

Report
On the ICJ Mission to Pakistan
Autumn 2011

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I Introduction

A The Mandate

The International Commission of Jurists (ICJ) is composed of 60 eminent judges and lawyers from all regions of the world, working to promote and protect human rights through the Rule of Law and to develop and strengthen national and international justice systems. The ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. The ICJ established an Asia Pacific Program (APP) with a regional office in Bangkok in 2006. In 2010 it developed a South Asia Program (SAP), which addresses the Rule of Law and human rights in a number of countries in the region, including Pakistan.

The country had been shaken by a series of dramatic governance crises with the unconstitutional usurpation of power by the Military on several occasions since it was founded in 1959. In this context the independence of the judiciary has been undermined, in particular by forceful removal of the Chief Justice. The constitutional order was restored in 2008 after successful protests by the Lawyers' Movement,¹ which were supported by a number of political parties and civil society groups.

A Mission on the independence of the judiciary and the Lawyers' Movement had been undertaken by the ICJ in 2007. The present Mission was to follow up that work. Its mandate was to assess and report on the nature and extent of this Rule of Law crisis and to make legal and policy recommendations in accordance with international principles and standards on the independence of the judiciary and the separation of powers.

Mr. Stefan Trechsel² and Mr. Graham Leung³ undertook the Mission which took place between 7th and 15th September 2011, with meetings in Karachi (twice), Lahore and Islamabad.

¹ The Lawyers' Movement was the name given to the popular mass protest movement started by the lawyers of Pakistan in response to the actions of 9 March 2007 by the country's president, general Pervez Musharraf when he unconstitutionally sacked Iftikhar Muhammad Chaudhry, the Chief Justice.

² Judge Stefan Trechsel (Switzerland) has been an ad litem Judge at the United Nations International Criminal Tribunal for the former Yugoslavia since April 2006. He is also a Professor Emeritus of Criminal Law and Procedure at the University of Zurich. Judge Trechsel was elected to the European Commission of Human Rights in 1975, later serving as its Vice-President (1987 to 1994) and President (1995 to 1999). He has also served as an independent expert of the Secretary-General of the Council of Europe on the issue of political prisoners in Azerbaijan. Judge Trechsel was a member of the ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights. He has also acted as counsel for the United States of America before the International Court of Justice in the LaGrand Case (Germany vs. the United States of America). He has authored several books with his most recent book entitled Human rights in Criminal Proceedings (OUP, 2005). Judge Trechsel obtained his law degree (1963) and PhD (1966) from the University of Bern.

³ Graham Leung (Fiji) is a former President of the Fiji Law Society and Chairman of the Electoral Commission of Fiji. He is a senior Vice President of Law Asia, a member of the Council of the Commonwealth Lawyers Association and an executive of the International Bar Association's Pro Bono and Access to Justice Committee. Mr Leung is the current Director of the International Commission of Jurist's Centre for the Independence of Judges and Lawyers (CIJL).

B The Method

1. General Observation

The Mission's approach was to meet with key actors and study primary resources to inform its assessment. Under the prevailing circumstances, this pragmatic approach was chosen with all its advantages and weaknesses. It is not intended as a scientific study conducted the methodological standards of empirical research.

2. Documents

One source of information, both accessible and reliable, is documents. We consulted legislative texts, in particular the Constitution of Pakistan, judgments of the Supreme Court and a variety of reports from governmental, inter-governmental and non-governmental sources, as well articles in the media.⁴

3. Interviews

The Mission also interviewed and consulted with a broad range of actors in the judiciary and legal profession, government and civil society. Amongst those whom the Mission met included Supreme Court Justices Jawwad Khawaja and Tassaduq Hussain Jilani, the Chief Justice of Lahore Ijaz Ahmed, Dr Babar Awan, former Federal Minister for Law, Justice and Parliamentary Affairs and current Vice-President of the Pakistan Peoples Party, Mr. Imran Khan, leader of Pakistan Tehreek-E-Insaf (Movement for Justice), Mr. Hamid Khan, and Ms Asma Jahangir then President of the Supreme Court Bar Association of Pakistan (SCBAP). However, there were also many informal conversations by members of the Mission with Pakistan lawyers and judges, particularly when they participated in a Regional Seminar entitled "Justice for All and Impunity for None" which was held from 9th to 11th September in Lahore. The seminar was organized by the SCBAP. As a number of interlocutors preferred not to be quoted, the Report will generally not identify the oral sources for any specific statement. The full list of persons who were interviewed at length by members of the Mission is attached as Annex A. There were several other members of the legal profession that members of the mission interacted with during the visit.

4. Visits

The Mission also visited a number of institutions including the High Court of Punjab in Lahore, the Supreme Court of Pakistan and the Parliament in Islamabad, as well as a number of lawyers' offices.

5. Standards of Reference

⁴ The following is a non exhaustive list of some of the literature reviewed:
Constitutional Legitimacy: A Study of the Doctrine of Necessity, Leslie Wolf-Phillips, Third World Quarterly, Vol. 1, No. 4 (Oct., 1979), pp. 97-133, World Report 2011: Pakistan, Human Rights Watch, Reforming the Judiciary, International Crisis Group, 2008, Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf, Selected works of Shoaib A. Ghias, January 2010, http://works.bepress.com/shoaib_ghias/doctype.html, Defending Dictatorship: US Foreign Policy and Pakistan's Struggle for Democracy, National Lawyers Guild Delegation to Pakistan and LUMS, Rule of Law Project, January 2008, <http://www.nlginternational.org/news/article.php?nid=101>.

The normative terms of reference for the Mission were the international law standards as set out in treaties and other instruments adopted within the framework of the United Nations, including the International Covenant on Civil and Political Rights (ICCPR), to which Pakistan is a party. Many of the essential elements regarding the administration of justice are to be found in Art. 14 of that Covenant. This provision has been interpreted authoritatively and extensively by the UN Human Rights Committee, established as the supervisory body for the ICCPR. Regard was also had to standards and jurisprudence from regional systems.

C Acknowledgments

Many people have provided valuable assistance to the Mission. We would in the first place like to thank the responsible official authorities in Pakistan for facilitating our visit to the country. It enabled the Mission to meet freely with members of Parliament, judges and other persons selected by us. We also wish to express our gratitude to the many persons who agreed to talk to us, to answer our questions and to express their opinion. Many opened their offices and their homes to us and also generously extended their hospitality. They are too numerous to name individually, but we have to mention Mr. Muhammad Afzal, Deputy Registrar of the Supreme Court, who prepared for us a comprehensive list of cases decided by that court *suo motu* while exercising its powers under Art. 184(3) of the Constitution which are discussed in Part IV (B) of this Report. The list of *proprio motu* cases provided by the Supreme Court (omitting the comments) is attached as Annex B.

At the same time, however, we cannot but state our deep regret at the fact that it was not possible, despite insistent efforts on our part, to meet with the Chief Justice Iftikhar Chaudhry. There can be no doubt that this Report would have drawn important benefits if it could have taken into account the views of the Chief Justice on some of the issues it dealt with.

Finally, particularly effective assistance was provided before, during and after the Mission to Pakistan by persons working for the ICJ. Without claiming to be complete, we mention Sheila Varadan, Jennifer Thambayah, Aiyan Bhutta, Asad Jamal and in particular Reema Omer.

II Background

A Federal Structure

Pakistan is a federal state composed of four Provinces: Balochistan (Quetta), Khyber Pakhtunkhwa (Peshawar), Punjab (Lahore), and Sindh (Karachi). In addition there are four other recognised units: Islamabad Capital Territory (Islamabad), Federally Administered Tribal Areas (FATA), Azad Kashmir (Muzaffarabad), and Gilgit-Balkistan (Gilgit). The jurisdiction of Pakistan's superior courts is not extended to FATA, thus denying citizen's access in the enforcement of fundamental rights guaranteed in the Constitution. Azad Kashmir has its own judicial hierarchy. According to Art. 142 of the Constitution the Provinces have the power to legislate on any matter not specifically within the competence of the Federal Parliament (Majlis-e-Shoora). Art. 142 (b) of the Pakistan Constitution provides in this respect

that “Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence”.

B The Constitution

1. History

When Pakistan achieved independence in 1947, the (British) “Government of India Act (1935)” served as the country’s Constitution. A Pakistani Constituent Assembly then elaborated an autonomous constitution in 1956 which was short-lived and was abolished in 1958. President Ayub Khan promoted a new Constitution in 1962, which he abrogated in 1969 when martial law was imposed. It was Zulfikar Ali Bhutto who, after the division of the country, promoted the drafting of the present Constitution which finally came into effect on 14 August 1973. Since that time, 19 amendments have been adopted. Some of these amendments made several changes to the Constitution through one single amendment, for example, under the 18th and 19th Amendments.

The text of the Constitution is composed of 12 parts, beginning with setting out fundamental rights, continuing with the basic organization of institutions and covering specific areas such as finance (Part VI), the judicature (Part VII) or Islamic provisions (Part IX).

2. Basic Principles of Organization

Pakistan is a parliamentary democracy. The President is Head of State (see Arts. 41 ss of the Constitution). The President is elected by an electoral college consisting of Members of the two Chambers of the Federal Parliament and of the Provincial Assemblies. The President must be a Muslim.

Majlis-e-Shoora (the Parliament) consists of the President and two Houses to be known respectively as the National Assembly and the Senate (Arts. 50 ss. of the Constitution). The Assembly has 342 seats “including seats reserved for women and non-Muslims.” A fixed number of seats are allocated to FATA and the Federal Capital units, with 10 extra seats reserved for non-Muslims. The Senate is composed of 104 members elected in six categories which include “technocrats” and women. The Prime Minister is elected by the Assembly. The Eighth Amendment to the constitution expanded the articles of the constitution to place stringent qualification standards for Parliamentarians to qualify as members.⁵ Parliamentarians are by law expected not to violate Islamic injunctions and to practice all Islamic obligatory duties. They must be “sagacious, righteous, non-profligate, honest” and should not oppose the ideology of Pakistan. The Constitution dedicates Part VII, Arts. 175-212B, to the “Judicature”: The Supreme Court, the five High Courts and the Federal Shariat Court.

C The Organization of the Judiciary

⁵ The Eighth Amendment was passed by military dictator Zia ul Haq, see article 62 of the constitution.

1. The Courts of First Instance

The Constitution of Pakistan does not mention district or other courts of a level below the High Courts. This lies within the competence of the Provinces.

2. The High Courts

Pakistan has five High Courts (Arts. 175, 192-203), one for each Province and one for the Islamabad Capital Territory. Each High Court has its seat in a city and benches in various other towns as well. They may also hold circuit courts. The jurisdiction of the High Courts is subsidiary to any other possibility of appeal “if it is satisfied that no other adequate remedy is provided by law”. High Courts may, upon application by an aggrieved Party, order that officials of the Federation, the Province or a local authority refrain from unlawful activities and annul unlawful administrative acts. It can rule on *habeas corpus* appeals and generally enforce fundamental rights⁶. Furthermore it shall supervise and control all subordinate courts. It also serves as the appellate court in a vast number of civil and criminal disputes. The High Court’s appellate jurisdiction is ousted for crimes that fall specifically under the appellate jurisdiction of the Federal Shariat Court, but under the same offences the High Courts may entertain bail petitions.

3. The Supreme Court

The Supreme Court (Arts. 175, 176-191) consists of the Chief Justice and a number of judges determined by Parliament, currently 17. If it is necessary to have additional judges, the Chief Justice, in consultation with the Judicial Commission, may nominate *ad hoc* Judges for a limited period of time. As a matter of original and exclusive jurisdiction the Supreme Court decides on disputes between National and provincial Governments, but it can only pass declaratory judgments in such cases.

The Supreme Court shall also “if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order” within the meaning of Art. 199, which gives High Courts jurisdiction to pass orders for the implementation of fundamental rights.⁷ This aspect of the Supreme Court’s activity will be discussed further in Chapter IV of this Report. Furthermore, the Supreme Court acts as an appellate court in a number of eventualities⁸ and gives advisory opinions, if so requested by the President.⁹

4. The Federal Shariat Court

The Constitution also establishes a Federal Shariat Court (Arts. 203A-203J) composed of eight Muslim members of which the Chief Justice must be qualified to be a judge of the Supreme Court or has been or is a permanent judge of a High Court. At least four judges must be qualified to be a Judge of the High Court and not

⁶ Habeas Corpus petitions may be filed by any person other than the aggrieved one. Over the years, the courts in Pakistan have widened the concept of an “aggrieved person”.

⁷ Article 184, Constitution of Pakistan.

⁸ Article 185, Constitution of Pakistan.

⁹ Article 186, Constitution of Pakistan.

more than three shall be Ulema, persons well versed in Islamic law.¹⁰ It shall “decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam”. It can act spontaneously or upon the petition by a citizen or the Federal or a Provincial government.¹¹

It is also an appellate court in criminal cases pending before ordinary courts. Offences under the Hadood Ordinances include theft, armed robbery, rape, fornication liabel and use or sale of alcohol. The court may not turn an acquittal into a conviction.¹² An appeal to the Appellate Shariat Bench of the Supreme Court exists for all matter decided by the Federal Shariat Court. The Chapter instituting the Federal Shariat Court overrides any other rule of the Constitution. This report will not examine that Court further.

5. The Bar

The Bar in Pakistan consists of four categories of lawyers: ordinary advocates, advocates of the High Court, advocates of the Supreme Court and senior advocates of the Supreme Court. Two strands organizations of lawyers can be identified, namely the Bar Councils (Provincial and Federal), statutory bodies established under the 1973 Bar Councils Act, and Bar Associations. The Bar Councils exercise public functions, such as deciding on admission to the Bar, carrying out disciplinary proceedings against lawyers and recognition of Bar Associations. The leading Bar Association is the Supreme Court Bar Association of Pakistan (SCBAP). In addition, there are High Court Bar Associations at all provincial capitals, as well as where circuit benches of High Courts sit and Islamabad. There are several District and Tehsil Bars. Gilgit – Baltistan and Azam Kashmir have their own separate system of bar associations.

III Independence of the Judiciary

A The Standards of Independence

The right to a competent, independent and impartial tribunal established by law is a fundamental guarantee within the framework of the administration of justice, including under article 14 of the ICCPR. This is evidenced, *inter alia*, by the fact that the European Court of Human Rights, when faced with a violation of this right, will not examine further complaints of unfairness because a lack of independence or impartiality can never be repaired by otherwise “fair proceedings”.¹³ Judicial independence is a necessary precondition to the Rule of Law.¹⁴

¹⁰ Article 203C, Constitution of Pakistan.

¹¹ Article 203D, Constitution of Pakistan.

¹² Article 203DD(2).

¹³ See, e.g., *Dmicoli v. Malta* § 43, judgment of 27 August 1991; *Incal v. Turkey* § 74, judgment of 9 June 1998, etc; there are also unfortunate exceptions such as *Coëme and others v. Belgium*, judgment of 22 June 2000 or *Öcalan v. Turkey*, judgment of 12 March 2003, where other aspects are discussed for didactical reasons. See also the UN Human Rights Committee, General Comment 13, Art. 14.

¹⁴ See The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002, Value 1.

There are a number of criteria to be considered when examining whether a court is independent, including the manner of appointment, the terms of office, safeguards against outside pressure and influence, impartiality of judges, the authority of the judgment and the economic status of judges. The baseline standards, in this respect, are set out in the United Nations Basic Principles on the Independence of the Judiciary.¹⁵ A more exacting body of standards that is particularly germane to Pakistan is the Beijing Statement of Principles of the Independence of in the LAWASIA Region, which has been signed by the Chief Justices of 33 States in the Asia Pacific Region, including the Chief Justice of Pakistan at its adoption in 1995.¹⁶

B The Appointment of Judges

Before the 18th Amendment, the President of Pakistan appointed judges of the Supreme Court after consultation with the Chief Justice of the Supreme Court. The 18th and 19th Amendments, however, have changed this process drastically.

The 18th and 19th amendments created the Judicial Commission (JC) to nominate judges to fill actual or potential vacancies in the Supreme Court and the High Courts. The Judicial Commission for the selection of judges to the Supreme Court is composed of the Chief Justice, the four most senior Justices of the Supreme Court, a former Justice of the Supreme Court nominated by the Chief Justice in consultation with the other Justices in the Commission, the federal Law Minister, the Attorney General, and a senior advocate of the Supreme Court nominated by the Pakistan Bar Council. If the appointment is for High Court judges, in addition to the nine members stated above, the Chief Justice of the concerned High Court, the senior most judge of the High Court, the relevant Provincial law minister and an advocate with at least 15 years' experience nominated by the Provincial Bar Council, are also part of the Judicial Commission. The JC has formulated its own rules.

In pursuance of the Judicial Commission of Pakistan Rules, 2010, the power to initiate nominations to the Judicial Commission for Judges of the Supreme Court, the Chief Justice of Federal Shariat Court or the Chief Justice of a High Court lies with the Chief Justice of Pakistan (S. 3(1) of the Rules).

The nominations made by the Judicial Commission have to be presented before the Parliamentary Committee, composed of four Senators and four members of the National Assembly, equally divided between the Opposition and the Treasury, which have the power to reject or confirm the nominations. In case of rejection, the Committee has to state the reasons for its decision to the Prime Minister. In case of confirmation, the names have to be forwarded to the President for appointment. Subsequently, through a judgment of the Supreme Court, the authority of the Parliamentary Committee was reduced drastically.¹⁷

The current system of judicial appointments has been criticized by a number of the Mission's interlocutors on the ground that the influence of lawyers is too weak, the underlying inference being that the Bar should have a stronger voice in the selection of judges. In any event, much of the legal profession had been demanding a system of appointments for judges analogous to some of the changes introduced by the 18th Amendment for a decade or so. There was a view in some quarters, however, that the contribution of a political body to the appointments process could be construed as

¹⁵ Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹⁶ <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html>

¹⁷ PLD 2011 SC 407; Munir Hussain Bhatti

an attack on judicial independence. Twenty-two Petitioners (including the Supreme Court Bar Association), two Applicants and one Appellant commenced proceedings in the Supreme Court claiming that the Amendment was “violative of the salient features of the Constitution, including provisions of fundamental rights, independence of the judiciary and federalism”.¹⁸ Similar criticism was voiced concerning the Judicial Commission which was composed, *inter alia*, of the Law Minister and the Attorney General. The case was heard over a period of four months and the short order was passed on 21 October 2010 by a Bench composed of all 17 Judges of the Supreme Court. The Supreme Court did not immediately set aside the Constitutional amendment, but sent the matter back to Parliament for re-consideration “*inter alia*, light of the concerns/reservations expressed and observations/suggestions made”¹⁹ in the reasoning of the decision. The case is still pending in the Supreme Court.

This decision is noteworthy in more than one respect. First, it is only infrequently that a Court takes issue with the highest normative text of the State, i.e., the Constitution. This is not per se beyond the competency a Court, as there are limits as to what can be written into a Constitution. For instance, a Court might determine that constitutional provision conflicts with an international legal obligation, which would be an important and appropriate function, given that under international law, no domestic legal arrangement can excuse the failure to discharge an international obligation. Thus, reviewing a constitutional provision for its compatibility with human rights law is perfectly appropriate. Everywhere the limitations set on the modifications of constitutions is a thoroughly discussed subject. Yet, in the present case it is the Supreme Court which has concluded that in a conflict between Parliament and the Judiciary, the latter ought to have a stronger position. As it was put by one of our interlocutors, this raises questions in the light of the principle “*nullus iudex in causa sua*.”²⁰

Second, it seems that any involvement of political organs in the nomination of judges is considered to impair the impartiality of the judiciary. So far, we have not heard thoroughly argued reasons for that opinion – if indeed it is the opinion of the Supreme Court.

Looking at the issue from a comparative perspective, there are varied approaches to the question of judicial appointments in different jurisdictions. There is no agreed universal standard under international law precisely as to the appropriate method of appointing judges, although there are general principles that must be respected in any such process.²¹ The Beijing State of Principles underscore that Judicial Services Commissions have been seen as ensuring propriety in the Selection of Judges. “Where a Judicial Services Commissions is adopted, it should include representatives of the higher judiciary and the independent legal profession as means of ensuring that judicial competence, integrity and independence are maintained.”²² However that does not mean that the political bodies may not choose from among a number of candidates vetted and nominated by a Commission. Overall, the general picture shows that there may be a modest, but tightly circumscribed, degree of involvement by the political organs of government.

Most recently, in Bolivia, judges of the highest courts were directly elected by popular vote.²³ This is rather exceptional, but in Switzerland and the US a substantial number of judges are popularly elected. The election of judges in the US has been widely criticized, including by the UN Human

¹⁸ PLD 2010 SC 1165 Nadeem Ahmed

¹⁹ Para. 13 of the Decision.

²⁰ A Latin phrase which literally means that no one should be a judge in their own cause.

²¹ See *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners Guide No 1, ICJ, 2007 at 41. See also Principle 14, *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*, adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific, 2007.

²² Beijing Statement of Principles, Principle 15.

²³ See, e.g., <http://globalvoicesonline.org/2011/10/16/bolivia-a-judicial-election-without-campaigning/>.

Rights Committee, which has suggested that it is potentially incompatible with article 14 of the ICCPR.²⁴ In some countries the election is a matter for Parliament, for example in Germany, half of the judges of the Constitutional Court are elected by the lower house of parliament *Bundestag*, the other half by the upper house *Bundesrat*.²⁵ Judges to the other Highest Courts are appointed by the corresponding Minister together with an electorate committee composed of Ministers of the *Länder* (States) and persons elected by Parliament. On the other hand, in Liechtenstein the Judges are appointed by the Prince together with the *Landtag* (Parliament). Prince and *Landtag* each appoint a number of representatives. The Prince presides and has the final ballot.²⁶

In other countries (e.g. Italy, France) there exists a “Superior Council for the Judiciary” (*Consiglio superiore della magistratura/Conseil supérieur de la magistrature*) composed of, *inter alia*, the General Prosecutor and the Minister of Justice as well as representatives of the judiciary and the Bar, presided over by the President of the State or the Minister of Justice.²⁷

Is any involvement of a political body in the appointment of judges compatible with the rule of law and the respect for human rights? It would be very difficult indeed to justify a negative answer to this question. Even the Judges of the European Court of Human Rights are, after all, elected by the Parliamentary Assembly of the Council of Europe.²⁸ But there is also a theoretical justification: The judge today is no longer regarded as “*la bouche de la loi*”.²⁹ It is generally accepted that his or her task is to interpret the law, a process which calls for value judgments. Persons of different political convictions are bound to adhere to some extent at least, different value systems. It is justified, therefore, in a democratic society, to have a system for appointing judges which will lead to the judiciary reflecting the range of specter of values of the society at large.

For all these reasons there is nothing per se improper in having a Parliamentary Committee being involved in the appointment of judges.

Such considerations notwithstanding, the 19th Amendment to the Constitution of Pakistan took into account almost all the considerations of the Supreme Court, but maintained the possibility for the Parliamentary Committee, after repeated consultations, to reject a candidate. This possibility does not impair the independence of the Judiciary and in particular the Supreme Court of Pakistan; but if the latter purports to control and possibly overrule the findings of the Parliamentary Committee, this would shift the balance of powers to the advantage of the judicial branch. While recognizing that it is probably desirable for any shifts to move in this direction, regardless of this consideration they must always aim to achieve an equalized system of checks and balances.

Outside the institutional aspects, criticism was heard repeatedly of the quality of judicial appointments, particularly to the High Courts. There were reports that widespread nepotism had led to the appointment of persons of mediocre competence to the Bench. The Mission was not able, within its limited remit, to reach a conclusion on this question, but, given the frequency of the allegations, it is a question that should be investigated and addressed as a matter of priority. Another frequently expressed concern was the high number of vacancies in the High Courts, ever since the dismissal of the “PCO” and other judges through the Supreme Court judgment in the Sindh Bar Association case.³⁰ Some High Courts have ever-since been working at half their sanctioned strengths.

²⁴ UN DOC A/50/40, paras 288 and 301

²⁵ Article 94 of the Grundgesetz (Constitution). In Switzerland federal judges are elected by the joint Chambers of Parliament, Art. 168 of the Constitution.

²⁶ Article 96 of the Constitution.

²⁷ For France see <<http://www.conseil-superieur-magistrature.fr/>>, for Italy : <<http://www.csm.it/>>

²⁸ ECHR Art. 22.

²⁹ The mouth of the law, Montesquieu, De l’esprit des lois (1748) livre XI, chap. 6.

³⁰ PLD 2009 SC 879, Sindh High Court Bar Association

C The Term of Office

Judges of the Supreme Court retain their position until they reach the age of 65 (Art. 179). The retirement age for Judges of the High Court is set at 62. Judges may retire at an earlier time. We do not see this as problematic. Life tenure is not an obligatory international standard.

D Safeguards Against Outside Pressure

1. By Other Powers of the State

Independence of the judiciary from the executive does not appear to have a long tradition in Pakistan. Art. 175(3) of the Constitution reads as follows: "The Judiciary shall be separated *progressively* (italics added) from the Executive within fourteen years from the commencing day" in 1973.

The Constitution protects the independence of the judiciary. Art. 68, for example, provides that no discussion shall take place in Parliament with respect to the conduct of any judge of the Supreme Court or of a High Court concerning his judicial activities. This must apply *a fortiori* to the Courts themselves, as collective bodies. Article 69 of the Constitution prohibits questioning the validity of any proceedings of the Parliament on the ground of irregularity of procedure.

In recent history there have been radical attacks on the judiciary, particularly on the person of the Chief Justice, most recently after military dictatorship was installed by General Musharraf. These events have been described and discussed in a number of excellent reports, e.g. by Human Rights Watch³¹ and the International Crisis Group.³² It would serve no useful purpose to repeat what is described and discussed there. We shall limit ourselves to the events following late 2007.

On 3 November 2007, President Parvez Musharraf while concurrently holding the substantive position of Chief of Army Staff, issued a Proclamation of Emergency.³³ In conjunction with the proclamation, two orders that were to profoundly affect the judiciary were also issued, namely the Provisional Constitutional Order (PCO) and the Oath of Office (Judges) Order, the effect of which was to make it mandatory for superior court judges to take fresh oaths under the new provisional order to remain in office. Pursuant to the same order, the Supreme Court passed an order restraining the President, the Government of Pakistan and other high-ranking military officials from taking any action that would undermine the judiciary. Subsequently, a minority of five of the 18 Supreme Court judges took oaths under the PCO. The Supreme Court was then reconstituted and Abdul Hameed Dogar was appointed Chief Justice. On 23 November 2007, the newly appointed Supreme Court upheld the legality of

³¹ Human Rights Watch, *Destroying Legality. Pakistan's Crackdown on Lawyers and Judges*, 19 December 2007, Volume 19, No. 19 (C), available at: <http://www.unhcr.org/refworld/docid/476b850a2.html><http://www.humansecuritygateway.com/showRecord.php?RecordId=21491>.

³² Reforming the Judiciary in Pakistan, Asia Report N°160, 16 October 2008.

³³ This was Musharraf's second attempt at issuance of an emergency, the first following his military coup of 12th October 1999.

emergency rule reflected in the PCO 2007 as well as presidential actions that stemmed from the declaration of emergency.³⁴

The PCO formed yet another basis of a rallying point of lawyers and civil society against President Musharaff's rule and eventually led to the lifting of the public emergency on the 15th December 2007. In consequence of protests led by the Lawyers Movement, Iftikhar Chaudhry was reinstated as Chief Justice on 22 March 2009. All other judges who had been dismissed were also reappointed.

In a landmark ruling delivered on 31 July 2009, the Supreme Court overturned the *Tikka Khan* case. In consequence of this decision,³⁵ the country's highest court declared that the 2007 PCO, the Oath of Office (Judges) Order and all judicial appointments made by Justice Dogar (purporting to be Chief Justice) were null, void and illegal. Over 70 judges appointed by defacto Chief Justice Dogar were removed. Following the decision of the *Sind High Court Bar Association*, the 'PCO judges' were subsequently charged with contempt of court between August and October 2009. In a controversial ruling of 13 October 2009, the Supreme Court held that all sitting judges who had taken oaths under the PCO should either resign and tender an unconditional apology for their actions, or face contempt charges for deliberately disobeying the Supreme Court's order of 3 November 2007. On 2 February 2011, the Supreme Court issued a short order *inter alia* holding that the Constitution of Pakistan does not prohibit contempt proceedings against superior, including Supreme Court, judges. The Court also decided that the circumstances warranted that contempt proceedings issue against several Supreme and High Court justices, including the then *de facto* Chief Justice Dogar and other justices.³⁶

On 3 March 2011, Justice Dogar and Justice Zahid Hussain, in obedience to an earlier decision of the Supreme Court, tendered their apologies to the Court and resigned from the bench. Following this, six High Court judges remained with contempt proceedings against them. On the 18 May 2011 a six-member bench of the Supreme Court held that the PCO was unconstitutional and without legal effect. The Court also held that the PCO judges ceased to be judges under the 1973 Constitution once they had taken oaths under the PCO. The Court determined that with effect from the passage of the 18th Amendment to the Constitution of Pakistan on 20 April 2010, the respondents in the action (the 'PCO judges') lost their position as judges and on account of their changed status and were unable to claim immunity from contempt of court proceedings. Instead of advising the respondents that they were no longer judges as suggested by the Supreme Court, the President referred the matter to the Supreme Judicial Council for determination. Later, through a notification these judges were also removed. The decision of the Supreme Court in this regard was controversial because of the widely held view that it had exceeded its competence overreached itself, given that the Supreme Judicial Council is the only constitutional body mandated to recommend dismissal of superior court judges to the President.

³⁴ See *Tikka Iqbal Muhammad Khan v Federation of Pakistan* PLD 2008 SC 178.

³⁵ See *Sind High Court Bar Association v Federation of Pakistan*: PLD 2009 SC 879.

³⁶ In total around 100 "PCO" as well as appointees by CJ Dogar were removed. All 5 "PCO" judges of the Balochistan High Court resigned leaving the High Court without a judge.

2. By Non-State Actors

The organs of the State, in particular the executive, are not the only source of influence on the judiciary. Non-state actors, such as business enterprises, armed groups and individuals may also try to exercise influence over the judiciary, thus posing a threat to its independence. A recent example is the case of Judge Pervez Ali Shah. He had sentenced to death Malik Mumtaz Hussein Qadri who had murdered Punjab Governor Salman Taseer.³⁷ The defendant believed that the Governor of the province was undermining the blasphemy law. Menaced by threats of death, Judge Shah had to flee to Saudi Arabia with his family.³⁸ This is a symptom of an unfortunate circumstance. In the face of criminal threats and intimidation, the State seems incapable of securing the life and safety of some of its citizens, including judges. It was widely reported in the media in Pakistan that a number of lawyers hailed the criminal convict, when he was produced in court and his was welcomed with showers of flower petals. This could add to the discomfort of any judge and clearly violates the code of professional ethics of lawyers.

E A Tribunal Established by Law

The international guarantee of access to a court does not only require that the tribunal be independent and impartial, but also that it be “established by law.”³⁹ The meaning of this guarantee is clear: it ensures *inter alia* that the jurisdictional power of the tribunal and its chambers is determined generally and independently of the facts of a given case.

The rationale behind this rule is obvious: linked to the guarantee of impartiality, it aims to prevent arbitrary situations where the very composition of a tribunal or a chamber thereof predetermines (at least to some extent) the outcome of a specific dispute.

Several interlocutors, not only those generally critical of the Supreme Court, mentioned the fact that the Chief Justice regularly composed the Chambers called upon to sit on, *inter alia*, *suo motu* cases. It is true that the assignment of cases to Chambers is, according to the law, the task of the Registrar. However, no one we met was able to point to a pre-established system which would allow reliable prediction of the composition of the Chamber which would deal with a specific case. We heard insinuations that the Chief Justice picked colleagues who would determine cases or reach decisions in the way he would have himself decided the case. There were also suggestions that judges who were considered partial to his views in a given case would be given preference for selection in hearing a matter. We want to stress that we do not endorse such suspicions of abuse and have no evidence to substantiate claims of misconduct on the part of the Chief Justice. However, in matters of independence and impartiality “even appearances may be of some importance”, as the European Court of Human Rights states consistently;⁴⁰ it is indeed unfortunate when unfounded impressions of abuse of power are created.

³⁷ The ICJ considers the death penalty to constitute a violation of the right to life and freedom from cruel, inhuman and degrading punishment. However, the issuing of death sentence, which is provided for under Pakistani law, cannot be the basis for the violent threats to which this Judge was subject.

³⁸ BBC News South Asia, 25 October 2011.

³⁹ Art. 14(1) ICCPR Art. 8 (1) ACHR, Art. 6(1) ECHR; the American Convention added the word “previously”.

⁴⁰ See, e.g., *Kyprianou v. Cyprus*, (*Application no. 73797/01*), Judgment of 15 December 2005, para. 118.

We regard it as very important that this matter be taken up and that clear rules be formulated allowing at the outset to predict which judges would deal with a certain case. One interlocutor said he did not know of any Supreme Court in the world where the Chief Justice would not decide on the composition of Chambers. We respectfully disagree – this alleged custom certainly does not apply to the United States Supreme Court (which always sits as a full bench), the German *Verfassungsgericht*, or the Swiss *Bundesgericht*, to give but a few examples.

F The Economic Situation of Judges

Under international standards, judges are entitled to adequate remuneration.⁴¹ Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. A sufficiently high salary is considered to be a bulwark against corruption. In this respect the Mission learned that the Government of Pakistan had substantially raised the salaries of first instance judges. However, we were also told that this had not so far shown a beneficial effect in the fight against corruption. One interlocutor said that he did not believe that a further increase would eliminate the problem; others however, called for a further augmentation of judges' salaries.

G The Independence of the Bar

The Mission did not hear complaints of overt interference with the independence of the Bar by the Government. However, the government is known to tempt bar leaders with promises of grants to the bar which indirectly sometimes materializes into interference. Several of our interlocutors affirmed that the Bar Associations are highly politicized. Many of the political parties have affiliated lawyers' wings in the bar. It was also alleged that when elections for the officers of the Association were impending, the Chief Justice would often call advocates close to him and indicate the candidates he would favor. This was regarded as an interference with the independence of the Bar. Given the number of allegations, this is a question that should be investigated and addressed as a matter of priority.

H Other Matters Affecting the Functioning of the Judicial System

We heard repeated complaints concerning the inadequacy of infrastructure in the judiciary, particularly at the district level, but also within the High Court. The lack of staff and equipment such as computers were said to hinder the effectiveness and efficiency of the courts. State reluctance to sufficiently fund the judiciary – compared with other branches of Government deemed of higher importance such as defense, health or education – is a general phenomenon. It is unfortunate that the value of a functioning legal system which provides legal certainty and facilitates economic development is often not adequately appreciated: the existence of an effective legal system is regarded as a key factor in investment decisions. The competent authorities in Pakistan are invited to strongly increase the support and resources available to the administration of justice, in particular to the courts of first instance.

⁴¹ UN Basic Principle 11

IV Procedures *suo motu*

Most of the interlocutors that were interviewed identified the proceedings “*suo motu*” (also known elsewhere as proceedings “*proprio motu*” or “*ex officio*”) as one of the more controversial issues in the administration of justice in Pakistan. These are cases taken up by the Supreme Court on its own initiative. In recent years a considerable number of examples has accumulated. Some observers were quite positive about this development, while others expressed the view that the Supreme Court was making too frequent application of that power and did not always use it in a way consistent with its purpose. It is therefore necessary to deal with this matter in some more detail.

A The Constitutional Rule

The practice of *suo motu* procedures is based on the text of Art. 184(3) of the Constitution which reads as follows:

Without prejudice to the provisions of Art. 199⁴², the Supreme Court shall, if it considers that a question of public importance with

⁴² Art. 199, in turn, deals in some detail with the jurisdiction of the High Court; it says this:

- (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-
 - (a) on the application of any aggrieved party, make an order-
 - (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or
 - (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or
 - (b) on the application of any person, make an order-
 - (i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or
 - (ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or
 - (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.
- (2) Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged.
- (3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.
- (4) Where-
 - (a) an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and
 - (b) the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest [or State property] or of impeding the assessment or collection of public revenues,the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorized by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order-
 - (i) would not have such effect as aforesaid; or
 - (ii) would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.

reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

There are two conditions that must be met in order to trigger an exercise of the Supreme Court's *suo motu* jurisdiction under Art 184(3). First, the issue must involve one of 'public importance'. Second, it must in some way have an impact on the enforcement of 'fundamental rights' notably those contained in Chapter 1 part II of the Constitution. Both these conditions are an essential requirement before the Court is entitled to determine matters in the exercise of its *suo motu* powers. An in-depth analysis of the inter-relationship between Art. 184(3) and Art. 199 of the Constitution would be beyond the scope of this Mission.

B Practical Application

Hereafter, we describe in concise and simplified form, some of the more recent examples of cases dealt with the Supreme Court in application of Art. 184(3) of the Constitution.

1. Case No 25/2009

This case concerned the Lahore Canal Widening Project. In order to facilitate traffic, important construction was planned for an area which was considered to be of particular ecological value. The case was taken up in response to a letter by the Lahore Bachao Tehrik ("LBT"), a civil society organization. The Chief Justice appointed an eminent lawyer to act as a mediator between the LBT and the Government of Punjab. The mediator formed a committee of eight high level public officials and came up with 15 concrete proposals, e.g. to divert through-traffic. The LBT agreed with most of the proposals. In its judgment, the Supreme Court adopted 10 directions, e.g. "that elaborate measures/steps should be taken to ensure that the Canal is kept clean and free of pollution. The Government of Punjab should ensure that a comprehensive action plan is devised by the concerned department and report is submitted to the Registrar of this Court within six weeks of the receipt of this judgment".

2. Case No 5/2010

[(4A) An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any authority or person, which has been made, taken or done or purports to have been made, taken or done under any law which is specified in Part I of the First Schedule or relates to, or is connected with, State property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made:

Provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order is made.]

^[185][(4B) Every case in which, on an application under clause (1), the High Court has made an interim order shall be disposed of by the High Court on merits within six months from the day on which it is made, unless the High Court is prevented from doing so for sufficient cause to be recorded.]

(5) In this Article, unless the context otherwise requires, -
"person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and "prescribed law officer" means

(a) in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and

(b) in any other case, the Advocate-General for the Province in which the application is made."

This is the LNG (liquefied natural gas) Fauji Foundation case. The Supreme Court took this case up based upon a press item in *The News*. It appeared that a contract with a foreign supplier had been approved, although a domestic company had presented a better offer. There was also a suspicion of corruption. The Supreme Court justified the application of Art. 184(3) by pointing out that by careful management extensive savings could have been made which would have been available for welfare, i.e. for granting fundamental rights to citizens; there had also been a violation of the principles of transparency and equal opportunity. Ultimately the Court annulled the contract and ordered the Ministry of Petroleum to proceed in a specific way.

3. Case No 14/2010

Two brothers were beaten to death by a lynching mob. A report was filed against policemen who had watched the incident but did not intervene. After a video of the incident was shown on television, the Supreme Court took notice of the incident *suo motu* and appointed a Commission to inquire into the incident. It also appointed a team of forensic experts to draw up a fresh autopsy report. On the basis of the report of the Commission, the Supreme Court directed the police to investigate the murders. It finally directed an Anti-Terrorism Court to try the persons involved in the lynching. That Court passed a judgment in which, *inter alia*, the seven defendants were sentenced to death.

4. Case No 24/2010

This case is known as the Hajj Corruption Case. It concerned the organization of the Hajj (pilgrimage) to Mecca and Medina (Saudi Arabia) under the authority of the Minister for Religious Affairs. A Saudi Prince had written a letter alleging that pilgrims were charged excessive prices for residences, while millions were corruptly pocketed by the embezzlers. The Supreme Court took notice of the incident *suo motu* and ordered an investigation over which it exercised control, *inter alia* by directing the lead investigator, Hussain Ashgar, to probe into the scandal and insisting that he continue to carry out this task when he was promoted to a different assignment. It appears that the Supreme Court continues to monitor the case.

5. Case No 10/2011

The issue *in casu* concerns an illegal shooting of an individual by Rangers in Karachi, recorded on video. The footage showed the Rangers ignoring the victim's pleas to be taken to hospital as he was bleeding heavily; help came too late to save his life. The Rangers then allegedly tried to cover up the crime by fabricating exculpatory evidence.

The Supreme Court took up the case *suo motu* after having seen the tape. It ordered the senior officers to be removed from their post within three days, withholding their salaries. It also appointed Additional Advocate General Sultan Khawaja to investigate all the suspects, send an indictment to the competent jurisdiction and submit a progress report to the Registrar of the Supreme Court. It also ordered that a trial be conducted on a day- to- day basis, taking no more than 30 days and to communicate the outcome to the Supreme Court.

6. Case No 10/2010

This case concerns the largest natural freshwater lake in Pakistan, the Manchar Lake. It had, over the last years, been drained and polluted. University of Sindh experts expressed growing concern and fishermen were driven out of business. The Supreme Court took *suo motu* notice of the matter and ordered the Sindh government and the Water and Power Development Authority to submit a report on the situation.

7. Case No 16/2011

This case concerns violence in Karachi. Between July and August 2011 more than 300 persons were killed in Karachi by indiscriminate shootings by military wings of the three political parties in power. The Supreme Court, considering that the authorities were not able to control the situation, took *suo motu* notice and ordered that the Advocate General of Sindh submit daily reports on the investigation; that the courts to which *challans* (indictments) were submitted hold trials on a day to day basis; that the Provincial Government provide all necessary assistance to facilitate the proceedings; and that all efforts be made to control crime, particularly racketeering (*bhatta*, extortion).

8. Case No 1/2009

Upon the release of a video in April 2009 showing a 17-year-old girl being whipped at Swat in public by some unknown persons, the Chief Justice took notice of the matter *suo motu*. Subsequently a case was mounted against the suspected offenders. The Supreme Court's involvement gave rise to a direction that the persons responsible should be arrested and dealt with in accordance with law. The Court also issued directions that the Secretary of the Interior, IGP and Chief Secretary of NWFP were to ensure proper implementation of the law.

C Assessment

“Judicial activism”, and in particular the application of *suo motu* powers by the Supreme Court, was the issue most frequently commented upon during the Mission. Opinions were quite divided and ranged from almost unconditional praise to harsh criticism. We shall address the salient arguments of these discussions and develop our own assessment thereafter.

1. Motive

There were isolated opinions which cast doubts upon the motives which animated the Chief Justice and the Supreme Court to take up cases *suo motu*. We have found no evidence of any improper motive in the cases examined. Without exception, there was clear and unequivocal evidence that they were taken up in order to promote a genuine public interest.

2. Justification

The invocation of the Supreme Court's *suo motu* jurisdiction was explained, at least for a number of cases rather convincingly, by the fact that the Government did not always function properly. This theory is in fact borne out by the evidence. In some cases (nos. 2, 4 and 5), corruption had infected the competent offices and there seemed to be no other authority to intervene but the Supreme Court. In other cases the (Federal or Provincial) Governments had been negligent in the protection of the environment (nos. 1, 6) or otherwise unable to maintain law and order. Only one interlocutor held that the government was not very strong and that for this reason concluded that the *suo motu* procedures were justified. We heard that the Chief Justice enjoyed an excellent reputation, that he was by far the most popular personality in Pakistan today. Persons among the lower economic strata looked at him, we were told, as a savior and brought their queries and problems to his attention in the hope that he would take up the case and solve the problem.

3. Legal foundation

As was already pointed out, the legal foundation for taking up cases *suo motu* is to be found in Art. 184(3) of the Constitution. The disposition is not entirely clear as far as the reference to Art. 199 is concerned, but it cannot be our task to dictate in precise terms how the Constitution of the Islamic Republic of Pakistan should be construed. Case 1 (and to a lesser extent also case no.4) denote a particularly extensive interpretation of the term “fundamental rights”. It is indeed not easy to understand how effective prosecution of a victimless crime protects human rights. We were under the impression that the Supreme Court sometimes acted simply to enforce the Rule of Law which, as far as the substance is concerned, certainly calls for praise.

4. Qualification

Courts are qualified to apply the law. The question has been raised as to whether the Supreme Court is qualified to decide delicate and complex questions of a practical/political nature, such as planning of roads and protecting the environment (Case No 1). It must be recognized, however, that in situations where difficult issues of environmental protection needed to be resolved, the Court took the advice of experts and we heard no allegations that the result was in substance wrong.

5. Criteria for the taking up of incidents *suo motu*

A criticism often heard was that there seemed to be no clearly defined criteria determining when an incident was to be taken up by the Supreme Court. According to the Constitution such proceedings can be applied when the Supreme Court “considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved”. This seems to require that two conditions be fulfilled before the court’s *suo motu* powers may be exercised: first, there must be an issue of public importance, i.e., going beyond the realm of an individual. Secondly, the problem must manifest itself in the context of fundamental rights and freedoms. Once these two conditions are met, *prima facie* the Court is constitutionally empowered to determine an issue on the basis of its *suo motu* powers. However, in view of the general situation prevailing in the Country, we cannot but presume that there is likely to be a very high number of incidents where these criteria would be met. It appears that the Chief Justice sometimes decides to exercise *suo motu* jurisdiction immediately on the basis of reports in the media. This introduces a certain element of chance to the practice which is hardly compatible with the rule of law.

A number of our interlocutors mentioned the role of the media and mentioned the excellent relations between the Chief Justice and journalists. We do not believe that this falls to be criticised. On the contrary, we think that when the Supreme Court takes up a case *suo motu* it intends to attain a result of general prevention going beyond the specific issue. This is, in our view, perfectly in line with the purpose of the institution of this kind of proceedings. However, if media publicity is sought to popularise the judges to undermine other institutions unduely then it could be of concern.

6. Separation of Powers

Like most States, Pakistan has a constitutional structure based on the principle of separation of powers – basically the legislature, the executive and the judiciary. This system is upset whenever one of the powers usurps the functions of another power, e.g., when the executive passes laws or the legislature adjudicates a case. In the way the Supreme Court manages cases taken up *suo motu*, it cannot be overlooked that occasionally it appears to act like the executive. In fact, as we have mentioned, issues are often taken up because the Government does not appear to deal with them properly (e.g. cases nos. 1 and 6). In such cases, the Supreme Court does not limit itself to deciding on a dispute and to stating the law, but goes beyond this, e.g. by asking for regular reports on the

progress on a matter. The Court's concerns over the execution of its judgments are quite understandable and the fact that it takes measures to enhance the implementation can certainly strengthen the administration of justice. However, as the very terminology indicates, the primary task of execution of judgments falls to the executive, with the courts role typically limited to supervising that execution and intervening when such execution is non-compliant with the judgment. The interaction between the three branches of power ought to be governed by the principle of checks and balances, and this principle is upset when one power assumes tasks attributed to another.

7. Problems with Implementation

While the Supreme Court, to some extent, endeavors to control the implementation of its judgments (cf. cases no. 1, 4, 5, 7), it has not always the power to do so, particularly where it orders the Government to act in a specific way. Opinions as to whether such judgments are actually complied with are divided. The Mission repeatedly heard that there were 18 judgments awaiting implementation, whereas one interlocutor denied that there existed any problem in this respect and maintained that the few remaining judgments would eventually be complied with, possibly with a certain delay. We tend to believe that there exists indeed a problem in this respect. To some extent, the reluctance of the Government to comply with certain judgments of the Supreme Court may be connected to resentment against the judiciary meddling with matters within what they perceive its purview.

8. *Nemo Iudex Sine Actore* – No Plaintiff – No Judge

There is a Latin maxim which says that without a plaintiff there can be no judge. It is related to the issue of separation of powers. Originally aimed at private law proceedings, since the introduction of the institution of the public prosecutor by the judicial reform introduced by Napoléon, it is also recognized in civil law type criminal proceedings. It is an indispensable feature of adversarial proceeding. Quite often *suo motu* cases are carried out without the participation of an injured party. However, the principle set out in Art. 184(3) of the Constitution entails that the Supreme Court can act on its own initiative and thereby assume the role both of the plaintiff/prosecutor and that of the impartial judge. This is a difficulty for which the Supreme Court bears no responsibility as it is rooted in the Constitution itself. We cannot help but notice that the power to raise cases *suo motu* has led to a procedural anomaly which is hardly reconcilable with the rule of law.

9. The Effect on Lower Courts

When the Supreme Court takes up a case *suo motu*, the matter is taken away from district and high courts. We wondered what effect this can have and heard different answers. On the one hand it was pointed out that the intervention of the Supreme Court has or is at least meant to have a pedagogical and preventive effect. It alerts the first instance court or the High Court, and also the investigating and prosecuting authorities, to cases raising issues of fundamental rights of individuals and teaches them how to deal with them. This is definitely very encouraging. On the other hand, it will also have a certain effect of frustrating lower courts, because the Supreme Court does the work it ought to have done itself. Finally, in some cases (e.g. nos. 6, 8) the Supreme Court gives precise directions as to how lower courts ought to do their work and this interferes with the latter's independence. In a recent Order⁴³ we find the following sentence: "The Chief Justice of Pakistan is

⁴³ See Constitution Petitions 11/2010 etc. at page 12.

pater familias i.e. the head of judiciary”. While this is socially true, it literally portrays a paternalistic vision which is not easily reconciled with the concept of judicial independence.

10. Procedural Rights of Individuals

As the examples show, some of the *suo motu* cases involve individuals who were personally victimized (cases nos. 3 and 5). These persons will normally be served in an excellent and privileged way. Yet, while they may originally have had the possibility to pursue their interests through three instances, they find themselves now reduced to only one instance. While this may work for their benefit, ultimately it also bypasses the ordinary course of justice.

11. Regular Business of the Supreme Court

Finally, a number of interlocutors have confirmed that the intense occupation with *suo motu* procedures has a negative effect on the ordinary business of the Supreme Court. There appears to be a growing backlog of cases, due to the fact that the capacities of the institution are absorbed by the superseding cases of actuality taken up *ex officio* by the Supreme Court.⁴⁴

V Conclusions

In conclusion, we obtained a complex picture of the administration of justice in Pakistan towards the end of 2011. We have come to the following conclusions:

1. While many of the problems created by military dictatorship appear to have been or are being meaningfully addressed, particularly with regard to the judiciary, there are still occasional tensions between the elected government and the military establishment which might lead to dramatic developments. By and large it can be said that the judiciary is independent of the executive and the legislature.
2. There are, however, certain difficulties connected with the general problems of the State, and we wish to emphasize two of them:
 - a) The administration of justice cannot function properly when its personnel – including advocates – are not motivated by the desire to contribute to the common good by administering justice, but abuse their position for personal benefit. This is quite obvious.
 - b) It appears, as the case of Justice Pervez Ali Shah⁴⁵ demonstrates, that there are violent currents of religious militancy in the State. These must be brought under control otherwise the Rule of Law cannot be solidly established and maintained.
3. Parliament and Government are weak, which leads to the Supreme Court filling the gap by intervening in matters germane to the administration. This occurs to the extent that the Supreme Court even challenges constitutional amendments and intervenes to strengthen its own and particularly the power of the Chief Justice as far as the appointment of judges is concerned. A concern in respect of the the balance of powers thereby arises.

⁴⁴ As of 1st January, 2011, a total of 20,234 cases were pending in the Supreme Court- See Dr Faqir Hussain, The Judicial System of Pakistan, February 2011.

⁴⁵ See Pt D(2), page 12 of the Report.

4. There are still problems with the nomination of judges. There are strong political tensions which lead to the result that not always the candidate best qualified is promoted. The proceedings are not fully transparent.
5. The so-called *suo motu* proceedings are generally being used as a strong instrument to support the rule of law and protect fundamental rights. This is commendable as a matter of principle and as long as the proceedings are used restrictively and on the basis of transparent criteria. We have not seen evidence of abuse in their practical application.
6. Yet, some of these same *suo motu* proceedings give rise to concern in respect of their administration. There seems to be an element of arbitrariness in the decision to apply them, and when they are inappropriately applied they may upset the balance of power and to interfere with the ordinary course of justice. We came to the view that they are used rather excessively.

VI Recommendations

1. The Government of Pakistan is encouraged to continue and strengthen its efforts to fight corruption wherever it occurs, particularly in connection with the administration of justice.
2. The Governments of Pakistan and of all the provincial governments should significantly increase the funds allocated to the judiciary in order to improve the equipment of courts, particularly District Courts, and to further raise the salaries of judges (and other personnel of the courts, as the case may be).
3. In the appointment and promotion of judges the influence of the Bar ought to be increased.
4. All authorities involved in the appointment and promotion of judges should make it a principle that persons of highest competency, integrity and independence are appointed; other important considerations, such as achieving gender balance should also be integrated.
5. The appointment and promotion of judges is a matter of strong and legitimate public interest – it should happen in the open, with full transparency.
6. A code of ethics for lawyers, consistent with protecting the independence of legal profession and the role of lawyers, at all levels ought to be elaborated and adopted, (where one does not already exist) and rigorously implemented, primarily by the Bar Councils and, if need be, by the courts.
7. The Supreme Court should establish precise rules as to the composition and allocation of cases to Chambers.
8. The Supreme Court also ought to identify criteria for the decision to take up cases *suo motu*. These rules may be somewhat more flexible than those governing the allocation of cases to Chambers.
9. As far as the substance of these latter rules is concerned, they should take into account that *suo motu* procedures must be and remain an exceptional exercise of powers.

10. In order to avoid the problem of *iudex sine actore* (judge without plaintiff), the institution of a independent Federal ombudsperson⁴⁶ which exists could be used in this regard. This should be an office led by a person of high ethical reputation. Individuals and civil society organizations could bring problems before the ombudsperson who, in turn, would look into the matter and attempt to bring about reconciliation or seize the Supreme Court to bring about a judicial decision. One could also empower and encourage the ombudsperson to act *proprio motu*. With this system the Supreme Court could be disencumbered of the awkward double role it is currently burdened with in *suo motu* cases and concentrate on adjudication, which is its proper task.
11. Pakistan's judicial history is unique and the role of its bar associations is exceptional in many respects. Equally intriguing is the jurisprudence being produced in recent years by the Supreme Court under the jurisdiction it enjoys under Article 184(3) of the Constitution. All three aspects would make a fine study and a contribution towards research on the independence of judges and lawyers. ICJ urges other concerned NGOs, institutions and research scholars to undertake a deeper study on these important aspects of the justice system of Pakistan.
12. The Supreme Court Bar Association of Pakistan and the Pakistan Bar Council, as lead bars of the country can play a vital role in commissioning these studies. They could encourage the lawyers' representatives at the Judicial Commission to play a more robust role and ensure that individual or small groups of lawyers do not act in any way which is intimidating for their opponent colleagues or judges. This especially, in cases which are sensitive in nature and capable of exploiting emotions.

ANNEX A

List of persons interviewed by the Mission: (Kindly renumber them in order of seniority)

1. JUSTICE TASSADUQ HUSSAIN JILLANI
2. JUSTICE JAWWAD S. KHAWAJA
3. CHIEF JUSTICE, LAHORE, IJAZ AHMED CHAUDHRY
4. SENATOR NAYYAR BOKHARI
5. SENATOR S.M. ZAFAR
6. MS ASMA JAHANGIR, PRESIDENT SUPREME COURT BAR
7. JUSTICE NASIR ASLAM ZAHID
8. MR JUSTICE NAJAM UZ ZAMAN
9. JUSTICE TARIQ MAHMOOD
10. JUSTICE SYED SHABBAR RAZA RIZVI
11. MR JUSTICE IMTIAZ RASHEED SIDDIQI
12. MR JUSTICE FAZAL MIRAN CHOCHAN
13. MR HAMID KHAN, SENIOR ADVOCATE SUPREME COURT

⁴⁶ The institution and the word come from Scandinavia; the word could be translated as Counselor.

14. MR MUNEER A. MALIK, SENIOR ADVOCATE SUPREME COURT
15. MR AITZAZ AHSAN, SENIOR ADVOCATE SUPREME COURT
16. MR IMRAN KHAN, FOUNDER PAKISTAN TEHREEK-E-INSAF (MOVEMENT FOR JUSTICE)
17. DR BABAR AWAN
18. MR MUSHAHID HUSSAIN
19. MR FAKHRUDDIN G. IBRAHIM, SENIOR ADVOCATE SUPREME COURT
20. DR KHALID RANJHA Sr. Advocate Supreme Court of Pakistan
21. MR TALIB RIZVI, SENIOR ADVOCATE Supreme Court of Pakistan
22. MR AZAM NAZEER TARRAR, ADVOCATE SUPREME COURT
23. MR SHAHBAZ RIZVI, ADVOCATE SUPREME COURT
24. MR SALMAN AKRAM RAJA, ADVOCATE SUPREME COURT
25. MR SHAHZAB MASUD, ADVOCATE SUPREME COURT
26. MS SABA LATIF, ADVOCATE HIGH COURT
27. MR TAFFAZUL RIZVI, ADVOCATE SUPREME COURT
28. MR FAISAL SIDDIQI, ADVOCATE
29. MR NAVED ANDARABI, ASC
30. MR HAIDER ALI KHAN, ADVOCATE HIGH COURT

List of other persons whom the Mission spoke to informally at the SCBA Conference in Lahore during the mission:

1. MS MARYAM ARIF, ADVOCATE
2. MR MUHAMMED SHUJA BABA, ADVOCATE SUPREME COURT
3. MR MALIK ISRAR ELAHI, ADVOCATE HIGH COURT
4. DR EHSAN-UL-HAQUE KHAN, ADVOCATE SUPREME COURT OF PAKISTAN
5. MR KHWAJA AHMAD HOSAIN, ADVOCATE
6. MR JUSTICE NASIRUL MULK, SUPREME COURT JUSTICE
7. MR M. HABIB QURESHI, ADVOCATE SUPREME COURT OF PAKISTAN
8. MR MUHAMMAD NAEEM SHEIKH, ADVOCATE SUPREME COURT, EX ADDITIONAL DEPUTY PROSECUTOR GENERAL
9. MR MOHAMMED SAAD SHIBILI, ADVOCATE SUPREME COURT

ANNEX B

LIST OF SOME SUO MOTU CASES DECIDED BY THE SUPREME COURT*

1. **Suo Motu Case No.05/2001.**
(Regulation of Trials and Appeals under Anti Terrorism Law).
2. **Suo Moto Case.No.1,2,3,4,6 & 7/2005**
(Glaring Omissions in Major Acts, etc.)
3. **Suo Moto Case No.10/2005**
(Environmental Hazard of Proposed New Murree Project)
4. **Suo Motu Case No.11/2005.**
(Causalities due to kite flying)
5. **Suo Moto Case.No.1/2006**
(Miserable Condition of women in Jail)
6. **Suo Moto Case No.4/2006**
(Proper Seating and other arrangements in Commercial Banks for depositing the Utility Bills)
7. **Suo Moto Case No. 9/2006.**
(Enforcement of License System in Sindh, Fisheries Ordinance 1980)
8. **Suo Moto Case No.10/2006 AND Constitution Petitions No.16/2004**
(Samar Minallah, etc. Vs. Federation of Pakistan, etc)
(Custom of Sung Chuti)
9. **Suo Moto Case.No.11/2006**
(Tobacco Epidemic in Pakistan)
10. **Suo Moto Case No.12/2006.**
(Supply of Polluted Drinking Water in the area of Ghulam Muhammadabad, Faisalabad)
11. **Suo Motu Case No.13/2006**
(Suo Moto Action Regarding Extra Judicial Killings by Karachi Police)
12. **Suo Moto Case No.16/2006**
(Scam at Islamabad Stock Exchange)
13. **HRC 3423-K/2007**
(Regularization of services)
14. **Suo Motu Case No.13/2007**
(Plight of the Families of Village Selkhatar, who are the victim of forceful acquisition of their land by Revenue Authorities for developing Bahira Town Scheme)
15. **Suo Moto Case. No.14/2007**
(Polluted water in D.G. Khan due to D.G. Cement Factory)
16. **Suo Moto Case 15/2007**
(Action regarding poultry feeds containing Pig meat)
17. **Suo Moto Case. No.21/2007**
(Clash of lawyers, Media Persons and Members of the Civil Society with Police/Law Enforcing Agencies outside Supreme Court Building and in front of Election Commission of Pakistan on 29.09.2007)

18. **Suo Motu Case No.23/2007**
(Regarding Increase of Fare during Umrah Season)
19. **Suo Motu Case No.24/2007**
(Regarding Remission in Punishment)
20. **Suo Moto Case No.25/2007**
(Incident of Terrorism on the Return of Former Prime Minister Benazir Bhutto in Karachi on night between 18th -19th October, 2007)
21. **HRC No.33 of 2008**
(Brutal Murder of three ladies)
22. **HRC 70/2008**
(Three innocent students in a police encounter)
23. **Suo Moto Case No.1/2009**
(Whipping on a 17 Years Old Girl in Swat)
24. **Suo Moto Case No.2-L/2009**
(Action Taken on T.V. news regarding the Injurious Food)
25. **Suo Motu Case 03/2009**
(Destruction of Forest and Illegal Acquisition of Land by DHA & Bahria Town)
26. **Suo Moto Case No.4/2009**
(Evacuee Trust Unfazed over losing land worth billions)
27. **Suo Moto Case. No.7/2009**
(Harassment by the Gujranwala Police to Journalist and General Public)
28. **Suo Motu Case No.9/2009**
(Regarding Illegal Transplantation of Human Organ)
29. **Suo Moto Case No.10/2009**
Action Against Makro Habib Pakistan Limited on Account of Establishing A Commercial Hyper Store on Webb Play Ground.
30. **Suo Moto Case No.11/2009**
(Disparity in the terms and conditions of employees of an Authority and the employees of Government)
31. **Suo Moto Case No.12/2009**
(Against compulsory Deduction of Zakat)
32. **Suo Motu Case No.13/2009**
(Joint Adventure Agreement between CDA and Multi Professional Cooperative Housing Societies, Islamabad)
33. **Suo Motu Case No.14/2009**
(Allowing Regularization of 50 Acres of Karachi Land at through away prices causing losses running into Hundreds of Millions to the State Exchequer)
34. **Suo Moto Case No.15/2009 and Const.Petition.No.30/2010**
(Corruption in Pakistan Steel Mills Corporation)
35. **Suo Motu Case No.18/2009**
(Dumping solved waste by Safina Sugar Mills in the Forest Land of Chak Bahadur Sarkar on Sargodha-Chiniot Road)

36. **Suo Motu Case No.20/2009**
(Against Allocation of Valuable Piece of Land on Low Price by the Revenue Department, Government of Sindh)
37. **Suo Moto Case No.21/2009**
(Overcharging of Tax by the Contractors of Sand at Multan)
38. **Suo Moto Case No.22/2009**
(Action regarding Non-issuance of C.N.I.C. to a Hindu married Woman)
39. **Suo Moto Case No.23/2009**
(Regarding Half Pension of Widows of Retired Government Servants)
40. **(Suo Moto Case No.25/2009) & HRC16167-P, 20069-P, 1048-P, 20350-P, 21399-P/2009)**
(Cutting of Trees for Canal widening Project)
41. **Suo Moto Case No.26/2009 & HRC No.12735-P/2010**
(Suo Moto Action against cutting of thousands of trees for the implementation of Multi Million Rupees gas Supply Project System)
42. **HRC 14/2008 & 44/2009**
(Murder of 17 years old girl in the name of honour)
43. **HRC No.29/2009**
(Against NGO who were misusing their position)
44. **HRC No.66/2009**
(Murder of applicant's husband)
45. **HRC 70/2009**
(Murder of applicant's husband)
46. **HRC 432/2009**
(Benefit of previous service prior to their regularization)
47. **HRC 790-G, HRC, 1857, HRC 7734-G of 2009 & HRC 1003-G of 2010**
(Rental Powers Projects)
48. **HRC 1174-G/2009**
(Disability of minor due to the negligence of WAPDA Authorities)
49. **HRC 1109-P/2009**
(High handedness of Police)
50. **HRC. 1305-G/2009**
(Promotion of female officer NAB)
51. **HRC 1356-P/2009**
(Recovery of minor)
52. **HRC No.1532-S of 2009**
(Murder of person in Police custody)
53. **HRC 2041-P/2009**
(Grant of compensation as her husband was died due to the fall over of a Wall of official building)
54. **HRC 2148-S/2009**
(For grant of compensation as vehicle was damaged by the Police)

55. **HRC No.2155-P/2009**
(High handedness of revenue department)
56. **HRC No.4768-P of 2009**
(Recovery of minors)
57. **HRC 8340-G/2009**
(Against illegal promotions of BS-22 Officers)
58. **HRC No.10719-S/2009**
(For arrest of the accused)
59. **HRC 11108-P/2009**
(High handedness of Police as well as Revenue officials)
60. **HRC 12837-P/2009**
(For the grant of their acquired land compensation)
61. **HRC No.12912-P/2009**
(An Aci attack victim prayed for help)
62. **HRC 16360-/2009 a/w HRC 1859-S/2010**
(For enhancement of salaries)
63. **HRC 17070-P/2009**
(For recovery of abductee)
64. **HRC 23032-G/2009**
(For recovery of abductee)
65. **Suo Motu Case No.01/2010**
(Extortion of High Fee by Private Medical College)
66. **Suo Moto Case.No.1-P/2010**
(Police torture upon accused persons outside the Police Station Bhawana, District Chiniot)
67. **Suo Moto Case No.03/2010**
(Action regarding implementation of Social Security Laws)
68. **Suo Moto Case No.05/2010**
(Regarding huge loss to public exchequer by ignoring the lowest bid Fauji Foundation and Multinational Energy Firm "Vitol" by awarding LNG Contract)
69. **Suo Moto Case No.7/2010**
(Suo Moto Action regarding illegal use of Pakistan Children as Camel Jockeys in UAE)
70. **Suo Moto Case No.08/2010**
(Suo Moto Action regarding Martyrs/Shohada of Mian Chanun)
71. **Suo Motu Case No.9/2010**
(Regarding non-payment of Benevolent Grant of the applicant Namely Mst. Bushra Bibi widow of late Syed Yousaf Shah)
72. **Suo Motu Case No.10/2010**
(Contamination of Water of Manchar Lake Due to Disposal Effluent from MNV Drain Now converted into RBOD)
73. **Suo Motu Case No.12/2010**
(Suo Moto case regarding transfer of tannery Zone in Dist. Sialkot)

74. **Suo Motu Case No.13/2010**
(Action regarding supply of Contaminated water to Rawalpindi from Rawal Dam)
75. **Suo Motu Case No. 14/2010**
(Regarding Torture by Sialkot Police on Two Young Persons)
76. **Suo Moto Case No.15/2010**
(Action regarding regularization of the contract employees of Zakat Deptt. as well as appointment of Chairman of Central Zakat Council)
77. **Suo Motu Case No.16/2010**
(Regarding ISAF Containers SCAM)
78. **Suo Moto Case No.18/2010**
(Action regarding violation of public procurement rules, 2004 in procurement loss of billions of rupees of exchequer caused by National Insurance Company Ltd)
79. **Suo Moto Case No.23/2010**
(Regarding Fake Encounter by Punjab Police held in EME, Colony, Lahore and Gujranwala City)
80. **Suo Moto Case No.24/2010**
(Regarding Corruption in Hajj Arrangements, 2010)
81. **Suo Motu Case No.25/2010**
(Regarding Allotment of Plot by CDA to Mr.Hamid Yar Harraj in Diplomatic Enclave at throw Away Price)
82. **Suo Motu Case No.26/2010**
(Regarding death of 11 Years Old Child in the incident of Drag Car)
83. **Suo Moto Case No.01/2011**
(Suo Moto Action regarding Land Grabbing in Bani Gala)
84. **Suo Motu Case No.02/2011**
(Suo Moto Case regarding non supply of Gas connection to Mst. Ghulam Fatima Resident of Gujar Khan)
85. **Suo Moto Case No.7/2011**
(Suo Moto action regarding non-transparent procedure of purchase of 150 Locomotives by M/o Railway resultantly causing 40 Billions losses to the National exchequer)
86. **SMC No.12/2005 & Constitution Petition No.22/2005**
(Sonia Naz. Vs. Inspector General of Police, etc.)
(Abduction and Rape of Mst. Sonia Naz)
87. **SMC No.17/2010, Const. P. No.62/2010, etc**
(Marvi Memon Vs. Federation of Pakistan through Secy. Cabinet, etc)
(Regarding unauthorized diversion of Flood water and alleged breaches in the embankments of barrages and canals)
88. **HRC 3104-B/2010**
(Death of three persons due to negligence of WAPDA & payment of compensation)
89. **HRC No.48659-A/2010**
(Recovery of abductee)
90. **HRC 11392-N/2010**
(Recovery of abductee)

91. **HRC 16369-/2010**
(Humiliating of police officials)
92. **HRC 22865-P/201**
(Registration of case)
93. **HRC 24028-/2010**
(Arrest of accused)
94. **HRC No.25508-P of 2010**
(Pollution matter)
95. **HRC 47864-P/2010**
(Request for compensation)
96. **HRC 48012-P/2010**
(For development work in a housing society)
97. **HRC 10785-P/2010**
(For recovery of minor missing for the last six years)
98. **Suo Moto Case No.6/2011**
(Regarding Payment of prescribed Minimum Wages to the Security Guards Working In PTCL.)
99. **Suo Moto Case No.12/2011**
(Action taken upon the application of Memona Parveen regarding enhancement of salary/ stipend of industrial home teachers, which is Rs. 500 per month)
100. **Suo Moto Case No.16/2011**
(Regarding the law and order situation in Karachi)
101. **Suo Moto Case No 17 of 2011**
(Regarding non constitution of board of directors and non-payment of salaries to the staff of 26 colleges, selected by C.M., Punjab under pilot project)
102. **Suo Moto Case No 18 of 2011**
(Regarding irregularities and non payment of salaries to the workers of Pakistan railways)

* The expressions “**suo motu**” and (mistakenly) “**suo moto**” are used interchangeably in the above list of cases supplied by the Supreme Court. The usual Latin term is “**proprio motu**”. The list is reproduced here as supplied.