of state necessity" to ratify the Governor-General's power to make laws.[25] In short, this 1955 trilogy of cases "pull[ed] the constitutional crisis out of the realm of public debate" by making the judiciary the arbiter of state structures.[26] More disturbingly, the Court betrayed an inclination for justifying extra-constitutional executive action in terms of "state necessity".[27]

Subsequently, Pakistan had three military leaders, Generals Ayub Khan, Yahya Khan and Zia-ul-Haq, before the present military government.[28] The judiciary has challenged none. Military rule in Pakistan first began on the morning of 8 October 1958, when General Ayub Khan, aided by President Iskander Mirza, staged a coup and ended two years of democratic rule under the 1956 Constitution.[29] For the second time, Chief Justice Munir favoured executive supremacy over the democratic, legislative processes by endorsing a doctrine of "revolutionary legality". Under that theory, courts would endorse a coup that "satisfies the test of efficacy and becomes a basic law-creating fact".[30] The Court thereby "equated force, efficacy and legality".[31] Only after the fall of General Yahya Khan and the restoration of civilian rule did the Court repudiate this doctrine in the Asma Jilani case.[32] That case concluded that General Yahya's assumption of power lacked a constitutional basis, and that a declaration of martial law did not necessarily give an army commander power to abrogate the Constitution.

The Supreme Court's respect for the democratic process did not last long. On the night of 4 July 1977, General Zia-ul-Haq ended civilian rule in favour of direct military control for the second time in Pakistan's history.[33] Again, the Supreme Court, in the Begum Nusrat Bhutto case, validated the military's action.[34] Eschewing reliance on the doctrine of revolutionary legality, which had been vehemently criticised, the Court concluded that state necessity vindicated the extra-constitutional coup by drawing on its 1955 precedent. More surprisingly, the Court explained that Zia had the power to pass all necessary laws, including amendments to the 1973 Constitution. In concluding, the Court emphasised the representations at the trial made by Sharifuddin Pirzada, the then-Attorney General, to the effect that Zia intended to hold elections "as soon as the process of the accountability of the holders of public offices is completed". General elections, however, were not to be held until February 1985, and those too for a partyless and toothless parliament.[35]

In short, Pakistan's courts have followed the path of least resistance and least fidelity to constitutional principles.[36] From Tamizuddin Khan's case through to

[20] Khan, op. cit., pp. 130-31, 136.
[21] Moulvi Tamizuddin Khan v. Federation of Pakistan, PLD 1955 Sindh 96.
[22] Jalal, op. cit., pp. 202-03.
[23] Federation of Pakistan v. Moulvi Tamizuddin Khan, PLD 1955 Federal Court 240. The judgment relied on the argument that laws needed the assent of the Governor-General to be valid, and that the provision in the Government of India Act under which the Sindh Chief Court had acted had not received that assent. The decision not only deprived Pakistan of a parliament but also entailed that as many as 46 acts lost legal sanction. Jalal, op. cit., p. 203
[24] Usif Patel v. The Crown, PLD 1955 Federal Court 387. See Khan op. cit., pp. 143-54.
[25] Ibid., p. 151-52; see Reference by his Excellency The Governor-General, PLD 1955 Federal Court 435.
[26] Jalal, op. cit. p. 206.
[27] Newberg, op. cit., pp. 58-59.
[28] Lau, op. cit., p. 150.
[29] Jalal, op. cit., pp. 274-76
[30] Cited in Khan, op. cit., p. 214; see The State v. Dosso, PLD 1958 Supreme Court 533.
[31] Newberg, op. cit., pp. 73-75.
[32] Asma Jilani v. The Government of the Punjab, PLD 1972 Supreme Court 139; see Khan, op. cit., pp. 444-46.
[33] Khan, op. cit. pp. 579-80.
[34] Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan, PLD 1977 Supreme Court 657.
[35] Khan, op. cit., p. 661.
[36] It would be naïve to suppose courts alone possess some unique power to protect the constitutional framework,

that of Begum Nusrat Bhutto, courts have been the military's handmaiden in extra-constitutional assaults on the democratic order.[37] It was not a role they were to abandon for General Pervez Musharraf.

C. THE SUPREME COURT AND THE 12 OCTOBER 1999 COUP

General Pervez Musharraf seized power from Prime Minister Nawaz Sharif on 12 October 1999 in a bloodless coup.[38] Two days after the coup, General Musharraf issued a "Proclamation of Emergency" that held the Constitution "in abeyance".[39] That same day, the General also issued "Provisional Constitutional Order No. 1 of 1999", or the PCO, reiterating his rule and barring any court from "mak[ing] any order against the Chief Executive or any person exercising powers or jurisdiction under his authority" or "call[ing] into question the Proclamation of Emergency". [40] As petitions challenging the coup filtered up the judicial hierarchy toward the Supreme Court, President Musharraf issued a new order requiring that superior-court judges swear a new oath to the PCO; this was a measure General Zia had taken in 1981.[41] On 26 January 2004, thirteen judges, including five members of the Supreme Court, were dismissed from their posts by the military government for not taking the PCO oath.[42] On 12 May 2000, a bench comprising the twelve remaining judges of the Supreme Court upheld the legality of General Musharraf's coup in the Zafar Ali Shah case.[43] Harkening back to the 1955 trilogy of cases and Begum Nusrat Bhutto's case, the Court contended that extra-constitutional intervention by the Army had become necessary, and was therefore justified under the doctrine of necessity. The Court endorsed the 14 October 1999 Proclamation of Emergency and the PCO, but concluded that the 1973 Constitution remained the supreme law of the land, despite being held in abeyance due to continuing state necessity.

Although none of the parties had queried whether the military government had authority to alter the Constitution, the Court nonetheless posited that General Musharraf, like General Zia before him, had authority to amend the Constitution. The Court did not explain how Articles 238 and 239 of the Constitution, which purport to vest that amendment power in the National Assembly, the federal legislature, and which contain no reference to the executive, let alone to the army, could be read to support that conclusion. Using this power, General Musharraf promulgated on 12 August 2002 the Legal Framework Order (LFO), which purported to make changes in 29 articles of the 1973 Constitution.[44] The Court ventured even further beyond the case at hand in declaring that General Musharraf would have three years from the date of the coup in which to achieve his declared aims and hold general elections.

Without a trace of irony, the Court cautioned that the independence of the judiciary (as well as federalism and the parliamentary form of government blended with Islamic principles) remained immutable. Of course, every judge who signed the Zafar Ali Shah judgment had violated his initial oath to the 1973 Constitution by swearing an oath to the PCO, which acknowledged the abrogation of that Constitution.

particularly when faced with a determined army. Yet courts can raise the cost, in terms of political capital, of extra-constitutional action, by rejecting military action. Moreover, courts can attempt to constrain political change outside constitutional bounds by granting the military the least necessary leeway. ICG interview with former Supreme Court judge, Karachi, August 2004.

[37] Courts, of course, have played a role in other political cases. For example, during the democratic interlude of 1988-1999, the Supreme Court was called on to adjudicate the legality of dissolutions of several National Assemblies, thereby taking a position in conflicts between the legislature and a civilian executive. See, for example, Mian Muhammad Nawaz Sharif v. President of Pakistan, PLD 1993 Supreme Court 473 (setting aside dissolution order); and Benazir Bhutto v. Farooq Ahmad Leghari, PLD 1998 Supreme Court 27 (declining to disturb dissolution order).

[38] See Lawrence Ziring, *Pakistan at the Crossroads of History* (Lahore, 2004), pp. 251-57.

[39] See Sheikh, op. cit., p. 216.

[40] Ibid., pp. 217-18.

[41] Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Karachi, 1995), pp. 263-64. General Yahya Khan also issued a PCO on 4 April 1969. Among other measures, that PCO limited the jurisdiction of all courts with regard to the Chief Martial Law Administrator and his deputy. Khan, op. cit., pp. 372-73.

[42] The PCO oath is discussed in further detail below. See supra, Section IV A.

[43] Zafar Ali Shah v. Pervez Musharraf, PLD 2000 Supreme Court 869.

[44] See ICG Asia Report Nº40, *Pakistan: Transition to Democracy?*, 3 October 2002, pp. 23-24. Most of the LFO was incorporated into the Constitution through the 17th Amendment.

In April 2002, General Musharraf announced a referendum; the legal effect of an affirmative vote in that referendum would be to permit the General to hold the office of President for five years.[45] Legal challenges to the referendum ensued on the ground that the Constitution set forth an exclusive procedure for electing a president, one that did not involve use of a referendum.[46] On 27 April 2002, the Supreme Court issued a short order declaring that challenges to the referendum were "academic, hypothetical and presumptive in nature and...not capable of being determined at this juncture". The Court accordingly declined "to go into these questions at this stage" and left "the same to be determined at a proper forum at the appropriate time".[47] Such reticence contrasts starkly with the Court's eagerness in the Zafar Ali Shah case to endorse and deepen the military's grip on political power.

In short, the Supreme Court not only ratified the 12 October 1999 coup and the suspension of the 1973 Constitution, but also handed the military an unsought license to amend the Constitution and then stood by while the procedures for presidential election were cast aside.[48]

III. JUDICIAL APPOINTMENTS AND PROMOTIONS

Executive influence on the judiciary rarely entails obvious tactics like financial bribes or threats. Rather, the judiciary's institutional architecture contains more subtle channels of influence. A first line of influence is the appointment and promotion system, which, although formally in the judiciary's hands, allows for a great deal of executive discretion.

A. THE CONSTITUTIONAL FRAMEWORK

Rules for appointments to the High Courts and the Supreme Court are set forth in Pakistan's Constitution. Those rules have been elaborated in a series of Supreme Court cases.

The President may appoint to the Supreme Court any Pakistani citizen with fifteen years' experience as a High Court advocate "after consultation with the Chief Justice" of Pakistan.[49] In practice, Supreme Court judges are elevated from the High Courts rather than being appointed directly from the bar.

High Court judges are also appointed by the President "after consultation" with the Chief Justice of Pakistan, the governor in the relevant province and the Chief Justice of the High Court. High Court judges must be Pakistani citizens with ten years' experience either in the High Courts, as a district judge or as a provincial or federal judicial officer.[50] According to the Chief Justice of Pakistan, High Court appointments are presently made either from the private bar or from the ranks of the subordinate judiciary, principally the district and sessions judges.[51]

According to a former law minister, the process of consultation is done by letters, not in person. First, the provincial Chief Justice prepares a recommendation and sends it to the governor of the province. The governor conducts an investigation into a candidate and bases his written recommendation upon that

[45] Christophe Jaffrelot, ed., *A History of Pakistan and its Origins* (London, 2002), p. 278. The referendum asked: "For the continuation of the local government system, restoration of democracy, sustainability and continuation of reforms, elimination of sectarianism and extremism and completion of Quaid-i-Azam's concept, do you want to elect President General Pervez Musharraf for the next five years as President of Pakistan?" Quoted in Terence N. Cushing, "Pakistan's General Pervez Musharraf: Deceitful Dictator or Father of Democracy?", *Penn State International Law Review*, Vol. 21, 2003, pp. 621, 631-32.

[46] An electoral college composed of both houses of the federal legislature and the provincial assemblies elects the president. See 1973 Constitution of Pakistan, Article 41.

[47] Hussain Ahmed v. Pervez Musharraf, PLD 2002 Supreme Court 853; Rafaquat Ali, "SC upholds referendum: No judgment on consequences of exercise: All petitions dismissed", *Dawn*, 28 April 2002.

[48] The Court also concluded that Prime Minister Nawaz Sharif's removal of General Musharraf had no legal effect because the General had not had the opportunity to be heard. In contrast, the Court ruled that the judges who had been removed through the PCO oath had lost any right they had to challenge that removal due to the passage of time. Zafar Ali Shah, PLD 2000 Supreme Court, p. 869.

[49] 1973 Constitution of Pakistan, Article 177(1). According to one former federal law minister, the mention of the President in this article should be read as referring to the President acting on the advice of the Prime Minister. ICG interview, August 2004.

[50] 1973 Constitution of Pakistan, Article 193(1).

[51] ICG interview with Justice Nazim Hussain Siddiqui, Chief Justice of Pakistan, Islamabad, 31 August 2004

investigation. Finally, the Chief Justice of Pakistan adds his recommendation letter to the file, which is forwarded by the Ministry of Law to the President. Consultees do not generally meet in person to discuss candidates.[52]

At first blush, the Constitution appears to vest discretion in the President. In 1996, the Supreme Court however curtailed that discretion in appointments and thrust the judiciary into a more prominent role. In a case popularly known as the Judges Case, the Court explained that the consultation demanded by the Constitution must be "effective meaningful, purposive" and furthermore must leave "no room for complaint of arbitrariness or unfair play". A Chief Justice's recommendation for a Supreme Court or High Court position hence bound the political branches "in the absence of very sound reasons to be recorded by the President/Executive".[53] The Judges Case further envisaged that a presidential refusal could be contested in court. While the Chief Justice has no obligation to record the reasons for a choice, not only must the President give reasons for declining the Chief Justice's recommendation, but also those reasons must be supported by record evidence.[54] In arrogating this appointment power to itself, the Pakistan Supreme Court followed the path of the Indian Supreme Court, which similarly interpreted a reference to consultation in Article 124 of the Indian Constitution as a warrant for judicial primacy.[55] After the Judges Case, the executive has only a highly circumscribed role in superior judiciary appointments, at least in theory.

In the Judges Case and two subsequent cases, the Supreme Court has outlined rules for the promotion of judges. A High Court judge may be promoted to become that court's Chief Justice and be elevated from a High Court to the Supreme Court. In the Judges Case, the Supreme Court explained that "the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice" of that court, and, absent "concrete and valid reasons", is entitled to the appointment.[56] Although this seniority rule is not contained in the 1973 Constitution, the Court described it as a "well-established" and "constitutional convention".[57] The Court subsequently extended this seniority rule to the Chief Justiceship of the Supreme Court.[58] In neither case did the Court explain the relationship between the seniority rule for the Chief Justices' positions, and the ability of the President to decline to make an appointment.

In a third, highly contentious case, the Court declined to apply the same seniority rule to elevations from the High Courts to the Supreme Court.[59] This third case arose from the December 2001 appointment of three judges from the Lahore High Court to the Supreme Court -- Khalil-ur-Rehman Ramday, Muhammad Nawaz Abbasi and Faqir Muhammad Khokhar. Both the Chief Justice of the Lahore High Court, Justice Falak Sher, and the second most senior judge were senior to the appointees; indeed, Justice Khokhar was thirteenth in seniority on the Lahore bench.

Rejecting a seniority rule, the Court concluded, "[t]here exists no Constitutional convention or past practice to appoint the most senior Judge of a High Court as a Judge of the Supreme Court".[60] According to the Attorney General of Pakistan, who argued the government's case, up to a third of elevations since 1947 to the Supreme Court have failed to follow a seniority rule, undermining assertions of a

[52] ICG interview with Syed Iftikhar Hussain Gilani, former Law Minister in PPP Government, Islamabad, 31 August 2004.

[53] Al-Jehad Trust v. Federation of Pakistan, PLD 1996 Supreme Court, 324, 363-367. The Court also held, among other things, that appointments generally should be made within 30 days, curtailed the use of ad hoc Supreme Court appointments while permanent vacancies existed, and barred nonconsensual transfers of judges to the Federal Shariat Court.

[54] ICG interview with Mahkdoom Ali Khan, Attorney General of Pakistan, Islamabad, 31 August 2004.

[55] See Nasim Hasan Shah, "Judiciary for Pakistan: A Quest for Independence", in Craig Baxter and Charles Kennedy, eds., *Pakistan 1997* (New Delhi, 1998), pp. 61, 73-74; Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441; AIR (1994) SC 268.

[56] Al-Jehad Trust, PLD 1996 Supreme Court, pp. 324, 363-367. The Judges Case has been the subject of extensive and conflicting commentary by the judges who were on the Supreme Court and played a role in that case. See Sajjad Ali Shah, *Law Courts in a Glass House* (Karachi, 2001), pp. 236-68; Ajmal Mian, *A Judge Speaks Out* (Karachi, 2004), pp. 176-202.

[57] Al-Jehad Trust, PLD 1996 Supreme Court, pp. 340-341.

[58] Asad Ali v. Federation of Pakistan, PLD 1998 Supreme Court 161. In this case, the Court held that the appointment of Chief Justice Sajjad Ali Shah, one of the authors of the 1996 Judges Case, had violated the rule of seniority. In consequence, the federal government denotified Justice Sajjad as Chief Justice on 23 December 1997. Khan, op. cit., p. 831.

[59] Supreme Court Bar Association v. Federation of Pakistan, PLD 2002 Supreme Court 939.

[60] Ibid., p. 981.

convention.[61] The Court also distinguished, rather weakly, between a "promotion" to the position of Chief Justice, and "a fresh appointment" to the Supreme Court, to which "the principles of seniority and legitimate expectancy" did not apply.[62] It is a measure of this decision's importance that the Supreme Court Bar Association, in protest at the result, withdrew its request for review, and declared that it would no longer seek adjudication of important constitutional questions before the Supreme Court, which could no longer be trusted with such matters.[63]

To summarise the law at present, the President appoints High Court and Supreme Court judges via ordinarily binding consultation with the relevant Chief Justices, and a seniority rule applies to Chief Justice positions on both the High Courts and the Supreme Court, but not to promotions from the High Courts to the Supreme Court.

B. APPOINTMENTS AND PROMOTIONS IN PRACTICE

In practice, the Musharraf government has a substantial amount of control over appointments and promotions within the judiciary despite the Judges Case and the seniority rules. Key to this control is the provincial Chief Justice -- a position that plays a critical role not only in appointments, but also, as discussed below, the assignment of cases, the creation of benches, and the management of the electoral process.[64] The Lahore High Court -- and to a lesser extent the Sindh High Court -- have seen manipulations to ensure that judges favourably inclined toward the government sit as Chief Justices. A former federal law minister, explaining the importance of particular High Courts, noted that: "The Lahore High Court is the most powerful in the country, in terms of size, population covered, and the number of constitutional petitions challenging government action".[65] By contrast, the Balochistan and NWFP High Courts -- less politically important and with fewer significant cases -- have not witnessed as much manipulation.[66]

To be sure, the Musharraf government is hardly the first to politicise superior judiciary appointments. In her second term in office, Benazir Bhutto appointed a large number of ad hoc judges to the High Courts and Supreme Court, transferred judges to the Federal Shariat Court, and abandoned the convention of seniority for promotions to the Chief Justice's post.[67] Nevertheless, manipulation of appointments has played a significant role in maintaining the present government's grip on power.

Political manipulation of the key Chief Justice post is most apparent in the Punjab, home to the Lahore High Court. Deviations from the seniority rule began in February 2000 and were justified on the ground that the then-Chief Justice of Pakistan did not approve the promotion of the most senior Lahore High Court judge, Justice Falak Sher, to the Chief Justice's position.[68] Thus, a failure to follow the seniority rule set forth clearly in the Judges Case was justified by the argument that the Chief Justice (and, it follows, the President too) has the power to decline any appointment. This interpretation of the Judges Case guts the seniority rule, leaving promotions once more a matter of discretion.

[61] ICG interview with Mahkdoom Ali Khan, Attorney General of Pakistan, Islamabad, 31 August 2004. Other lawyers, however, challenged that figure as an exaggeration. ICG telephone interview with Hamid Khan, former President of Supreme Court Bar Association, Lahore, 29 August 2004. According to Khan, about 80% of Supreme Court appointments were made on a seniority basis.

[62] Supreme Court Bar Association v. Federation of Pakistan, PLD 2002, p. 983.

[63] ICG telephone interview with Hamid Khan, former President of the Supreme Court Bar Association, Lahore, 29 August 2004.

[64] See supra, Sections V C and IV B.

[65] ICG interview, Karachi, August 2004. Another prominent legal historian noted that the Lahore High Court had been inordinately important from the time that it was headed by Justice Munir, who decided the Tamizuddin Khan case. ICG interview with Pakistani legal historian, August 2004.

[66] That is not to say that those tribunals have been free from manipulation. In April 2002, a judge of the Balochistan High Court, Tariq Mehmood resigned after being assigned to the Election Commission and then asked to oversee the April 2002 referendum. When Justice Mehmood balked at the referendum and resigned his commission, the Chief Election Commissioner first pressured to him to withdraw his resignation, and then arranged for a postdated withdrawal of his commission. Ultimately, Justice Mehmood declined to acknowledge the postdated withdrawal and had to resign from the bench. ICG telephone interview with Justice (r) Tariq Mehmood, Quetta, 28 August 2004; Pakistan Bar Council, *White Paper on the Role of the Judiciary* (Islamabad, 2003), pp. 9-10.

[67] ICG interview with Mahkdoom Ali Khan, Attorney General of Pakistan, Islamabad, 31 August 2004; Lau, op. cit. p. 156.

[68] "Appointment of junior judge as LHC CJ defended", *Dawn*, 5 February 2000.

Justice Falak Sher, nonetheless, was subsequently appointed Chief Justice in July 2000. On two occasions, Justice Sher was allowed to retain the Chief Justice position while more junior Justices rose to the Supreme Court. In September 2000, the second most senior judge on the Lahore High Court, Justice Tanvir Ahmad Khan was elevated to the Supreme Court.[69] Then, in December 2001, three further junior judges, including one who was thirteenth in seniority within the Lahore High Court, were elevated to the Supreme Court from Lahore while Chief Justice Sher remained at his post. These three appointments were challenged and upheld by the Supreme Court, which held that no seniority rule applies to promotions to the Supreme Court.[70]

In September 2002, Justice Sher was elevated to the Supreme Court and Justice Iftikhar Husain Chaudhry, brother of a former Punjab governor, took his place as Chief Justice of the Lahore High Court. In elevating Justice Chaudhry, a more senior judge, Justice Fakhar-un-Nisa Khokhar, who would have been the nation's first woman Chief Justice, was passed over.[71] In June 2004, the Chief Justice of Pakistan, Nazim Hussain Siddiqui recommended three judges of the Lahore High Court for elevation to the Supreme Court, including Justice Chaudhry. In July 2004, the President elected to appoint only two of Justice Siddiqui's three recommendations -- Justices M. Javed Butter and Tassadaq Hussain Jillani -- thus keeping Justice Chaudhry in the Lahore High Court.[72] The federal Secretary of Law explained that the Chief Justice's recommendation was rejected because Justice Chaudhry was crucial to Asian Development Bank (ADB) projects in Lahore.[73]

Members of the bar argue find this rationale unpersuasive.[74] Substantial work under ADB auspices in other provinces has not barred other promotions. And Lahore's Chief Justice is seen as the one of the least effective in achieving reforms. Former NWFP Chief Justice Mian Shakirullah Jan engaged actively in the ADB projects by issuing delay-reduction guidelines, lowering pendency rates, and establishing a citizen-court liaison system -- achievements that largely have eluded Lahore's Chief Justice.[75] Yet, Chief Justice Shakirullah Jan was elevated to the Supreme Court earlier this year. If the President is able to disregard the Chief Justice's recommendation on such a flimsy pretext, the consultation requirement loses much of its meaning.

Manipulation is also evident in the Sindh High Court. In April 2000, Justice Saiyed Saeed Ashhad became Chief Justice despite the fact that another judge, Justice Majida Razvi, had seniority over him.[76] Furthermore, despite the presence of a seat on the Supreme Court informally allocated to the Sindh High Court, and a June 2004 recommendation from the Chief Justice of Pakistan, Justice Ashhad has not been elevated.[77] Such delay technically constitutes a

[69] ICG interviews with Hamid Khan, former President of Supreme Court Bar Association, Lahore, 29 August 2004, and Muhammad Arshad, Secretary of Pakistan Bar Council, 31 August 2004.

[70] Supreme Court Bar Association v. Federation of Pakistan, PLD 2002, p. 981. Critics of these appointments observe that the consultee Chief Justice of the Supreme Court at the time had four days of his tenure remaining when the new appointments took effect, and that, under the Judges Case, should have allowed his successor to make the appointments. See Human Rights Commission of Pakistan, *State of Human Rights in 2002* (Lahore, 2003), p. 44.

[71] ICG interview with Justice (r) Fakhar-un-Nisa Khokhar, former Justice of Lahore High Court, 12 August 2004. One commentator at the time argued that Justice Khokhar's passing-over constituted gender discrimination. Qazi Faez Isa, "Why can't a woman be Chief Justice", *Dawn,* 5 October 2002. It seems as likely, however, that the federal government wanted a political ally as Chief Justice for the 2002 national elections. See supra, Section VI B.

[72] ICG interviews with Justice Nazim Hussain Siddiqui, Chief Justice of Pakistan, and Justice (r) Mansoor Ahmad, Secretary, Ministry of Law, Justice and Human Rights, Islamabad, 31 August 2004. A third judge from the Peshawar High Court was elevated at the same time. See "3 judges elevated to apex court", *Dawn*, 30 July 2004.

[73] ICG interview, 31 August 2004.

[74] ICG interview with former chairman of Lahore High Court Bar Association, August 2004.

[75] Asian Development Bank, *Evaluation Report for Annual Performance Review of Access to Justice Programme 2003* (Islamabad, May 2004), pp. 11-16. Donors also report that "the Lahore High Court Chief Justice has not played a positive role in the [Access to Justice] Program". ICG interview with staff of donor agency, Islamabad, 29 August 2004.

[76] ICG interviews with Sindh High Court and Supreme Court Advocates, Islamabad, August 2004. Justices Ashhad and Razvi had both been appointed on 5 June 1994; as the senior in age, however, Justice Razvi was technically senior too in rank. Justice Ashhad, however, had been an additional judge for two years up until early 1994. Before June 1994, he had had a three-month break in service, which entailed that he was not entitled to include that two-year service when calculating his tenure. Nonetheless, the two years were so included in the determination of his seniority.

[77] "Names of senior most judges suggested: four vacancies in SC", *Dawn*, 16 June 2004. There is informal consensus that each provincial High Court "has" a number of seats on the Supreme Court roughly equivalent to the size and population of the province.

violation of the Judges Case.[78] According to members of bar associations in Karachi, the federal government is unwilling to elevate Justice Ashhad lest the second most senior judge, who is known for his independence, becomes Chief Justice. Karachi lawyers predict that no elevation from the Sindh High Court will occur before December, when a second vacancy on the Supreme Court becomes open; a judge more amenable to the federal government's position can be eased then into the Sindh Chief Justice's seat after two promotions to the Supreme Court have been made.[79]

In these ways, President Musharraf's government can manipulate the rules of promotion to ensure its selections fill the posts of provincial Chief Justice in Lahore and Sindh. With the Chief Justice's position secure, judicial appointments come within effective executive control. What the Supreme Court in the Judges Case described as an inter-branch negotiation becomes a decision vested in de facto executive control; the present system permits no outside scrutiny of the interaction between a Chief Justice and the executive. Names of appointees are not publicised, but circulated only between the Chief Justices and the executive.[80] No check on the executive thus exists.

Even before the October 1999 military coup, observers of judicial appointments noticed less emphasis on competence and more on "character", a term that encompasses sectarian concerns.[81] According to one Supreme Court advocate, recent appointees have been elevated "with the expectation that they'll toe the line. There's a distinction between looking at judicial philosophy and looking for personal loyalty -- sycophants and lackeys".[82]

The executive is looking for more than a shared political philosophy. The latter, indeed, is arguably an inevitable and beneficial feature of a judicial appointment process as it serves as a break on rapid political change when a new government enters power.[83] Rather, the government seeks unprincipled political allegiances. Lawyers across the country broadly agree with such an assessment; one senior Supreme Court advocate commented: "Now the government doesn't need to put pressure on judges because they are waiting for the government's word".[84]

Recent appointees' behaviour supports this interpretation of the appointment system. The present Chief Justice of the Lahore High Court, Justice Chaudhry, has declared, without the benefit of a case or briefing to decide, that General Musharraf can hold the offices of both Chief of Army Staff and President, even as this issue continues to be hotly debated in political circles.[85]

Executive influence is also felt in individual cases. The present chairman of the Lahore High Court Bar Association gave the example of a case against a Defence Housing Authority, in which an army commander, who was an officer of that authority, failed to appear; the court, however, would not issue a contempt notice, as it would have for any other litigant. Judges, noted the lawyer, "are aware in their subconscious of where the power lies".[86] A journalist, who had been previously arrested by the army and whose *habeas corpus* petitions had been rejected on the ground that he was in army custody, added: "When someone is arrested in an anti-state offence, there is no law. The judiciary steps aside".[87] Other cases never move beyond the filing stage. For example, one 1997 case registered in the Supreme Court by former air chief Asghar Khan, accusing the ISI (Inter-Services Intelligence Directorate) of distributing funds to opposition parties in the 1990

[78] M. Kamran, "Government violating statutory law and Supreme Court verdict", *Daily Times*, 11 March 2004.
[79] ICG interviews with former judge and Karachi lawyers, Karachi, August 2004.
[80] ICG interviews with former federal Ministers of Law, Islamabad and Karachi, August 2004.
[81] ICG interview with former federal Minister of Law, August 2004.
[82] ICG interview with Supreme Court Advocate, Rawalpindi, August 2004.
[83] For example, one lawyer suggested that past appointments to the Peshawar High Court serve as a check on efforts by the six party religious alliance, the Muttahida Majlis-i-Amal (MMA), which holds power in NWFP's provincial assembly, to accelerate Islamisation of provincial law. ICG interview with Peshawar High Court advocate, Peshawar, August 2004.
[84] ICG interviews with Supreme Court advocates and former judges, Lahore, Karachi, Rawalpindi, Islamabad, Peshawar, August 2004. Some lawyers, however, argue that incompetent but loyal judges were appointed during the regimes of Generals Ayub Khan and Zia-ul-Haq.
[85] ICG interview with former chairman of Lahore High Court Bar Association, August 2004; Pakistan Bar Council, op. cit., p. 12.
[86] ICG interview with Ahmed Ahwais, Chairman of Lahore High Court Bar Association, 10 August 2004; see also Human Rights Commission of Pakistan, *State of Human Rights in 2003* (Lahore, 2004), p. 79.
[87] ICG interview with newspaper editor, Lahore, August 2004.

national election, has simply remained in limbo since being filed.[88]

Focused on the goal of ensuring control of the judiciary, the present government moreover has failed to ensure even minimal representation of women within the superior judiciary. Rather, manipulations of the promotion system have eliminated opportunities for women.[89] Since the October 1999 coup, the two woman judges of the superior judiciary, Fakhar-un-Nisa Khokhar and Majida Razvi, were slated to become Chief Justice of the Lahore and Sindh High Courts respectively by operation of the seniority rule. In both cases, those woman judges were circumvented in violation of the seniority rule. After the retirement on 28 June 2004 of Justice Khokhar, no woman has sat in the higher judiciary.

According to women lawyers and activists, the failure to appoint women cannot be ascribed to a paucity of qualified and talented candidates.[90] Rather, they identified a "failure of political will", and a gap between the present government's modernising rhetoric and its unwillingness to unsettle relations with religious parties. One warned, however "if women do not see opportunities within the profession, they don't join it".[91] In filling present vacancies on the High Courts, however, the government and the Chief Justices have an opportunity to undo some of the damage wrought by their omission of Justices Khokhar and Razvi from the Chief Justice positions.

C. REFORMING THE APPOINTMENT AND PROMOTION OF JUDGES

A reformed appointment system for the High Courts would disperse nominating authority and open the process to public scrutiny. At present, the Chief Justice of the relevant High Court initiates the appointment process by identifying names based on his knowledge of lawyers appearing before the High Court and lower-court judges.[92] Instead of concentrating this nomination power in that one individual, nominations could be developed by a committee comprising the Chief Judge of the High Court, the two most senior judges, and the heads of the provincial and local bar councils and associations. Politically diverse, this group also includes varied perspectives on the pool of lawyers and judges from which High Court appointments are made.[93] The recommendation prepared by this committee would include details of candidates' professional achievements and would explain the grounds for the recommendation. The kinds of professional achievements the various kinds of practicing lawyers and members of the subordinate judiciary have are sufficiently different that formulating a common set of necessary achievements may exclude otherwise qualified people.[94] The recommendations would be published to ensure public scrutiny of a candidate's achievements. Public comments could be submitted to the committee. The recommendation and the comments then would be forwarded to the Chief Justice of Pakistan.[95] The President would appoint only those endorsed by both the nominating committee and the Chief Justice of Pakistan. The President, furthermore, would have no discretion to decline to make an appointment.

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[88] ICG interview, August 2004; see Shah, op. cit., pp. 422-23

[89] Numbers of women in the subordinate judiciary are slightly healthier. In the Punjab, there are 39, in Sindh 66, in Balochistan 8, and in NWFP 40. Figures provided by Rukhshanda Naz, Aurat Foundation, Peshawar, 24 August 2004.

[90] ICG interviews with women lawyers and activists, Rawalpindi, Peshawar and Karachi, August 2004.

[91] Ibid.

[92] ICG interview with former federal Law Minister, Karachi, August 2004.

[93] To be sure, bar councils and bar associations are political, in the sense that factions within them are aligned with political parties, and those parties will attempt to push certain candidates for judicial positions. ICG interviews with members of Pakistan Bar Council, August 2004. Such party-political affiliations, however, are no reason to exclude the bar associations and councils from the appointment process. Rather, by injecting a diversity of political opinions, the bar's involvement makes less likely the capture of the appointment process by one political faction.

[94] The Attorney General of Pakistan argues that the pool of lawyers qualified to sit on the High Courts is dwindling primarily due to collapsing standards in legal education. ICG interview with Mahkdoom Ali Khan, Attorney General of Pakistan, Islamabad, 31 August 2004. Significant numbers of Pakistani lawyers, however, receive training overseas, particularly in the United Kingdom. The problem is not so much a dearth of qualified lawyers, but a paucity of talented lawyers willing to join a judiciary that has been sapped of its prestige through repeated humiliations by military governments.

[95] There is scant reason to involve the governor of the province in the judicial appointment process. At present, the governor conducts security checks on candidates. According to one former Chief Justice of a High Court, those security checks are a "drama and a nonsense", and add little of substance to the appointment process. ICG interview with former Chief Justice of a High Court, August 2004. Another former judge concurred, observing that the investigation in his case had been cursory. ICG interview with former judge, Karachi, August 2004.

A system of this kind would not exclude entirely the possibility of executive capture and is likely to be fiercely resisted by High Court Chief Justices, reluctant to part with their ability to steer patronage to favoured lawyers. Nevertheless, it would introduce transparency and meritocracy, which a successful judicial-appointment scheme must strive toward if the superior judiciary is to become substantively independent and respected.

Prominent lawyers suggest an alternative mechanism: an appointment committee consisting of all Chief Justices, other senior Supreme Court judges, senior members of main bar councils, and ruling and opposition members of the National Assembly.[96] The Pakistan Bar Council has proposed a similar committee for disciplining judges.[97] A large committee of this kind, composed of members from several different provinces, however, may prove cumbersome, and its personnel would lack detailed knowledge of all provinces' bars.

On the issue of promotions, one easy solution would be mechanical application of the seniority rule to promotions to the position of Chief Justice and then from a High Court to the Supreme Court. Discretion at any stage of the promotion process allows the executive to influence judges by promising the advancing or withholding of positions.[98] The Supreme Court has said only that no convention compels a seniority rule; it has said nothing that would preclude such a rule. A clear rule has the virtue of making executive influence evident, and thereby amenable to dispute. Indeed, in India, deviations from the seniority rule are cause for protest and even judges' resignations.[99] Of course, the history of Pakistan's judiciary demonstrates that merely having clear rules is insufficient to prevent the erosion of the rule of law; the rules also must be respected. Nonetheless, without such rules, that erosion accelerates and becomes more difficult to discern and oppose.

[96] ICG interviews with Rasheed A. Razvi, vice-chairman of Pakistan Bar Council, and Abu'l Inam, member of Pakistan Bar Council and former president of Supreme Court Bar Association, August 2004.
[97] Pakistan Bar Council, op. cit., pp. 43-46.
[98] ICG telephone interview with Hamid Khan, former President of Supreme Court Bar Association, Lahore, 29 August 2004.
[99] T.R. Andyarujina, "Judicial Accountability: India's Methods and Experience", in C. Das and K. Chandra, eds., *Judges and Judicial Accountability* (Delhi, 2003), pp. 106-07.

IV. THE REMOVAL OF JUDGES

Mechanisms for removing judges are pivotal to judicial independence. An effective removal mechanism is necessary to ensure that judges who succumb to financial or political corruption can be taken off the bench. The power to divest a judge of his or her robes, however, also can be a potent political tool. Combining the worst of all possibilities, the present mechanisms for removing judges fail to address financial and political corruption while vesting excessive power in the hands of the executive.

A. MEANS OF REMOVING JUDGES

The Constitution prescribes only two ways to remove judges of the superior courts. First, Supreme Court judges must retire at age 65, while High Court judges must retire at 62.[100] An attempt to extend Supreme Court judges' tenure by three years through constitutional amendment in the 9 October 2002 Legal Framework Order was bitterly and successfully opposed by the legal community, who found an ally in the Muttahida Majlis-i-Amal.[101]

Second, a Supreme Judicial Council composed of the Chief Justice of Pakistan, the two most senior judges on the Supreme Court and the two most senior High Court Chief Justices has sole responsibility for disciplining judges. Until 2004, the Council relied on references from the President. The recent Seventeenth Amendment to the Constitution gave the Council power to act on its own motion.[102] The Council, however, has not acted against any judge since the adoption of the 1973 Constitution. Further, government and opposition lawyers concur that on the two pre-1973 occasions when the Council did act, its action was prompted by internal disputes within the judiciary, and that it would require a "very proactive Chief Justice, who is not on the horizon" for the Supreme Judicial Council to become meaningfully active.[103]

The Musharraf government, however, has not felt itself restricted to constitutional means for removing

[100] 1973 Constitution of Pakistan, Articles 175 and 195.
[101] ICG interview with Supreme Court advocates, Islamabad, August 2004. "The D-day approaches", *The Weekly Independent*, 6 March 2003, p. 3; Pakistan Bar Council, Press Release, Islamabad, 6 January 2003.
[102] 1973 Constitution of Pakistan, Article 209.
[103] ICG interviews with former Supreme Court Justices and lawyers, Islamabad and Lahore, August 2004.

judges it viewed as an obstacle. Having abrogated the Constitution after the 12 October 1999 coup, and adopted the Provisional Constitutional Order on 20 January 2000, the federal government issued a notification that all judges were to swear a new oath to the PCO, superseding the oath they had sworn at their induction to the 1973 Constitution.[104] As discussed above, that oath compelled judges to abandon their initial oath to the Constitution in order to remain judges. In so doing, the Musharraf government borrowed a tactic of General Zia, who on 24 March 1981 promulgated a PCO and then required all judges to take an oath under that order.[105] Three Supreme Court Justices declined to take the oath in 1981, and one was not given an opportunity to do so.[106]

Immediately after the 12 October coup, General Musharraf had promised then-Chief Justice of Pakistan Saiduzzaman Siddiqui that the judiciary would be permitted to continue without interruption.[107] Indeed, under an order promulgated on 31 December 1999, the new Chief Justice of the Peshawar High Court took an oath under the 1973 Constitution. Even then, legal challenges to the coup, including assertions of treason, were pending before the Supreme Court. It is unclear what unsettled the military and prompted the most drastic of its attacks on judicial independence. But on 25 January 2000, General Musharraf informed Chief Justice Siddiqui that a new oath under the PCO would to mandated. The Chief Justice indicated he would decline to take that oath. In the late evening of 25 January, the Chief Justice received visits from the new Interior Minister, the head of ISI and others urging him to take the oath; on his continued refusal, he was told not to attend the Supreme Court the next morning, where other judges would be taking the oath.[108] Other Supreme Court Justices were informed of the new oath on the morning of 26 January; they were not coerced when they declined to take it.[109] Four other Supreme Court Justices -- Nasir Aslam Zahid, Mamoon Kazi, Wajeehuddin Ahmad and Kamal Mansoor Alam -- joined their Chief Justice in not taking the PCO oath.[110] All five stepped down from the bench.

In the High Courts, judges who had come into conflict with their Chief Justices or who had rendered decisions unfavourable to the military, were not notified of the oath, never received the opportunity to take the oath and have never received official notification barring them from taking the oath.[111] One such judge later was informed that the reason for his non-retention may have been that he had decided more than once against clients of Sharifuddin Pirzada, a senior legal advisor to President Musharraf who also represents private clients.[112]

On 26 January 2000, a total of thirteen judges of the Supreme Court and High Courts either declined to take the PCO oath or were never offered the oath.[113] Since September 2003, new judges have been taking oaths once more under the 1973 Constitution.[114] Other judges who have not taken new oaths are in the paradoxical situation, since the restoration of the 1973 Constitution, of enforcing a constitutional order different from the one they are sworn to uphold.[115] Moreover, the possibility of a new across-the-board oath requirement, with exceptions made for judges who have displeased the federal government, casts a continuing shadow on judges.[116] Under such circumstances, it is difficult for any judge to retain a credible commitment to constitutional norms in the face of executive opposition.

B. REFORMING REMOVALS AND STEMMING CORRUPTION

On the one hand, the formal system for removing judges is emasculated. Corruption therefore is unchecked in the higher judiciary. On the other hand, the executive, through illegal and unconstitutional

[104] For the text of the different oaths, see Sheikh, op. cit., pp. 219-23.
[105] Maluka, op.cit., pp. 263-64. General Yahya Khan also issued a PCO on 4 April 1969. Among other measures, that PCO limited the jurisdiction of all courts with regard to the Chief Martial Law Administrator and his deputy. Khan, op. cit., pp. 372-73.
[106] ICG interview with Justice (r) Fakharuddin G. Ibrahim, former Supreme Court Justice, August 2004; Khan, op. cit., p. 649.
[107] ICG interview with Justice (r) Saiduzzaman Siddiqui, former Chief Justice of Pakistan, Karachi, August 2004.
[108] Ibid.
[109] ICG interview with Justice (r) Nasir Aslam Zahid, former Supreme Court Justice, Karachi, August 2004.
[110] Ibid.
[111] ICG interview with Rasheed A. Razvi and Mushtaq Memon, former judges of the Sindh High Court who were not offered the PCO oath, Karachi, August 2004.
[112] ICG interview with former High Court judge, August 2004.
[113] ICG interview with Rasheed A. Razvi, Vice-Chairman, Pakistan Bar Council, Karachi, 18 August 2004.
[114] "Eight LHC judges take oath today: JAC to boycott ceremony", *Dawn*, 3 September 2003.
[115] New constitutional article 270-C seeks to square this circle by deeming the PCO oath to be an oath under the Constitution.
[116] "Government debates fresh oath for judges", *Dawn*, 20 January 2004.

oaths that show disdain for the constitutional order, has plenary and unfettered power to get rid of judges it dislikes for political reasons. Reform requires not only a new system for removing judges but also a commitment on the part of the executive that it will not ignore the Constitution for short-term political gains. To date, the Musharraf government has shown scant taste for the rule of law so understood.

Instead of the Supreme Judicial Council, the Pakistan Bar Council has suggested giving a committee of judges, lawyers from the bar councils and associations, and parliamentarians from both the government and the opposition benches the responsibility for disciplining judges. Five votes would trigger an investigation by an inquiry committee composed of council members.[117] To the extent that political capital has already congealed around this scheme, it is worthy of support as an improvement over the present arrangements. The scheme, however, suffers from some flaws. Such an ad hoc body would be able to meet only infrequently, would not be able to cope with a high volume of complaints without administrative support, and would lack necessary investigative tools.

More is needed. Other countries vest power to sanction judges to the legislature.[118] But, as the present Attorney General noted, a legislative impeachment power, even with a two-third-majority trigger as in India and the United States, would be open to manipulation when the executive has control of the legislature.[119] The discipline system ought to remain within the judiciary lest judges' independence be further corroded.

An improved removal system would incorporate new administrative structures and new oversight mechanisms. An initial step would be to mandate that judges report all their income and benefits, and those of close relations, to a new division within the judicial administration that would be responsible for monitoring and investigating corruption. This department also would conduct regular audits of judges and close relations.[120] To ensure its independent and efficient operation, the department would be headed in the High Courts by a judge from a different High Court on a one-year secondment, and in the Supreme Court, by a retired Supreme Court judge.[121] The Chief Justice of Pakistan would appoint such judges.

The auditing unit within the judicial administration also would be the front line for receiving and reviewing complaints. Submissions through bar councils and bar associations should be allowed where possible so that complaining lawyers can remain anonymous, sheltered from reprisal from judges. Any generally open avenue for complaints would generate a vast volume of frivolous or politically motivated filings, necessitating an administrative structure as a first-order filter. Results of investigations, supervised by the visiting High Court judge or the retired Supreme Court judge, would be appealed to a bench of the Chief Justice and two senior Supreme Court judges. All results of investigations would be published.

Finally, a judicial committee of the kind advocated by the Pakistan Bar Council could be an additional avenue for complaints, with recommendations of that body automatically resulting in investigations. The judicial committee could also maintain a watchdog role, commenting on investigations and decisions by the Chief Justice and his, or her, colleagues.

Without reforms of this kind, and without a normative commitment by the executive to the rule of law, beyond the contingent and varying commitment needed to obtain a minimal level of international legitimacy, corruption and improper influence in the judiciary are unlikely to diminish.

C. "ADDITIONAL" HIGH COURT JUDGES

One further device for eliminating disfavoured judges from the bench merits mention. High Court judges are typically appointed for either one or two years as "additional" judges, before being confirmed

[117] Pakistan Bar Council, op. cit., pp. 43-46.

[118] In India, a legislative super-majority is needed for removal. See Andhyarunjina, op. cit., pp. 123-24. The U.S. Constitution vests an impeachment power in the legislative branch with a super-majority trigger. See Constitution of United States, Article I, Section 3, Clause 6. Such provisions appear to function best when there are strong norms against their invocation so as to preclude legislative tampering with the judiciary.

[119] ICG interview with Mahkdoom Ali Khan, Attorney General of Pakistan, Islamabad, 31 August 2004.

[120] Auditing only the judge would be ineffective as illicit income can pass through family members. Thus one High Court judge is reported to take payments through his wife, a doctor, who includes the bribes in her consultation charges. ICG interview with High Court advocate, August 2004.

[121] This would be an exception from a rule, currently not in force, but nonetheless much needed, barring post-retirement salaried employment of judges. See supra, Section V A.

as permanent judges.[122] Confirmation involves the same process of endorsement by the Chief Justice of the High Court, the governor and the President. An unconfirmed judge, unlike one who is confirmed, can continue to practice before the High Court after he or she steps down from the bench.[123]

Supporters of the practice of additional judges argue that it allows lawyers to test the waters of a judicial career, and to consider whether the drop in income and informal rules discouraging social activities are to their taste.[124] The practice, however, also allows the executive or a Chief Justice to remove disfavoured judges from the bench.

One former judge, who served on the Peshawar High Court from 1988 to 1990, observed that he made politically unpopular decisions during his tenure as an additional judge, striking down part of the regulations governing the Provincially Administered Tribal Areas (PATA) and, only four days before his second anniversary on the bench, invalidating the dissolution of the NWFP provincial assembly. He subsequently was not confirmed.[125]

The confirmation process also has allowed sectarian bias to enter judicial selections. A former judge of the Sindh High Court, one of very few Christians to be appointed to bench, had been selected initially by Benazir Bhutto's second government in January 1997. A year later, the Chief Justices at both the provincial and the national level had changed; both new Chief Justices placed a premium on sectarian conformity such that the Christian judge's confirmation was rejected.[126]

Little flexibility would be lost if judges were to be retained initially as additional judges, with automatic confirmation after one year. Judges who decided against a career on the bench could resign after one year without the penalty of being unable to practice. If a judge misbehaves in the first year, the ordinary removal mechanisms are available. No judge need worry, however, that the results he or she reaches in particular cases might impact their tenure within the judiciary.

V. OTHER MECHANISMS OF EXECUTIVE CONTROL

Shaping the courts' personnel limits the executive's need to engage in more direct modes of intervention in the judiciary. Nevertheless, a gamut of other options exists for influencing judges or changing specific cases' outcomes. Sitting judges, for example, can seek supplementary benefits from the government or prestigious post-retirement positions in other parts of the government. Financial corruption within the higher judiciary can also be manipulated for political ends. Finally, High Court Chief Justices have administrative powers that can be used to channel cases toward outcomes regardless of law.

A. REWARDING FAVOURED JUDGES

The federal government has ways to reward favoured superior court judges. Most basically, the executive has the power, by presidential order, to change the benefits and emoluments of judicial service, for example by adding the right to rent-free residences.[127] Rewards, however, need no statutory authorisation. One former Supreme Court Justice enumerated those among his former colleagues on the apex courts who had sought benefits above and beyond their statutory allocations, including special renovations to their residences.[128] Other indirect methods of rewarding favoured judges also exist; one former provincial Chief Justice observed that relations of his colleague judges would be awarded sought-after government positions as a form of reward.[129] For example, ICG was told that one Supreme Court Justice obtained a three-year foreign scholarship for his wife.[130]

In addition, some judges seek a secure income and continuation of benefits after retirement by looking to the federal government for continued employment beyond the mandated retirement age. Most notably, former Chief Justice Irshad Hassan Khan, having endorsed General Musharraf's coup d'état in the Zafar

[122] Al-Jehad Trust v. Federation of Pakistan, PLD 1996 Supreme Court, pp. 324, 363-367.
[123] ICG interviews with former judges, Lahore, Karachi and Peshawar, August 2004.
[124] ICG interview with former judge, Karachi, August 2004.
[125] ICG interview with former judge of the Peshawar High Court, Peshawar, 24 August 2004.
[126] ICG interview with former judge of the Sindh High Court, Karachi, 15 August 2004.
[127] See President's Order No. 2 of 2004, An Order further to amend the Supreme Court Judges (Leave, Pension and Privileges) Order, 1997 (Islamabad, 1 June 2004).
[128] ICG interview with former Supreme Court Justice, Karachi, August 2004.
[129] ICG interview with former provincial Chief Justice, August 2004.
[130] ICG interview with former Supreme Court Justice, Karachi, August 2004.

Ali Shah case, received the post of Chief Election Commissioner after mandatory retirement.[131] In that position, he oversaw the April 2002 referendum.

New ethical rules are needed to address these practices. Judges should be subject to strict final audits and obliged to report when close relations receive a benefit, whether employment-related or not, from the provincial or federal government. Moreover, judges should be precluded from taking salaried governmental positions after their retirement.[132] Prophylactic measures of this kind would reduce space for improper influence.

B. FINANCIAL CORRUPTION AND POLITICAL INFLUENCE

Former High Court judges state categorically that they were never threatened or improperly approached during their tenure.[133] Nevertheless, the presence of corruption within the high judiciary provides another lever, in the form of an implicit threat, for the executive. One prominent Supreme Court advocate explained that it is unlikely that the government, through the security services, is unaware of corruption among judges. Such information provides a threat that need not be articulated to be effective.[134] The Pakistan Bar Council has also noted that "[t]he military regime seems to be happy with corruption in [the] judiciary because in its view the judges with compromised integrity would not dare to question any of its acts".[135]

Few instances of financial corruption by the government or political influence are publicised. Lawyers explain that they cannot afford to anger the judges before whom they appear by making corruption allegations.[136] A government-sponsored amendment to the 1973 Legal Practitioners and Bar Councils Act, which would, if passed, allow courts not only to suspend lawyers, but also to reprimand them and remove them from practice, would further discourage criticism and whistle-blowing.[137] Despite these obstacles, the Pakistan Bar Council has raised allegations of corruption against the former Chief Justice of Pakistan, Sheikh Riaz Ahmed; Bar Council members pointed to one case as an example in which that Chief Justice required, without precedent or legal justification, a large bond to be posted by a foreign-company litigant.[138]

It seems likely that this well-publicised case represents a very small fraction of judicial corruption. Indeed, ICG interviews with lawyers in Lahore, Karachi, Rawalpindi and Peshawar yielded a variegated harvest of anecdotes concerning financial corruption of sitting High Court judges.[139] For example, ICG was told that lawyers who are familial relations of judges will appear in the same High Court, charging higher fees than warranted by their age and experience and obtaining inordinately impressive results. The nephew of one judge and the brothers of two judges, ICG was told, were repeatedly identified as commanding fees and achieving results that could not be justified absent improper influence. In a High Court bar room, lawyers also pointed out to ICG well-known "touts" allegedly used by one High Court judge to channel bribes.[140]

New restrictions are needed to bar close relations of a judge from practice before the High Court on which

[131] ICG interview with Supreme Court advocates, Lahore and Quetta, August 2004; Pakistan Bar Council, op. cit., pp. 8-9.
[132] The sole exception might be one-year appointments of Supreme Court judges to administer the anti-corruption unit within the Supreme Court's administration. See infra, Section IV A.
[133] ICG interviews with former Judges, Karachi and Peshawar, August 2004. Exceptions exist**.** In one case, a British newspaper obtained audio tapes recording Justice Abdul Qayoom of the Lahore High Court taking instructions from Nawaz Sharif's government on what punishment Benazir Bhutto and her husband would receive in a corruption case involving the Swiss company SGS Cotencna. Owen Bennett Jones, *Pakistan: Eye of the Storm* (New Haven, 2003), pp. 235-36.
[134] ICG interview with senior Supreme Court advocate, Karachi, August 2004
[135] Pakistan Bar Council, op. cit., p. 20.
[136] ICG interviews with lawyers, Rawalpindi, August 2004.
[137] ICG interview with Mohammad Arshad, Secretary, Pakistan Bar Council, 15 August 2004. The proposed amendment trains on section 54 of the Legal Practitioners and Bar Councils Act of 1973, which presently permits courts to suspend lawyers based on "grave indiscipline in view of the Court or grave professional misconduct in relation to any proceeding before it". Pursuant to the federal government's proposed amendment, courts' power to punishment would grow to include reprimands and removal from practice, and the scope of conduct subject to judicial scrutiny would expand to reach "professional or other misconduct".
[138] Pakistan Bar Council, op. cit., p. 20; ICG interviews with senior Supreme Court advocates, August 2004.
[139] ICG interview with High Court Advocates, Lahore, Rawalpindi and Peshawar, August 2004.
[140] The federal Secretary of Law commented that "allegations of corruption are normally raised by corrupt people", a response which perhaps suggests one reason why judicial corruption, when it occurs, is rarely reported. ICG interview with Justice (r) Mansoor Ahmad, Secretary, Ministry of Law, Justice and Human Rights, Islamabad, 31 August 2004.

that judge sits. In addition, dealing with corruption of this kind requires vigorous enforcement of existing ethical rules by the High Courts and the Supreme Court.

C. ADMINISTRATIVE POWERS OF CHIEF JUSTICES OF THE HIGH COURTS

In addition to having a key role in the appointment process, Chief Justices in both the High Courts and the Supreme Court wield signal administrative powers. Under High Court and Supreme Court rules, Chief Justices have plenary control over the assignment of cases to judges and the transfer of judges between benches.[141] Indeed, the Supreme Court exercises no administrative supervision over the High Courts.[142] Hence, a province's Chief Justice has a free hand in determining which judges hear which case.

Judges sit in benches of different sizes: a one-judge bench; a two-judge, or divisional, bench; and a bench of three or more judges, known as a full bench. The court's registrar prepares rosters of cases, with benches designated for periods of between a week and a few months. Cases can be directed to particular judges by their initial roster assignment. "The Chief Justice knows who's a weak judge and who's a strong judge", noted one former judge, explaining why this power is significant.[143] Moreover, a Chief Justice retains power to transfer a case from one set of judges to another by changing the composition of benches.[144] Abusive use of these powers, ICG was told, is particularly rife in the Lahore High Court. According to lawyers practicing before that tribunal, the Lahore High Court registrar takes any sensitive case, and any case in which certain prominent and political lawyers are acting, to the Chief Justice of that tribunal for assignment, a practice which "used to be discrete", but is now "done openly".[145]

"Administrative power is that which corrupts", noted one additional district and sessions judge, as there is no review or appeal from administrative decisions; in contrast, legal judgments rendered in open court, must be justified based on evidence, and are subject to review on appeal.[146] Reducing a Chief Justice's discretionary administrative power would not only reduce the executive's ability to interfere with pending cases, it would also improve courts' efficiency. Transferring the task of case assignments to a professional managerial body within the court, a body that operated without direction from the Chief Justice and according to internal regulations, would accomplish these goals.[147]

[141] ICG interviews with High Court and Supreme Court advocates, Rawalpindi, Islamabad, Lahore and Karachi, August 2004.
[142] ICG interview with Justice Nazim Hussain Siddiqui, Chief Justice of Pakistan, 31 August 2004.
[143] ICG interview with former High Court judge, Lahore, August 2004.
[144] ICG interview with former Lahore High Court Bar Association, Lahore, August 2004.
[145] ICG interview with prominent High Court advocate, Lahore, August 2004.
[146] ICG interview with additional district and session judge, NWFP, August 2004.
[147] It would not work to create a fixed, mechanical schedule of case allocations, as that would enable lawyers to calculate which judges they would obtain. Rather, a professional, managerial body within the court must have the responsibility for fixing the schedule, without direction, but also without too much predictability

VI. THE SUBORDINATE JUDICIARY

The subordinate judiciary presents a social rather than a political crisis. Chronically under-funded, woefully short of trained staff and adequate facilities, and forced to work in squalid conditions, the subordinate judiciary shows a legacy of generations of state neglect. One consequence of this neglect is endemic corruption and concomitant interminable delays in the resolution of cases.[148] Corruption can be traced in the first instance to abysmally low salaries. It is compounded by the involvement of district and sessions judges in the electoral process as returning officers, a role that results in some judges being involved in, or purposefully disregarding, electoral law violations.

It is worth noting that informal dispute resolution mechanisms, which involve tribal or village-level councils known as *jirgas* and *panchayats*, do not provide an adequate alternative. One recent field study conducted in all four provinces concluded that the tribal justice system, while "quick, efficient, and less expensive than the formal court system", was "subjective, coercive, and open to abuse because there is no check on the absolute authority of the *sardar* (tribal chief) and no appeal system. More importantly, it denied individual freedom".[149] Another recent field study, conducted under ADB auspices, also concluded that "[w]hile citizens appreciate the fact that local *panchayats* represent a low-cost and speedy alternative when it comes to the delivery of decisions, they do not believe that local *panchayats* are the best forum when it comes to the delivery of 'justice"'.[150]

While that study concluded that *panchayats* "maintain peace and harmony in local communities . . . by reasserting the leadership of extended families, prevailing kinship factions, and the politicians they support,[151] they clearly do not deliver justice. Women fare especially poorly under traditional justice mechanisms that condone or prescribe punishments such as gang rape and *karo-kari* (or honour killing).[152] District and civil courts, therefore, are likely to remain a critical part of dispute-resolution strategies across the board.

A. JUDICIAL STANDARDS, SALARIES AND CORRUPTION

To enter the subordinate judiciary, a law graduate must pass a competitive exam and undergo an interview with a High Court judge. Judges in the subordinate judiciary are paid according to the civil service scale, although without all the benefits that civil servants receive.[153] Members of the subordinate judiciary earn between Rs.20,000 and 40,000 ($333-666) per month.[154] According to serving and former judges, their salary is inadequate to support a family.[155] Litigants are well aware of low judicial salaries and the corresponding opportunities for corruption. A lawyer explained that clients often ask whether a judge can be bribed before asking where their case stands on the merits.[156] Litigants and former judges also explain that clerks in the subordinate courts will demand "speed money" for filing-related

[148] Studies conducted in the early 1990s identified the importance of delay for litigants. See Mohammad Yasin and Sardar Shah, "System of Justice", in Mohammad Yasin and Tariq Banuri, eds., *The Dispensation of Justice in Pakistan* (Karachi, 2004), p. 100-05. Delay also follows from the manner in which trials are conducted "in a series of segments, with frequent and regular adjournments between and within each segment", with each witness being heard weeks and perhaps months apart. Asian Development Bank and Ministry of Law, Justice and Human Rights, *Selected Proceedings of TA 3433-PAK: Strengthening of Institutional Capacity for Judicial and Legal Reform* (Islamabad, January 2003), p. 217.

[149] Foqia Sadiq Khan and Shahrukh Rafi Khan, *A Benchmark Study on Law-and-Order and the Dispensation of Justice in the Context of Power Devolution* (Islamabad, 2003), pp. 42-43. Unsurprisingly, this study concluded that poorer households are least likely to engage in litigation, while middle income or richer households "only approach the *panchayat* or *jirga* if they are able to influence it". Ibid., p. 89.

[150] "Supporting Access to Justice under the Local Government Plan. Small Scale Technical Assistance (SSTA 3640-PAK)", (undated document), p. 12.

[151] Ibid., p. 13.

[152] Khan and Khan, op. cit., pp. 88-89; Marie D. Castetter, "Taking Law into their own hands: Unofficial and illegal sanctions by the Pakistani tribal councils", *Indiana International and Comparative Law Review*, (Vol. 13, 2003), p. 543; Human Rights Commission of Pakistan, *State of Human Rights in 2002* (Lahore, 2003), p. 76. The government and courts have made some efforts to outlaw these practices but the abuses continue because of weak or nonexistent enforcement mechanisms.

[153] ICG interview with civil judge, Lahore, August 2004.

[154] Asian Development Bank and Ministry of Law, Justice and Human Rights, op cit., at p. 331.

[155] ICG interviews with former and serving civil judges, Lahore and Karachi, August 2004.

[156] ICG interview with lawyer, Islamabad, August 2004.

paperwork to be accomplished or for a file to be moved to the attention of a judge.[157]

Lawyers also bemoan a decline in judicial standards due to a collapse in quality across the legal profession.[158] An increase in private law colleges in the late 1980s and the early 1990s, argue these lawyers, eased access to the profession. Never a prestigious choice, law became a last-ditch option for those failing in a first career. Bar councils, which have a statutory obligation to regulate entrance to the profession, have failed to establish meaningful entrance thresholds to limit entry to the profession.[159] A paucity of high-quality education institutions, and a near-complete dearth of academic work in law, including an absence of critical commentary on judicial decisions, means there is only scant pressure for change within the bar.[160]

On the question of salaries, one ADB study recommended that salaries within the subordinate judiciary be doubled as a baseline for reform. The study explained: "Without this 'first-step', performance-based incentive schemes will never get off the round. The reason is simple: if salaries remain at existing levels, a rational judge will opt for a stable status quo rather than a 'risky' set of performance-enhancing reforms . . . because he doubts that a real reward for enhanced performance will ever be paid".[161] One of the policy conditions within the ADB structural-adjustment loan is an understanding on salaries.[162] As a first step, the National Judicial Policy Making Committee, a body that includes all the Chief Justices, has recommended an increase in monthly stipends for judges of between Rs.4000 and 5000 ($66-83) -- about a quarter of the increase recommended in the ADB study -- and forwarded their recommendation to the provincial governments.[163] At least in Punjab, salaries have so increased.[164]

Increased salaries are without doubt a vital 'first-step' in reform.[165] Substantial increases in salary, however, depend on a decoupling of judicial salaries from the civil service pay scale. Such a move, noted one senior bureaucrat, has been resisted, would "create discontent", and therefore is unlikely in the near-term.[166] Even an increase in salary and the introduction of performance-based incentives, however, is unlikely to stem corruption. As the reported presence of corruption among the relatively well-paid members of the superior judiciary demonstrates, an adequate salary however does not necessarily deter illegal rent-seeking activity. Aggressive efforts at identifying, prosecuting and removing corrupt judges are therefore needed. These require a Chief Justice who is not himself or herself corrupt, and so amenable to overlooking others' misbehaviour.

High Court leadership is essential not only for dealing with corruption. Structural reforms to address delay and other inefficiencies also work best where institutional leadership -- the Chief Justice of the relevant High Court -- is committed to change. Local lawyers attribute the success of ADB-initiated reforms in Peshawar to "good management by the [former] Chief Justice", Justice Mian Shakirullah Jan.[167] Reform in the subordinate judiciary therefore will be limited in scope without institutional and personnel change in the higher judiciary.

B. THE SUBORDINATE JUDICIARY AND THE ELECTORAL PROCESS

A further reason for corruption within the subordinate judiciary is the involvement of district and sessions judges in elections as returning officers. While

[157] ICG interviews with litigants and former judge, Islamabad and Lahore, August 2004.
[158] ICG interviews with lawyers, Islamabad, Peshawar and Lahore, August 2004.
[159] Lawyers argue that those who stand for election within bar councils have an interest in keeping the membership base broad in order to keep winning elections. Hence, reform of bar admissions is repeatedly stymied.
[160] The ADB plans on assisting in the creation of centres of excellence in legal education. ICG interview with ADB consultant, Lahore, August 2004; ADB, *Access to Justice Program (AJP) Annual Mission Report Memorandum of Understanding* (Islamabad, April 2004) p. 7. There is a risk, of course, that such prestigious institutions will benefit those who would have otherwise studied overseas and those who intend to practice commercially, rather than feeding into the bench.
[161] Asian Development Bank and Ministry of Law, Justice and Human Rights, op cit., at pp. 330-31.
[162] ICG interview with ABD staff, Islamabad, August 2004.
[163] ICG interview with Dr. Faqir Hussain, Secretary of Law and Justice Commission of Pakistan, Islamabad, 27 August 2004.
[164] "Rs. 61.6m allowance for judges", *Dawn*, 27 August 2004.
[165] Even with salary change only partially accomplished, some reform is feasible, as successful delay-reduction projects in NWFP demonstrate. ICG interview with ADB staff and Peshawar-based lawyers, Islamabad and Peshawar, August 2004. Asian Development Bank, *Evaluation Report for Annual Performance Review of Access to Justice Programme 2003* (Islamabad, May 2004), pp. 11-16.
[166] ICG interview with senior bureaucrat, Islamabad, August 2004.
[167] ICG interview with Peshawar High Court lawyer, Peshawar, August 2004. The new Chief Justice, Justice Nasir ul Mulk, is also seen as a genuine reformer.

perhaps better positioned to fulfil that role than executive officers, district and sessions judges are exposed to compromising pressures from political factions seeking to manipulate electoral results.

Provincial and national elections fall within the bailiwick of the national Election Commission composed of a Chairman and four commissioners who are judges from each of the four High Courts.[168] The present Chairman is retired Supreme Court Justice Irshad Hassan Khan, who rendered the May 2000 Zafar Ali Shah judgment. The Pakistan Bar Council argues that the position of Chief Election Commissioner was a "rewar[d]" for that judgment.[169] One former Justice of a High Court also commented that executive selection of the commissioners further undermines that independence.[170]

The Election Commission lacks resources to manage the election on the ground.[171] It must rely on other branches of the federal and provincial governments. Under present election laws and ordinances, "all executive authorities" are obliged to assist the Election Commission as needed in the election process.[172] Until the November 1988 elections, district magistrates, who held a combination of executive and judicial powers, managed the election as returning officers. From 1988, judges have played that role.[173] The returning officer is tasked with doing "all such acts and things as may be necessary for effectively conducting an election in accordance with the provision of [the election laws and ordinances]".[174] A returning officer receives candidates' nomination papers and ensures that candidates have the correct qualifications; objections to candidates based on their qualifications are lodged with returning officers.[175]

Before the October 2002 elections, General Musharraf issued an ordinance containing 10 qualifications, including being "of good character" and "sagacious, righteous and non-profligate".[176] Further, the law contains 17 grounds for disqualification, including "propagating any opinion, or acting in any manner, prejudicial to the Ideology of Pakistan".[177] These vague criteria leave returning officers considerable discretion.

Moreover, returning officers are responsible for approving the locations of polling stations and the lists of presiding officers, both furnished in the first instance by local government authorities.[178] Finally, although the presiding officers for individual polling stations are responsible for counting the votes, the returning officer consolidates results from all the polling stations and issues a public notification of final results.[179]

At minimum, the supervisory responsibilities associated with the post of returning officer have a significant toll on district and sessions judges' workload. One such judge noted: "For one month before and one month after the elections, we don't do much judicial work".[180] Moreover, judges usually minimise their social lives, to avoid contacts with potential litigants.[181] During an election, however, such contact is inevitable. One additional district and sessions judge observed that he had to interact with candidates and the nazim (mayor) of the district government, and afterward "people will come to court and claim to know you afterwards. Confidence in impartiality suffers".[182]

The electoral function is not merely a drain on scarce judicial resources. Returning officers have manifold opportunities to manipulate electoral results. In the view of former provincial bureaucrats who have supervised elections, the returning officer "doesn't

[168] The Election Commission Order, 2002 (Chief Executive Order No. 1 of 2002), Article 5.
[169] The Pakistan Bar Council, op. cit., p. 8.
[170] ICG telephone interview with Justice (r) Tariq Mehmood, former Justice of Balochistan High Court, 28 August 2004.
[171] Ibid.
[172] The Election Commission Order, 2002 (Chief Executive Order No. 1 of 2002), Article 9. See also the Representation of the People Act, 1976 (Act No. LXXXV of 1976), Article 5(1) ("All executive authorities of the Federation and in the Provinces shall render such assistance to the Commissioner and the Commission in the discharge of his or her functions as may be required of them by the Commissioner or the Commission").
[173] ICG interview with former district magistrate of Islamabad, Islamabad, 27 August 2004.
[174] The Representation of the People Act, 1976 (Act No. LXXXV of 1976), Article 7(4).
[175] The Conduct of General Election Order, 2002 (Chief Executive's Order No. 7 of 2002), Article 8E.
[176] Ibid., Article 8D(1).
[177] Ibid., Article 8D(2).
[178] Presiding officers will be regular employees of the provincial government, including school teachers, headmasters, and civil servants. The Representation of the People Act, 1976 (Act No. LXXXV of 1976), Articles 8 and 9, 7(4); ICG interviews with former bureaucrats and parliamentarians, Islamabad, August 2004.
[179] The Representation of the People Act, 1976 (Act No. LXXXV of 1976), Articles 38-42.
[180] ICG interview with additional district and session judge, NWFP, August 2004.
[181] ICG interview with former judge, Karachi, August 2004.
[182] ICG interview, Islamabad, August 2004.

need to do much", but rather needs only to ignore or fail to correct electoral manipulation by others.[183] Locations for polling stations thus can be selected to make voting difficult for one side.[184] Moreover, "everyone wants their sympathisers as presiding officers", noted one former executive magistrate, because presiding officers can slow down voting at polling stations in opposition strongholds, or allow multiple and fraudulent voting at locations where opposition parties have less of a presence.[185] A returning officer sympathetic to one political faction simply ignores such manipulation.

Consolidating votes for a constituency, the returning officer also comes under direct political pressure during the final hours of the election. According to opposition politicians, during the October 2002 election some returning officers were pressured during the final vote count to doctor results.[186]

The district and sessions judges who act as returning officers are assigned to their respective districts by the Chief Justice of the relevant High Court.[187] This administrative authority means the Chief Justice has yet another politically significant power. In the Punjab, a new Chief Justice was appointed on 7 September 2002, immediately prior to the 2002 national elections. Two days later, Lahore's district and sessions judge was replaced by the district and sessions judge from Bahawalnagar, who had earlier served in Lahore during the 1997 elections. New additional district and sessions judges were also appointed at Lahore, Bhakkar and Bahawalnagar in the Punjab. Ten days later, five more district and sessions judges were transferred.[188] In Chakwal district, also in the Punjab, for example, the district and sessions judge was changed prior to the election. "The previous judge had a reputation for honesty", observed a local journalist, whereas the new judge was "someone whose flexibility was noted".[189]

The Chief Justice can also influence appeals from contested elections. One member of the Pakistan Muslim League (Nawaz) reported that in some constituencies in the Punjab, the Lahore Chief Justice brushed aside charges of election fraud in the October 2002 election and notified election results despite a suspension of notification by the Election Commission and an ongoing dispute.[190]

Despite these problems, politicians and bureaucrats agree that the present system is a substantial improvement on the pre-1988 system in which district magistrates, responsible directly to the executive, supervised the election.[191] Indeed, some opposition parliamentarians argued that they would not have been elected had an executive official, rather than a judge, been the returning officer. Gains to electoral fairness, nevertheless, come at the cost of damage to judicial independence. Because supervisory responsibilities fall at the Chief Justice's feet, remedying political influence over judges when they act as returning officers is, as with so many other issues, a question of minimising executive capture of the office of Chief Justice. Subjecting the selection of the Chief Election Commissioner to parliamentary scrutiny may also mitigate against undue political influence. In addition, restrictions on transfers of district and sessions judges in the run-up to elections would cap costs to judicial independence.

C. REFORM WITHIN THE SUBORDINATE JUDICIARY

Numerous projects are underway aimed at reducing delays, creating new facilities and improving citizens' access to the courts. These are being funded through a US$305 million structural adjustment loan linked to a technical-assistance loan and a technical-assistant grant from the ADB. Together, these constitute the "Access to Justice Program" (AJP).[192] $150 million of

[183] ICG interview with former senior provincial bureaucrats, Islamabad, August 2004.
[184] According to one former executive magistrate, who was responsible for supervising elections between the separation of the magistry from the executive, polling stations can be placed in effective no-go zones for women from one village or tribe. ICG interview, Islamabad, August 2004.
[185] Ibid.
[186] ICG interviews with Pakistan Muslim League-Nawaz [PML (N)] and Pakistan People's Party parliamentarians. Islamabad, August 2004.
[187] ICG interview with additional district and session judge, August 2004.
[188] ICG interviews with journalists, parliamentarians and former bureaucrats, Islamabad, August 2004**.** See also Human Rights Commission of Pakistan, *State of Human Rights 2002* (Lahore, 2003), p. 48.
[189] ICG telephone interview with Chakwal journalist, 27 August 2004.
[190] ICG interview with Ahsan Iqbal, Senior Vice-President of PML (N), Islamabad, 7 August 2004.
[191] ICG interview with parliamentarians and former bureaucrats, Islamabad, August 2004.
[192] See generally Asian Development Bank, *Evaluation Report for Annual Performance Review of Access to Justice Program 2003* (Islamabad, May 2004); ICG interviews with ADB staff, Islamabad, August 2004. According to senior

that loan has been released so far; another $100 million is due to be released by December 2004.[193] ADB, however, has registered some dissatisfaction regarding progress in areas like police reform.[194]

In the words of one donor, AJP contains "everything under the sun".[195] The most recent survey of expected and current projects includes measures as varied as enhanced continuing legal education, judicial salary reform, a new independent prosecution service, changes to the code of criminal procedure, delay-reduction projects, citizen-court liaison committees, district ombudsman, and small causes courts.[196] Notably absent are two particularly politically sensitive aspects of judicial reform -- any reform of the High Courts and the investigation or prosecution of judicial corruption in either the subordinate or the superior courts.[197] The AJP thus skirts core issues in judicial reform.

Moreover, the AJP depends on leadership from the High Court. The High Courts have constitutional responsibility to "supervise and control all courts subordinate" to them.[198] Concerning corruption, the High Courts typically exercise that supervisory function through "Member Inspection Teams", which "monitor and assess court work of the District Judiciary" under the auspices of the Chief Justice.[199] Such teams, however, are handicapped as long as senior High Court judges are amenable to corruption. Progress on the key problems within the subordinate judiciary thus depends on reform of the High Courts.

One area in which reform may face fewer political obstacles is commercial law. Prominent lawyers in Islamabad and Karachi report that commercial transactions are inhibited by uncertainty about both the state of law and the quality of judges.[200] Judicial opinions contain "systematic flaws in logic", explained one Islamabad-based corporate lawyer, that prevent the kind of planning necessary for sophisticated deals. Dedicated commercial benches exist in Karachi but have had little impact to date.[201]

Businesses seeking certainty may have recourse to commercial arbitration, an alternative to judicial resolution, under laws enacted in 1937 and 1940. Indeed, curbs on legal practice by former judges entail that at least one former justice of the Supreme Court has a thriving arbitration practice.[202] Despite the availability of arbitration forums within Pakistan, as well as internationally, lawyers explain that arbitration awards remain difficult to enforce in Pakistan's courts. Such enforcement proceedings "can drag on excessively".[203] Even with an award, explained one Karachi-based lawyer, "foreign clients don't want to go to court; they just settle".[204]

Not only do opportunities for reform exist in this are, but the commercial bar is also a powerful constituency for such reform. One area where reform began but has stalled is the recognition and enforcement of foreign arbitral awards. Pakistan signed, but has not ratified, the New York Convention on the Recognition, and Enforcement of Foreign Arbitral Awards 1958. Ratification should facilitate flows of foreign direct investment both in and out of the country.[205] No other signatory state has failed to ratify the treaty. Although

government officials, the AJP was slated to be about US$200 million less until the terrorist attacks of 11 September 2001 in the U.S. changed geostrategic priorities. ICG interview with senior federal bureaucrat, August 2004.

[193] $100 million was released in 2001 and $50 million in 2002. ICG interview with ADB staff, Islamabad, November 2004.

[194] ICG interview with Justice (r) Mansoor Ahmad, Secretary, Ministry of Law, Justice and Human Rights, Islamabad, 31 August 2004. See also "ADB concerned over unused funds: Aid for judicial reforms", *Dawn*, 29 October 2004; Intikhab Hanif, "ADB loan seen expediting police reforms", *Dawn*, 21 August 2003; "Access to Justice Program", at http://www.pakistan.gov.pk/law-division/ policies/ajp.htm.

[195] ICG interview with staff of donor government assistance agency, August 2004.

[196] See generally ADB, *Evaluation Report for Annual Performance Review of Access to Justice Program 2003* (Islamabad, May 2004).

[197] Much early resistance to the project, indeed, came from the High Courts, particularly the Lahore High Court, rather than the federal government, which was eager for the injection of new funding. ICG interview, Islamabad, August 2004; Human Rights Commission of Pakistan, *State of Human Rights 2002* (Lahore, 2003), p. 49.

[198] 1973 Constitution of Pakistan, Article 203.

[199] *Peshawar High Court Annual Report 2003* (Peshawar, 2004), p. 23; see also *Lahore High Court Annual Report 2003* (Lahore, 2004), pp. 57-58.

[200] ICG interviews with commercial lawyers, Islamabad and Karachi, August 2004.

[201] See ADB, *Evaluation Report for Annual Performance Review of Access to Justice Program 2003* (Islamabad, May 2004), p. 83.

[202] ICG interview with former Supreme Court justice, Karachi, August 2004.

[203] Remarks of U.S. Ambassador to Pakistan Nancy Powell, quoted in "U.S Envoy Urges Attention to Pakistani Business Practices", at http://usinfo.state.gov/ei/Archive/2004/Jan/07-980601.html

[204] ICG interview, August 2004.

[205] ICG correspondence with Tariq M. Rangoonwala, Chairman, International Chamber of Commerce, Pakistan

the cabinet in January 2004 decided to approve implementing legislation for the treaty, it has not been presented to parliament. According to the Federal Minister of Commerce, the January 2004 cabinet resolution counts as a ratification,[206] but members of the business community remain concerned by the legal uncertainty. To clarify the treaty's status under Pakistani law, legislative approval is necessary.

D. WOMEN AND RELIGIOUS MINORITIES BEFORE THE SUBORDINATE JUDICIARY

Apart from corruption and political interference, the subordinate courts often fail to give adequate hearings to women and religious minorities like Christians and Ahmadis. "In the lower judiciary", observed one prominent women lawyer, "women clients are afraid of senior lawyers and judges, many of whom sexually harass them".[207] According to a women civil judge, being on the other side of the bench is no deterrent to discriminatory behaviour, particularly given the lack of security arrangements for judges.[208] Attitudes, nevertheless, vary greatly. Some male judges are sensitive to gender concerns while some female judges are "hardly gender-sensitive".[209] Studies by the ADB also have identified numerous barriers to entrance to the profession arrayed against women, including the difficulty of accessing education, particular at evening colleges, and problems of long hours and inadequate physical security.[210]

Discrimination against religious minorities, which is pervasive throughout Pakistani society, is also evident in the subordinate courts. Christian lawyers, for example, may be confronted with the assertion that a non-Muslim cannot represent a Muslim in court, and is thus excluded from judicial proceedings.[211] Discrimination against Ahmadis has had a constitutional imprimatur since Zulfikar Ali Bhutto's second amendment to the 1973 Constitution, which pronounced Ahmadis to be non-Muslims.[212] One Ahmadi lawyer explained,"judges are reluctant to give a judgment for an Ahmadi, especially if there is a religious tinge to the case". He cited cases where property is claimed to be exempt from seizure for public use because of its religious use by an Ahmadi community, and blasphemy cases in which an Ahmadi is charged because of his or her utterance of Koranic language.[213] Both Christian and Ahmadi lawyers reported direct pressure through mob protests at the courtroom and threats against presiding judges.

Training to avoid discriminatory behaviour and punishments for such discriminatory behaviour are in short supply. The Federal Judicial Academy in Islamabad now has a component in its in-service training for judges on gender. The director of that institution, however, described gender sensitisation as "a cliché", and stated that training at present focuses on the legal rights of women.[214] More substantial training is hence needed on issues related to the attitude and deportment of judges pertaining both to women and to minorities. Furthermore, the government has also failed to execute a recommendation of the National Commission on the Status of Women that one third of key subordinate judiciary positions, including district and sessions judge, additional district and sessions judge, and civil judge, be reserved for women.[215]

[206] "ICC Pakistan statement for 'A symposium on the implications of a potential US-Pakistan Bilateral Investment Treaty'", Karachi, September 2004, p. 1.
[207] ICG interview with Rukhshanda Naz, Aurat Publication and Information Service Foundation, Peshawar, 24 August 2004.
[208] ICG interview with civil judge, Lahore, August 2004.
[209] ICG interview with lawyers and journalists, Karachi, August 2004.
[210] ADB and Ministry of Law, Justice and Human Rights, op. cit., pp. 347-48.
[211] ICG interview with Christian lawyers, Lahore, August 2004.
[212] Khan, op. cit., p. 517. For discussion of the blasphemy laws, see Amjad Mahmood Khan, "Persecution of the Ahmadiyya Community in Pakistan", *Harvard Human Rights Journal*, (Vol. 16, 2003), p. 217; Human Rights Commission of Pakistan, *State of Human Rights in 2003* (Lahore, 2004), pp. 71-77.
[213] ICG interview with Ahmadi lawyer, Islamabad, August 2004.
[214] ICG interview with Chaudhry Hasan Nawaz, Director-General of Federal Judicial Academy, 25 August 2004.
[215] Human Rights Commission of Pakistan, *State of Human Rights 2002* (Lahore, 2003), p. 48.

VII. PARALLEL COURT STRUCTURES

Despite shortfalls in funding and staffing within the ordinary court system, successive Pakistani governments have established parallel judicial structures under Article 212 of the 1973 Constitution.[216] Some parallel courts have jurisdictions defined by subject-matter. Specialised courts for banking, customs and excise, and tax matters operate without raising significant concerns; indeed, commercial lawyers posit the need for new courts designated solely for commercial matters to improve the low quality of judgments in that field.[217] The accountability and anti-terrorism courts, however, deal with criminal matters. Heightened concerns about prosecutorial selectivity and procedural fairness arise under the laws establishing those courts. Little justification exists for distinct courts for particular criminal offences; rather, such parallel structures invite abusive prosecutions.

Other parallel courts, including tribunals used in the Federally Administered Tribal Areas and the Northern Areas, operate largely free from superior-court oversight. Vulnerable to arbitrary executive authority and imposition of martial law, residents of those areas can have little confidence in the rule of law. While distinct legal regimes for FATA and the Northern Areas can be justified in legalistic, constitutional terms, little can be said to justify the tight control wielded by the federal government over the judiciary in those areas.

A. THE NATIONAL ACCOUNTABILITY BUREAU AND ACCOUNTABILITY COURTS

Pakistan's legislature first enacted anticorruption measures in 1947; subsequent anticorruption measures followed in 1958, 1963, 1977, 1996, and 1997.[218] Passed during Nawaz Sharif's second government, the 1997 *Ehtesab* (or Accountability) Act created "a powerful investigative unit, the *Ehtesab* Cell", with investigative powers, and stipulated that cases would be heard before a divisional bench of the High Court.[219] From its beginning, that legislation was a partisan weapon. Within about five months of the act's passage, twelve references had been filed against Benazir Bhutto, her husband Asif Ali Zardari and her political allies; the Pakistan People's Party retaliated by filing references against Sharif and his supporters.[220] "Basically, the *Ehtesab* Law was a re-enactment of the old laws", explained a Lahore-based lawyer who had been a prosecutor for the *Ehtesab* Cell, "but the chief *Ehtesab* officer alone had power to file a complaint".

Scarcely a month after the 12 October 1999 military coup, the Executive issued the National Accountability Ordinance, repealing the 1997 Act. That ordinance created a new agency, the National Accountability Bureau or NAB, charged with enforcing a new schedule of corruption-related offences through a separate system of accountability trial courts.[221] Those courts are staffed with district and sessions judges who are qualified to be judges of a High Court, and who are appointed for three years by the President with the relevant High Court Chief Justice's consultation.[222]

On its face, the NAB Ordinance aims to expedite the criminal process, with section 16 of the new law stipulating that trials must be completed within 30 days. Yet few trials wrap up within that period.[223] By vesting tremendous power in the NAB Chairman and by failing to provide procedural mechanisms or training to facilitate delay reduction, the clearest outcome of the law is instead to create a heavy-handed parallel prosecutorial apparatus that can be used to intimidate and harass political opponents, just as the *Ehtesab* Act was used under Nawaz Sharif's second government.

Among his many powers, the NAB Chairman has sole power to initiative prosecutions, to make arrests, to transfer cases from the ordinary courts to accountability courts, to freeze property, and to compel

[216] Article 212 of the 1973 Constitution allows establishment of "Administrative Courts and Tribunals". And Article 175(1) allows for the creation of "such other courts as may be established by law".

[217] ICG interview with commercial lawyers, Islamabad and Karachi, August 2004.

[218] The Act was entitled the Public and Representative Offices (Disqualification) Act, 1949. See Khan Asfandyar Wali v. Federation of Pakistan, PLD 2001 Supreme Court 607, 670.

[219] S.M. Zafar, "Constitutional Developments in Pakistan, 1997--99", in Craig Baxter and Charles H. Kennedy, eds., *Pakistan 2000* (Karachi, 2001), pp. 10-11; ICG interview with NAB prosecutor, Lahore, August 2004.

[220] Zafar, op. cit., p. 11.

[221] National Accountability Ordinance, 1999, Ordinance No. XVIII of 1999, §9.

[222] Khan Asfandyar Wali v. Federation of Pakistan, PLD 2001 Supreme Court 607, 883-884.

[223] Lawyers noted that they had cases pending for upward of three years. ICG interview with defence lawyers, Karachi and Lahore, August 2004.

banks and financial institutions to disclose documents.[224] After arrest, a suspect can be held for 90 days. Although the Government must seek extensions every 15 days within that 90-day period, those requests are a mere formality.[225] No bail is available.[226] Unlike other criminal offences, no commuting of a sentence is possible.[227] Critically, for the first time in Pakistan's legal history, an executive agency, NAB, can also negotiate plea bargains. Section 25 of the NAB Ordinance allows the NAB Chairman to accept an accused person's acknowledgement of guilt and return of stolen funds in return for the accused's release and dismissal of charges. In 2001, the Supreme Court upheld, with minor modifications, the NAB Ordinance, validating NAB's plea-bargaining powers and the system of accountability courts distinct from the ordinary district and sessions courts.[228]

Defence lawyers practicing in the accountability courts identify several obstacles to a fair proceeding.[229] At the threshold, lawyers highlight the separateness of NAB proceedings. Trials are conducted in distinct buildings, and only the accused, his lawyer, and with the court registrar's permission, family members can attend. The judge is conscious of the tight 30-day timeframe. Even though that timeframe is rarely satisfied, lawyers report that "judges feel under pressure to move quickly".[230] The atmospherics of accountability proceedings, in short, tilt the trial toward the government. The government, moreover, selects the judge in consultation with the provincial Chief Justice. Appointment to an accountability court may be a reward for a favoured judge who would otherwise be mandated to retire, a reward that may predispose a judge toward conviction.[231]

Further, the plea-bargaining process, which is unconstrained by precedents or clear guidelines, transpires without judicial scrutiny even while the defendant is subject to up to 90 days of pre-trial imprisonment without bail. At that time, defendants are hardly in a condition to make a reasoned, independent choice. Judicial approval when a plea agreement is reached, in one defence lawyer's words, is "a formality".[232] At trial, the prosecution also has procedural advantages, including a derogation from the presumption of innocence: when it is proved that a defendant has accepted or obtained a gift or pecuniary advantage, the judge is entitled to presume illicit motive.[233] Unsurprisingly, lawyers estimate that the conviction rates in accountability courts are higher than in district courts, but note that the High Courts vacate judgments in a meaningful number of cases.

The NAB, moreover, is seen as an extension of the military.[234] It is headed by a lieutenant general, Munir Hafiz. Provincial branches are headed by two-star major generals serving in uniform. Since its inception, military officers have dominated its staff. The prosecutorial policy of the NAB, which reaches serving politicians but which excludes serving army officers and serving judges, furthers the political goals of the military. Prosecutions against politicians, who have reached agreements with the military, like the former Interior and current Federal Minister for Kashmir Affairs and Northern Areas, Makhdoom Faisal Saleh Hayat, are kept in abeyance.[235] By contrast, cases against those out of political favour, like Asif Ali Zardari, are pursued vigorously, with pressure seemingly placed on a judiciary that may be inclined to acquit on some charges.[236] Given their pro-

[224] National Accountability Ordinance, 1999, Ordinance No. XVIII of 1999, §§12, 6A, 18, 19, 24.
[225] ICG interview with NAB prosecutor, Lahore, August 2004.
[226] ICG interview with defence lawyer, Lahore, August 2004. See National Accountability Ordinance, 1999, Ordinance No. XVIII of 1999, §9(b). The High Courts have power to grant bail under their constitutional writ jurisdiction, contained in Article 199 of the 1973 Constitution. The stringent conditions for such constitutional relief, however, militate against that avenue being frequently employed.
[227] ICG interview with defence lawyer, Lahore, August 2004.
[228] Khan Asfandyar Wali v. Federation of Pakistan, PLD 2001 Supreme Court 607, 931-932.
[229] ICG interviews with defence lawyers, Lahore and Islamabad, August 2004.
[230] ICG interview with defence lawyer, Lahore, August 2004.
[231] A judge otherwise slated for retirement who continues in the NAB courts benefits from income and additional benefits, such as a chauffeur-driven vehicle, not furnished to retirees.
[232] Plea-bargaining is typically justified by the presumption that its outcomes roughly reflect the substantive outcomes that would occur at trial; defendants and the government, that is, bargain "in the shadow" of the trial. Even in a system with relatively high resource and competence levels like the United States, however, there is reason to believe that skewed structures of representation and funding undermine the "accuracy" of plea bargained results. See Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial", *Harvard Law Review*, (Vol. 117, 2004), pp. 2545-47. Where levels of professionalism are lower and the probability of a procedurally adequate trial less, as in Pakistan, even less confidence is warranted in the outcomes of plea-bargaining.
[233] National Accountability Ordinance, 1999, Ordinance No. XVIII of 1999, §14.
[234] ICG interviews with government and private lawyers, Lahore and Islamabad, August 2004.
[235] ICG interview with defence lawyer, Lahore, August 2004.
[236] ICG interview with Senator Farooq Naik, counsel for Asif Ali Zardari, Karachi, August 2004.

establishment bias, NAB and the accountability courts are understandably viewed by the public with scepticism, despite the widely shared sentiment that many politicians, including those targeted by NAB, are corrupt. It is telling that no one, including members of the present administration, endorses the extension of accountability courts' jurisdiction as a way of dealing with the problem of judicial corruption.

Until recently, NAB prosecutions had been limited to allegedly unlawful acts committed while a defendant held a public office. In May 2003, however, the Lahore High Court substantially expanded the ambit of the NAB ordinance by holding that a defendant could be tried in an accountability court for acts committed while that defendant held no public office.[237]

As mission creep causes the NAB to overlap to an even greater extent with the ordinary courts, the need to question the value of an independent trial-court system becomes more pressing. There is no reason why speedier trials could not be achieved within the framework of the ordinary courts. Chief Justices of the High Courts have ample authority to issue orders and allocate resources to ensure timely outcomes without compromising procedural adequacy. In one prominent lawyer's words: "Why apply NAB when corruption laws still exist and courts still exist, and then only in certain cases?"[238] Each of Lahore's five accountability courts spent between Rs.1.1 and 1.7 million (between $18,333 and $28,333) in the twelve-month period beginning in July 2002.[239] Quite apart from introducing unwelcome prosecutorial discretion and procedural anomalies, the accountability courts are a superfluous financial burden for the already hard-pressed Pakistani judiciary.

B. ANTI-TERRORISM COURTS

The second Nawaz Sharif government in 1997 introduced anti-terrorism courts in their present form soon after its accession to power.[240] Enacted after sectarian violence in the Punjab and Sindh had accelerated, the measure was part of a raft of law-enforcement measures targeting terrorism.[241] In addition to authorising new courts, the government broadly allowed the use of military force against alleged terrorists and permitted warrantless searches based on the "reasonable" suspicion of a police or military officer.[242] In 1998, the Supreme Court invalidated sections of the 1997 Anti-Terrorism Act. While authorising the use of so-called Special Courts for the schedule of offences contained in the 1997 Act, the Supreme Court insisted that an appeal to a High Court must be available.[243] A year later, the Court further held that the establishment of military courts to try civilians under the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 (Ordinance XII of 1998), was unconstitutional, and that cases before military courts must be transferred to the civilian anti-terrorism courts.[244]

Like accountability courts, the anti-terrorism courts may be staffed with district and sessions judges, with most appointments being made from the ranks of additional district and sessions judges. Also like accountability courts, anti-terrorism courts are not open without restriction to the public and are tasked with completing trials within a limited period (seven days).[245] Judges and prosecutors operate under the same psychological pressures, pressing toward convictions as in the accountability courts. Furthermore, an anti-terrorism court sits at a venue determined by the federal government, unlike ordinary district courts.[246] Anti-terrorism proceedings have taken place in prisons, an environment hardly conducive to a proper defence.[247]

Especially problematic is the unencumbered discretion police have to decide whether to bring cases in the ordinary courts or in the anti-terrorism courts.[248] The Anti-Terrorism Ordinance provides a sweeping

[237] Ch. Zulfiqar Ali v. Chairman, NAB, PLD 2003 Lahore 593, 603-610.
[238] ICG interview with Abid Hassan Minto, government's counsel in the Khan Asfandyar Wali case, 11 August 2004.
[239] National Judicial Policy Making Committee, *Administrative Tribunals and Special Courts Annual Reports 2002* (Islamabad, 2003), pp. 85-86.
[240] Zafar, op. cit., p. 15; Anti-Terrorism Act 1997, Act No. XXVII of 1997.
[241] See Amnesty International, "Legalizing the Impermissible: The New Anti-terrorism Law" (London, 1997), p. 1.
[242] Anti-Terrorism Act 1997, Act No. XXVII of 1997, §§5 and 10.
[243] Mehram Ali v. Federation of Pakistan, PLD 1998 Supreme Court 1445, 1489-1490. The Court also held that confessions, to be admissible, must be taken by a judicial magistrate rather than a police officer. Ibid., p. 1491.
[244] Sh. Liaquat Hassan v. Federation of Pakistan, PLD 1999 Supreme Court 504.
[245] ICG interviews with defence lawyers, Lahore, August 2004.
[246] Anti-Terrorism Act 1997, Act No. XXVII of 1997, §15(2).
[247] For example, see "Prosecution ends arguments in blast case", *Dawn*, 14 August 2004, p. 17.
[248] ICG interviews with lawyers and NGO staff members, Lahore, August 2004.

definition of terrorist offences, one that can be applied to almost any violent crime. The ordinance includes within the ambit of terrorist acts "violence against a person" or to property that "create[s] a sense of fear or insecurity in society".[249] In one case of multiple rape, for instance, the prosecution argued that the crime had "caused [a] widespread sense of insecurity and harassment [sic] in society".[250] In another case, a former head of a security service brought a case against a journalist, arguing that the latter's stories about financial corruption in the military constituted acts of terrorism.[251] Charges initially framed as ordinary criminal offences also are re-characterised before trial as terrorism charges.[252] In particular, the anti-terrorism legislation has been used against Ahmadis.[253]

In short, the anti-terrorism courts, like the accountability courts, give the federal government unwarranted procedural shortcuts and a tool with which to coerce suspects. The federal Secretary of Law defends special tribunals by reasoning that they are part of the regular court structure, not deviations of resources, since judges from the ordinary courts staff them.[254] This line of reasoning, however, ignores the need for separate funding for facilities and administration. Scant too is evidence that accountability or anti-terrorism courts yield an aggregate increase in the amount of timely justice delivered, as opposed to simply racking up convictions in cases where the federal government has an interest. Given the undisputed need for more resources for the ordinary court system, little justification exists for diverting funds and personnel to parallel systems, even if the establishment of the latter provides short-term political gain.[255]

C. THE FEDERALLY ADMINISTERED TRIBAL AREAS

Stretching along Pakistan's western border lie the seven agencies, populated mainly by Pashtun tribes, which make up the FATA.[256] Although part of the formal territory of Pakistan and allotted seven seats in the National Assembly, the FATA is subject to a distinct, colonial-era regime. Superior courts have no jurisdiction over FATA, due to Article 247(7) of the Constitution.[257] Instead, concentrating judicial and executive power in a single authority, the judicial regime of the FATA provides little transparency or check on arbitrary power.[258]

The FATA is governed from Islamabad by the federal government under the 1901 Frontier Crimes Regulation (FCR), a set of imperial-era British laws designed for expeditious, not just, governance of unruly frontier areas.[259] Under that law, executive officers, called the Deputy Commissioner and the Commissioner, "were empowered to eradicate villages, to detain members of a hostile tribe, and to refer criminal cases like murder, to a council of elders".[260]

Police, administrative and judicial powers in FATA are now held by the political agent, a bureaucrat, appointed by the Governor of NWFP as a representative of the President.[261] Typically, the political agent is not native to the FATA. Those

[249] Anti-Terrorism Act 1997, Act No. XXVII of 1997, §6(1)(b) and (2)(b)-(c).
[250] "Defence plea for case shifting dismissed", *Dawn*, 25 August 2004, p. 5. See also Human Rights Commission of Pakistan, *State of Human Rights in 2002* (Lahore, 2003), p. 74 (noting use of antiterrorism courts by police officers seeking to evict peasants from their land).
[251] ICG interview with Mak Lodhi, journalist, Lahore, 10 August 2004. The case was dropped after the paper in question hired the country's top defamation and human-rights lawyers and published an apology.
[252] ICG interview with NGO staff, Islamabad, August 30, 2004
[253] ICG interview with I.A. Rehman, Director, Human Rights Commission of Pakistan, 9 August 2004; ICG interview with Ahmadi lawyer, Rawalpindi, 26 August 2004.
[254] ICG interview with Justice (r) Mansoor Ahmad, Secretary, Ministry of Law, Justice and Human Rights, Islamabad, 31 August 2004.
[255] ICG interview with Senator Latif Khosa, Lahore, August 2004.

[256] The FATA includes seven districts or agencies, South Waziristan Agency, North Waziristan Agency, Kurram Agency, Orakzai Agency, Khyber Agency, Mohmand Agency, and Bajaur Agency. It also includes areas adjoining Peshawar, Kohat, Bannu, and Dera Ismail Khan districts. See 1973 Constitution of Pakistan, Article 246(c).
[257] "Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area" absent legislative approval, 1973 Constitution of Pakistan Article 247(7); see Chaudhari Manzoor Elahi v. Federation of Pakistan, PLD 1975 Supreme Court 66 (same).
[258] The provincially administered tribal areas, or PATA, however, are now subject to the jurisdiction of the regular Pakistani courts. The PATA have district and sessions courts, like the remainder of Pakistan, from which appeals are heard in the High Courts and the Supreme Court. See *Peshawar High Court Annual Report 2003* (Peshawar, 2004), p. 23.
[259] ICG interviews with lawyers practicing in Peshawar, August 2004. See also 1973 Constitution of Pakistan, Article 247(1).
[260] *Peshawar High Court Annual Report 2003* (Peshawar, 2004), p. 22.
[261] ICG interview with Afrasiab Khattak, Advocate, former chairperson and current Council member, Human Rights Commission of Pakistan, Peshawar, 23 August 2004.

appearing before the political agent in his capacity as district magistrate have no right to counsel. A political agent can impose sentences as long as 15 years; no death sentence, however, can be imposed.[262] No right of appeal to the Peshawar High Court or the Supreme Court exists for those convicted by a political agent.[263] Instead, an appeal can be made first to an FCR Commissioner, who is a Peshawar-based bureaucrat appointed by the NWFP Governor. A further appeal is then available to the law secretary and the home secretary of the province. Given the skeletal guidance given by the FCR on substantive criminal rules, the review exercised by these bodies is necessarily narrow. Indeed, one Peshawar-based lawyer who has appeared before that committee explained that the two secretaries asked him to talk only of the facts of the case, and not the law, because there was no relevant law. Further, "bureaucrats are used to safeguarding their own interests", one observer of FCR proceedings noted, "It's rare for them to provide any relief on their own".[264]

According to lawyers familiar with the FCR's operation, a political agent, under section 40 of the FCR, has power to impose up to three years of preventive detention.[265] The FCR also allows collective punishment of tribes and villages through detentions and the seizure of property when, for example, a political agent has "good reason to believe" people have "failed to render all assistance in their power" to aid in apprehending suspects or when a village or tribe has suppressed evidence of an offence.[266] Conducting missions in North and South Waziristan Agencies in recent months, the Pakistani army collaborated with political agents and exercised collective-punishment powers under the FCR to demand that villages in those areas provide no support for militants and hand over militants. Some detained by the political agent were transferred to military custody, initially in Zarinoor Colony, near Wana, out of the control of the political agent.[267] Unsurprising, residents of FATA are apprehensive about going to a political agent, resolving most disputes at family or village level.[268]

The British, in drafting the FCR, made one concession to the tribal culture of the predominantly Pashtun FATA: a political agent may refer a case to a tribal council, or *jirga*, for resolution.[269] Because the political agent nominates the members of the *jirga*, who are known as *maliks*, he can create a forum that will arrive at the result he desires. In cases where neither the government nor the individual political agent has a stake, the *jirga* process can be quicker and contains more opportunities for disputants to air and negotiate their grievance than the ordinary judicial process.[270] Verdicts by *jirgas* are, however, more often a travesty of justice, favouring those with political or economic clout; and indisposed toward the most vulnerable segments of the population, particularly women.[271] As one NGO staff member pointed out, differences in culture provide scant reason for failing to provide the benefits of an independent judiciary to the FATA.[272]

These criticisms of the FATA regime are hardly new. In 2001, the federal government created a "FATA

[262] ICG interview with A. Afridi, Tribal Reforms and Development Forum of Kyber Agency, Peshawar, 23 August 2004.
[263] "No appeal shall lie from any decision given, decree or sentence passed, order made or act done, under any of the provisions of this Regulation". Frontier Crimes Regulation of 1901, §48.
[264] ICG interview with journalist, Peshawar, August 2004.
[265] ICG interview with lawyer, Peshawar, August 2004. On its face, section 40 of the FCR only permits the political agent "to require a person to execute a bond for good behaviour or for keeping the peace" for a period "not exceeding three years".
[266] ICG interviews with lawyers, Peshawar, August 2004. Frontier Crimes Regulation of 1901, §§21-24.
[267] ICG interview with Peshawar-based journalist, Peshawar, August 2004.
[268] ICG interviews with lawyers and community activists from FATA, Peshawar, August 2004.
[269] Frontier Crimes Regulation of 1901, §8.
[270] ICG interview with Maryam Bibi, Khwendo Kor, Peshawar, August 2004.
[271] See Human Rights Commission of Pakistan, *State of Human Rights in 2003* (Lahore, 2004), pp. 33-37, also Amnesty International, *Pakistan: The Tribal Justice System* (London, 2002). Although the Sindh High Court recently curtailed the use of *jirgas* out of concern for women's human rights, that judgment has had little impact even in Sindh. ICG interview with journalist, Karachi, 16 August 2004.
[272] ICG interview with Maryam Bibi, Khwendo Kor, Peshawar, August 2004. The Supreme Court, indeed, has already acknowledged this logic in a case concerning the use of FCR-like procedures in the tribal areas of Balochistan. In rejecting a justice system in which the executive, represented by a Deputy Commissioner, wielded inordinate authority, the Court explained that the "mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedures of criminal law, trial and detention which is enforceable in the entire country". See Government of Balochistan v. Azizullah Memon, PLD 1993 Supreme Court 341, 361. The Azizullah Memon judgment relied in part on the right to access to justice, as articulated in the Universal Declaration of Human Rights, Article 10, a right that has equal relevance in the FATA.

Reforms Committee" to review the region's legal and political organization. Among its recommendations, that committee suggested the separation of judicial and executive functions and the extension of a right of appeal to the High Courts and the Supreme Court.[273] Those recommendations, until now dormant, remain valid and pressing today.

D. THE NORTHERN AREAS

The Northern Areas comprises five districts to the north of the NWFP: Gilgit, Ghizer, Diamer, Skardu, and Ghanche. Part of the princely state of Jammu and Kashmir before 1947, those provinces are claimed now by both India and Pakistan.[274] The Northern Areas hence fall outside Pakistan's constitutional boundaries. In practice, the Minister for Kashmir Affairs and the Northern Areas governs them from Islamabad, but no representatives of the Northern Areas sit in the National Assembly.[275] NGOs working in the five districts report a heavy military presence there.[276]

The judicial hierarchy of the Northern Areas contains a lower judiciary comprised of three district and sessions judges, who hail from the area, and a single Chief Court, also staffed by two lawyers from the area.[277] The ordinances regulating the Northern Areas provide no criteria for the appointment of Chief Court judges, and no protection for their tenure except for that provided in the civil service law; the secretaries of the Minister for Kashmir Affairs and the Northern Areas and the Ministry of Law, Justice and Human Rights all can remove judges.[278] According to the Northern Areas High Court Bar Association, about 60% of cases before these judges involve the Minister for Kashmir Affairs and the Northern Areas as a party.[279]

In 1999, the Supreme Court held that residents of the Northern Areas possess the same fundamental constitutional rights as Pakistani citizens, that the Chief Court should have jurisdiction to enforce those rights, and that an appeal from the Chief Court to either the Supreme Court or another appellate tribunal must be made available.[280] The Supreme Court itself has only jurisdiction to enforce a limited category of fundamental rights in the Northern Areas.[281] On 8 November 1999, the government passed ordinances enlarging the Chief Court's jurisdiction and envisaging establishment of a Court of Appeals.[282] Five years later, no such tribunal exists. The Minister for Kashmir Affairs and the Northern Areas and the Attorney General of Pakistan nevertheless insist that the promised tribunal will soon be established.[283]

Even if established, however, the new Court of Appeals, as envisaged in the 1999 ordinance, lacks meaningful independence from the government. In particular, judges of the new court would lack security of tenure because they are appointed for renewable three-year terms.[284] The Minister for Kashmir Affairs and the Northern Areas, the secretary of that ministry or the secretary of the Ministry of Law, Justice and Human Rights can remove a judge simply by reporting misconduct on that judge's part. The Court of Appeals, as presently conceived, thus repeats design flaws of the Chief Court. To be effective, a reformed court system for the Northern Areas must have the same guarantees of judicial tenure as the ordinary court system.

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[273] Francois Tanguay-Renaud, "Post-Colonial Pluralism, Human Rights & the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan", *Singapore Journal of International and Comparative Law*, (Vol. 6, 2002), pp. 541, 590-92.

[274] Afzal A. Shigri, "Status of the Northern Areas", *The News*, 6, 30 August 2004.

[275] 1973 Constitution of Pakistan Article 1.

[276] ICG interview with NGO staff working in Gilgit, Islamabad, 30 August 2004.

[277] ICG interviews with Gilgit-based NGO staff, former policeman and Gilgit-based lawyer, Islamabad, August 2004; Northern Areas Council Legal Framework (Amendment) Order, 1999, §9 PLD 2000 Central Statutes 41.

[278] ICG interview with Afzal A. Shigri, 31 August 2004; Northern Areas High Court Bar Association, "An Analysis of Judicial Systems in Pakistan", Gilgit, pp. 1-5.

[279] Northern Areas High Court Bar Association, "Charter of Demands", Gilgit, p. 2.

[280] Al-Jehad Welfare Trust v. Federation of Pakistan, 1999 SCMR 1379; Ajmal Mian, *A Judge Speaks Out* (Karachi, 2004), pp. 333-34**.** All Pakistani citizens have the right to enforce fundamental rights in this manner under Article 184(3) of the Constitution.

[281] Pervez Iqbal v. Federation of Pakistan, 2004 SCMR 1334, 1338.

[282] Northern Areas Court of Appeals (Establishment) Order, 1999, PLD 2000 Central Statutes 46.

[283] ICG interview with Mahkdoom Ali Khan, Attorney General of Pakistan, Islamabad, 31 August 2004; ICG telephone interview with government staff, Gilgit, August 2004; "Northern Areas to have appellate court soon", *Daily Times*, 13 August 2004; "SC issues notice to attorney general", *Dawn*, 28 February 2004.

[284] Northern Areas Court of Appeals (Establishment) Order, §5(1), 1999, PLD 2000 Central Statutes 46.

VIII. CONCLUSION

Despite promises from Prime Minister Liaquat Ali Khan onwards, successive governments have paid scant attention to empowering the judiciary. Handicapped at birth by its unconstitutional and illegal origins, the present military government similarly has been unable to let the judiciary act independently. Benefiting from tools used by Generals Ayub Khan and Zia-ul-Haq, this government instead has purged the courts of independent judges and manipulated a putatively neutral system of appointments and promotions to ensure that its allies fill key positions. Commitment to the rule of law within the executive remains tentative, particularly on matters of national political authority.

Never a bulwark of strength in Pakistan's democratic order, the courts have buckled quickly. In keeping with its practice when confronted by military interventions in democratic politics in 1958 and 1977, the Supreme Court went out of its way, in the Zafar Ali Shah case, to endorse military rule and endow General Musharraf with the means to entrench his rule through extensive retooling of the 1973 Constitution. The court, in short, has been as much a handmaiden as a victim of democracy's decline since the 12 October 1999 coup.

Amendment of the rules for the appointment, promotion and removal of judges, either by legislative or constitutional changes, is no panacea. The government already has demonstrated its reckless disdain for constitutional norms and its willingness to deal expeditiously with judges with more scruples. Nevertheless, such changes are an initial and necessary step. The discretion vested by the present system in executive hands is abused. The judiciary needs at minimum a transparent appointment system that focuses on merit not political loyalty; a promotion system mechanical in its predictability and without discretion that could be manipulated by the executive; and a removal mechanism capable of identifying and addressing financial corruption. More than new systems, the existence of an independent judiciary depends on executive respect for constitutional norms.

In short, the state of the judiciary continues to be a measure of democracy's health and the existence of the rule of law in Pakistan. Just as it has taken years of assaults and neglect to degrade the judiciary, so the process of rebuilding institutional confidence and self-esteem will be a long and arduous one. After more than half a century of failing to make good on the promise of the Objectives Resolution, no excuses exist for delaying that process today.

Islamabad/Brussels, 10 November 2004

APPENDIX A

MAP OF PAKISTAN

Map No. 4181 Rev. 1 UNITED NATIONS
January 2004

Department of Peacekeeping Operations
Cartographic Section

APPENDIX B

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November 2004

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