

Authority without accountability: The search for justice in Pakistan

Executive summary



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

Chief Justice Iftikhar Muhammad Chaudhry, November 2012

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

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

The ICJ's close analysis of the Supreme Court's jurisprudence during Chief Justice Chaudhry's tenure shows that in some instances, the Supreme Court has been able to improve awareness of human rights violations and has strengthened the right of victims to achieve remedy and reparations. The Court has tried to provide some accountability for corruption and human rights violations by the civilian government and taken a firm stance against unconstitutional usurpation of power by the military. In doing so, the Court has brought Pakistan closer to fulfilling some of its obligations under international human rights law. This Report has documented some of the strides made by the Supreme Court in these areas; needless to say, these cases are not exhaustive.

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

There remain, however, areas of concern, particularly regarding the Supreme Court's exercise of its original jurisdiction under Article 184(3). As set out more fully below, ICJ's analysis shows that at times the Supreme Court has exercised its original jurisdiction, particularly its *suo motu* powers, in a manner that has not always been coherent or consistent with its own jurisprudence or with international human rights law. In some cases, the Supreme Court has acted swiftly to exercise its original jurisdiction in cases of human rights violations, facilitating victims'

right to remedy and reparation. In other instances, however, the Court has not responded to urgent human rights issues, even when it has been directly petitioned. The opacity surrounding how, and why, the Court prioritizes some human rights issues over others has led to criticisms of arbitrariness that question the Court's actual, and perceived, impartiality and independence.

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

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

NEW HOPE FOR HUMAN RIGHTS?

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

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

International legal instruments cited in this report

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)
- International Convention for the Protection of All Persons from Enforced Disappearance (ICPED)
- United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
- United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity
- United Nations Basic Principles on the Independence of the Judiciary
- Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (Latimer House Principles)
- Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region
- The Bangalore Principles of Judicial Conduct

1977 and October 1999 – and there were three successful military takeovers. On all occasions, the Supreme Court provided legal cover to the military takeover.

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

THE SUPREME COURT'S EXPANDING JURISDICTION

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

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

After Chief Justice Chaudhry's reinstatement in 2009, the Supreme Court began to expand the use of Article 184(3), notably its *suo motu* powers, to respond to a variety of matters including allegations of human rights violations, abuse of power and corruption. The number of petitions under Article 184(3) also rose exponentially. According to media reports, compared to 450 petitions made in 2004, the Supreme Court received

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

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

more than 90,000 petitions between April 2010 and December 2011. The Supreme Court's own records state that the Supreme Court continues to receive approximately 250 applications daily under Article 184(3).

INCONSISTENCY AND OPACITY

The ICJ's 2012 report on its mission to Pakistan raised concerns that the Supreme Court was using its Article 184(3) powers excessively, and recommended that its original jurisdiction be used more restrictively and on the basis of transparent criteria. After undertaking a more in-depth study of the Court's jurisprudence in the present Report, the ICJ continues to be concerned that the Supreme Court's interpretation of what are 'public importance' and 'fundamental rights' has at times been inconsistent and has sometimes failed to comply with recognized international law and standards.

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

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

In asserting jurisdiction of matters under Article 184(3), the Supreme Court has also sometimes interpreted 'fundamental rights' in a manner that is inconsistent with international human rights law. This issue arose prominently in the 'memogate' case, which involved allegations that Pakistan's ambassador to the United States, Hussain Haqqani, had written a memorandum to a senior US military figure asking for assistance to Pakistan's



The Supreme Court has had some success in tracing and producing some of the disappeared persons before the Court. But the Court has so far not passed a judgment on the issue of enforced disappearances and has not held anyone accountable. There is no point in having success in one or two cases if the phenomenon of illegal abduction goes on and escalates after each new government. We want to address the issue of ED and want the Court to pass an order directing those responsible to stop the practice.

Amina Janjua, Defence of Human Rights, June 2013

civilian government against a potential military coup d'état. In response to a petition brought by opposition political parties, the Court accepted jurisdiction under Article 184(3) by interpreting the individual's right to life—protected under the Pakistan Constitution and international human rights law—to include the right to dignity and, thus, Pakistan's right to sovereignty and an 'honorable existence'. In essence, the Supreme Court interpreted the right to life to address a political dispute about foreign relations. The Court's ruling diverged from interpretations of the applicability of the right to life and opened up the Court to criticism that it has exercised its human rights jurisdiction based on political considerations rather than a legal interpretation of 'fundamental rights'.

FAILURE TO ADDRESS MAJOR HUMAN RIGHTS ISSUES

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

ENFORCED DISAPPEARANCES

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

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

In December 2010, it came to light that the 11 men were being detained under the Army Act in connection with 'terrorist activities'. Between August 2011 and January 2012, four of the eleven men died in custody under suspicious circumstances. Lawyers for the detainees claimed they died after being subjected to torture. Since then, the remaining seven detainees have been brought before the Court twice; however, the Supreme Court has

not ordered their release or determined whether their detention is lawful.

THE LINGERING THREAT OF THE DEATH PENALTY

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

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

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

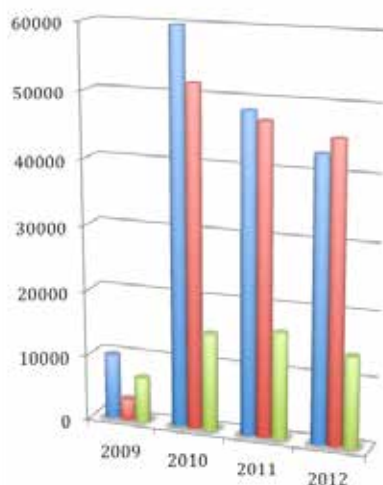
IMPUNITY OF ARMED FORCES FOR ARBITRARY DETENTION

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

INADVERTENT CONSEQUENCES

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

The number of applications made to and disposed of by the Human Rights Cell of the Supreme Court from 2009 to 2012



■ Number of petitions referred by the Human Rights Cell and accepted by the Supreme Court

■ Number of Human Rights Cell cases disposed of by the Supreme Court

■ Number of Human Rights Cell cases still pending before the Supreme Court

boundaries and violation of separation of powers; and the creation of a two-tier and arbitrary justice system.

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

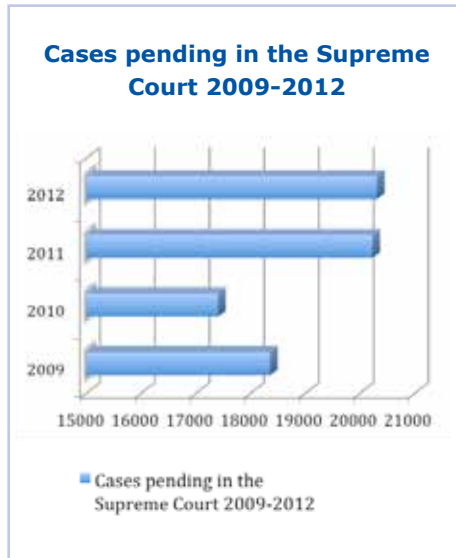
Moreover, such an enormous increase in caseload will inevitably exacerbate the already long delays faced by litigants. More than 20,000 cases are pending before the Supreme Court alone, including more than a thousand appeals by prisoners on death row. This hinders the realization of the right to a hearing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

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

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

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

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



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

CONTEMPT OF COURT

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

CONCLUSION AND RECOMMENDATIONS

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

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

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

- (1) The Supreme Court should exercise its powers under Article 184(3) of the Constitution in a manner that complies with Pakistan’s obligation under international law to promote, protect and respect human rights, maintain rule of law and uphold separation of powers;**
- (2) The Supreme Court should adopt transparent yet flexible criteria to govern how cases are selected under Article 184(3), and in particular taken up under the Court’s *suo motu* jurisdiction, and develop criteria to guide how ‘public importance’ and ‘fundamental rights’ are interpreted. Such criteria should take into account that *suo motu* procedures are an exceptional exercise of power;**
- (3) The Supreme Court should adopt transparent rules to determine the order in which cases under Article 184(3) are heard and the composition of the bench to hear cases;**
- (4) The Supreme Court must ensure that parties who may be affected by the Court’s exercise of its 184(3) jurisdiction have an adequate opportunity to request to intervene in the case before a decision is rendered or the matter is disposed of; and**
- (5) The Supreme Court should ensure that all dispositions or actions ordered, in cases taken up under Article 184(3) are themselves consistent with rule of law, separation of powers and human rights, and do not leave persons whose rights are foreseeably likely to be directly and adversely affected without redress or remedy.**

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