

**HUMAN RIGHTS FIRST SUBMISSION
TO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS**

UNIVERSAL PERIODIC REVIEW: PAKISTAN MAY 5-16, 2008

Introduction

1. This report is a Human Rights First submission to the Office of the High Commissioner for Human Rights (OHCHR) for consideration in its summary of stakeholder submissions for Pakistan's appearance before the second Universal Periodic Review session, scheduled from May 5 to 16, 2008.

2. Using the guidelines approved by the Human Rights Council¹ and the Civil Society Unit of OHCHR,² this submission focuses primarily on the current situation of the judiciary in Pakistan, and particularly the lasting impact of provisions enacted under martial law. These concerns are of particular relevance to section I(A) and (B) of the Human Rights Council's Guidelines, and to section 7(b)-(e) of the Civil Society Unit's Guidelines.

Executive Summary

3. Martial law was imposed on November 3, 2007, and although it was revoked on December 15, a Revocation Order affirmed the continuation of repressive measures taken during martial law and stripped the judiciary of its constitutional power to review much executive action. Among the measures affirmed and insulated from judicial review are the replacement of scores of senior judges, including the Chief Justice of the Supreme Court; a provision retroactively allowing civilians to be tried in military courts; and restrictions on the media and the legal profession.

4. The absence of an independent judiciary has undone efforts to address past abuses such as "disappearances" and opens the door to further human rights abuses. It also prevents judicial review of human rights abuses that occurred during martial law and compromises the electoral process, long-term stability, and the credibility of investigations into violence, including the assassination of Benazir Bhutto.

5. The Pakistani government should take all necessary measures to restore the judiciary as an independent branch with power to review executive action. This requires that all orders and amendments issued during martial law be withdrawn and the deposed judges reinstated. The continuing house arrest of judges and lawyers must end, and the threat of prosecution against them lifted. The government should also ratify the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).

¹ Human Rights Council, *Organizational and Procedural Matters, Human Rights Bodies and Mechanisms, Universal Periodic Review*, U.N. Doc. A/HRC/6/L.24 (September 24, 2007).

² OHCHR, *Guidelines for 'Relevant Stakeholders' Wishing to Provide Information to the Universal Periodic Review* (January 9, 2008).

Continuing Attacks on Judicial Independence and Human Rights

A. Overview

6. Over the previous half century, Pakistani courts had frequently been intimidated or induced to support military coups and other acts contrary to the rule of law. In 2007, however, the Supreme Court demonstrated a growing independence on important cases, including the growing problem of “disappearances,” secret detentions without charge or trial thought to be linked to government counterterrorism operations. When the Chief Justice was first ousted in March, Pakistan’s lawyers stood up in an unprecedented demonstration of support for the Supreme Court. The Court’s reinstatement of its Chief Justice in July was itself a demonstration of judicial independence and encouraged citizens to bring further judicial challenges to the executive branch’s actions.

7. The Court was set to rule on the validity of President Musharraf’s re-election in mid-November. In his capacity as Army Chief of Staff, Musharraf imposed martial law on November 3, justifying this action by accusing the judiciary of interfering with counterterrorism efforts.³ Immediately following the Proclamation of Emergency (Proclamation) on November 3, President Musharraf issued a Provisional Constitution Order (PCO) that prohibited judicial review of the PCO, the Proclamation, and the Judges Order dismissing the judges who refused to support the PCO, as well as “any Order made in pursuance” of those orders.⁴ The PCO even more broadly prohibited the courts from exercising any power “against the President . . . or any person exercising powers . . . under their authority.”⁵ He replaced the dismissed judges with loyalists and detained dozens of judges and thousands of lawyers and activists, often under harsh conditions.⁶

8. Using his authority under the PCO to amend the Constitution “as is deemed expedient”⁷—and without regard to procedures laid out in the constitution⁸—President Musharraf amended the Constitution and other laws to further undermine the rule of law and judicial independence. President Musharraf amended the media laws to, among other things, prohibit broadcasting, or written or graphic materials depicting, anything that “defames or brings into ridicule” the President or other government officials.⁹ First-time violations can result in massive fines and imprisonment.¹⁰

³ Proclamation of Emergency (Nov. 3, 2007), *available at*

http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html.

⁴ Provisional Constitution Order No. 1 of 2007, November 3, 2007, § 3(1), *available at*

http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html [hereinafter PCO]; see also Oath of Office (Judges) Order § 7 (Nov. 3, 2007), *available at*

http://www.pakistani.org/pakistan/constitution/post_03nov07/judges_oath_order_2007.html [hereinafter Judges Order].

⁵ PCO § 2(3).

⁶ On December 9-14, Maureen Byrnes, Executive Director of Human Rights First and a colleague, attorney Charles Lister, traveled to Pakistan, where they spoke with, among others, deposed judges and formerly detained lawyers, including members of the Human Rights Commission of Pakistan. They were unable to meet with those under house arrest but met with their family members.

⁷ PCO § 2(1).

⁸ See PAK. CONST., arts. 238-239 (1973), *available at* <http://www.pakistani.org/pakistan/constitution/part11.html> (requiring amendments to originate in, and be approved by two-thirds of total membership of Parliament).

⁹ Pakistan Electronic Media Regulatory Authority (Amendment) Ordinance 2007, Ordinance No. LXV of 2007, § 2 (Nov. 3, 2007), *available at* <http://pakistan-blackout.blogspot.com/2007/11/text-of-ordinance-on-electronic-media.html> [hereinafter PEMRA Amend.]; see also Press, Newspapers, News Agencies, and Books Registration (Amendment) Ordinance 2007, Ordinance No. LXIV of 2007, § 3 (Nov. 3, 2007), *available at* <http://www.kylapasha.com/blog/?p=317>.

¹⁰ PEMRA Amend. § 9.

9. Pakistan has ratified neither the ICCPR nor the Torture Convention. However, the continuing crackdown on the judiciary and institutionalization of measures taken during martial law violate these treaties and the Pakistani Constitution and conflict with other non-binding but significant international documents, including the Universal Declaration on Human Rights (UDHR), the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), the United Nations Basic Principles on the Role of Lawyers (Basic Principles on Lawyers), and the United Nations Basic Principles on the Independence of the Judiciary (Basic Principles on the Judiciary). Pakistan should comply with these documents and should ratify both the ICCPR and the Torture Convention.

B. Measures taken upon lifting martial law

10. Despite the lifting of martial law on December 15, the orders and amendments issued during martial law remain in place, lawyers and judges remain under house arrest, and the judiciary remains stacked with President Musharraf's supporters. Orders and amendments issued upon revocation of martial law affirm the measures taken during martial law, including the installation of loyalist judges; insulate them from judicial review; and empower President Musharraf to issue further orders, also shielded from judicial review.

11. **Affirmation of executive action, including dismissal of judges:** Constitutional amendments issued under the Second Amendment Order on December 14, immediately before the lifting of martial law, ensured that the deposed judges were permanently replaced and attempted to legitimize these appointments by providing for an oath under the Constitution.¹¹ The Revocation Order lifting martial law was the primary mechanism by which President Musharraf institutionalized the orders and amendments issued and measures taken during martial law, including the dismissal of judges, new government authority over lawyers, media restrictions, and other measures such as mass arrests and detentions. The order reinstated the Constitution but affirmed the controversial amendments¹² and further provided that the repeal of the PCO did not “invalidate, nullify or render ineffective” any order passed or action taken under the Proclamation.¹³

12. **Barring judicial review:** Nearly every major amendment or order issued on or after November 3, including the Revocation Order¹⁴ and the Second Amendment Order,¹⁵ eliminated judicial review of appointments, acts, and orders, in violation of the Constitution's specific prohibition on interference with the High Courts even during emergency rule¹⁶ and of more general provisions on the role of the courts to review executive action.¹⁷ These measures also conflict with international norms on the role of the judiciary.¹⁸

¹¹ PAK. CONST., art. 270(C)(2)(i) (1973); see also Constitution (Second Amendment) Order, 2007, President's Order No. 6 of 2007, Dec. 14, 2007, § 2(1) (implementing the amendments), *available at* http://www.pakistani.org/pakistan/constitution/post_03nov07/po6_2007.html [hereinafter Second Amendment Order].

¹² Revocation of Proclamation of Emergency Order, 2007, Dec. 15, 2007, § 4(1), *available at* http://www.pakistani.org/pakistan/constitution/post_03nov07/emergency_revocation_order.html [hereinafter Revocation Order].

¹³ *Ibid.* § 5(1).

¹⁴ *Ibid.* § 7(3).

¹⁵ Second Amendment Order § 2(3).

¹⁶ PAK. CONST., art. 232 (1973).

¹⁷ PAK. CONST., art. 199(1)(a)(i)-(ii) (1973).

¹⁸ See, e.g., Basic Principles on the Independence of the Judiciary, ¶¶ 1 (requiring the government to “respect and observe the independence of the judiciary” and guarantee and enshrine it in the Constitution), and 3 (requiring that “[t]he judiciary shall have jurisdiction over all issues of a judicial nature”), and 4 (prohibiting “any inappropriate or unwarranted interference with the judicial process”) [hereinafter Basic Principles on the Judiciary], *endorsed by* G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (Nov. 29, 1985) and G.A. Res. 40/146, ¶ 2, U.N. Doc. A/RES/40/146 (Dec. 13, 1985). Installing beholden judges violates these same

13. **Permitting further action:** The Revocation Order also provides that “[i]f any difficulty arises in giving effect to any of the provisions of this Order, the President may make such provisions and pass such orders as he may deem fit”¹⁹ and bars such future orders from judicial review.²⁰ This provision opens the door to further violations of the rule of law, and with the other provisions, risks creating a perpetual form of martial law.

C. Impact of a compromised judiciary

14. **Right to a judicial remedy and due process:** Eliminating judicial review and arbitrarily dismissing judges conflict with international norms on the role of the judiciary²¹ and the right to a remedy, provided under the UDHR and the Declaration on Human Rights Defenders,²² for human rights violations that occurred during and after martial law. Included among those actions placed outside of judicial scrutiny are acts of arbitrary arrest and detention and torture of lawyers and other human rights defenders, measures the Constitution prohibits even during emergency rule.²³

15. The replacement of judges has already affected the conduct of a number of human rights cases. On January 3, the Court retracted an October order that suspended three police and administrative officials accused of beating protesters.²⁴ In another example, the new Court has ceased action on the crucial issue of hundreds of “disappearances,” thus violating the UDHR.²⁵ An amendment to the Pakistan Army Act, which places civilians accused of certain crimes into military courts and, like all other martial law period orders, is still in place and insulated from judicial review, likewise conflicts with the UDHR’s due process protections.²⁶

provisions. See also *ibid.* ¶ 2 (requiring impartial decisions “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect . . . for any reason”) and 6 (requiring that “judicial proceedings are conducted fairly”).

¹⁹ Revocation Order § 7(2).

²⁰ Section 7(3) of the Revocation Order applies to the broad range of orders covered in Articles 4(1) and 5(1) in the broadest terms: “The validity of any provision made or orders passed under clause (1) and (2) [which allows for future orders], shall not be called in question by or before any court . . . , any forum or authority, on any ground whatsoever.”

²¹ The dismissals appear to have resulted from President Musharraf’s dissatisfaction with past and anticipated decisions, and not “for reasons of incapacity or behaviour that renders them unfit to discharge their duties,” the only justifications for dismissal. Basic Principles on the Judiciary ¶ 18. Nor did the judges receive “a fair hearing,” as required under paragraph 17. See also Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, arts. 10-11, U.N. Doc. A/RES/53/144 (Mar. 8, 1999) [hereinafter Declaration on Human Rights Defenders].

²² See Universal Declaration of Human Rights, G.A. Res. 217A(III), at 71, U.N. Doc. A/810, art. 8, 10 (right to a “fair and public hearing by an independent and impartial tribunal, in the determination of [one’s] rights and obligations”) (Dec. 10, 1948) [hereinafter UDHR]; see also Declaration on Human Rights Defenders art. 9(1), (2), and (5).

²³ See PAK. CONST., art. 233(1) (1973). President Musharraf’s martial law was not valid under Article 232(1) of the Constitution, which provides that the President may issue a proclamation of emergency – President Musharraf issued the Proclamation in his capacity as Chief of Army Staff, not as President. Therefore, even those actions permitted under emergency rule – suppression of free speech, assembly, association, press, and movement – should be subject to judicial review.

²⁴ Kim Barker, *Judicial spark stifled in Pakistan*, CHICAGO TRIBUNE, Jan. 18, 2008, available at http://www.chicagotribune.com/news/nationworld/chi-pakjudges_barker_mon_14jan18,1,4728217.story.

²⁵ See UDHR art. 10 (right to a “fair and public hearing by an independent and impartial tribunal, in the determination . . . of any criminal charge against him”). In contrast, the deposed court had ordered the government to report on the status of the disappeared and to ensure they were properly charged if there were sufficient grounds. See *Missing Persons Case*, in the Supreme Court of Pakistan, August 21, 2007 (on file with Human Rights First). On November 13 the government was due to report on its progress in locating the “disappeared.”

²⁶ See Pakistan Army (Amendment) Ordinance, 2007, Ordinance No. LXVI of 2007, § 2 (Nov. 10, 2007), available at http://www.app.com.pk/en/index2.php?option=com_content&task=view&id=20627&pop=1&page=0&Itemid=2.

16. Threat of further human rights violations: The abrogation of judicial independence opens the door to future violations of fundamental human rights protected in the UDHR and other documents. The likelihood of intimidation or disbarment of lawyers who might challenge the measures further encourages violations of fundamental human rights, while the threat of disbarment or other interference in the ability of lawyers to do their jobs²⁷ conflicts with numerous provisions of the Basic Principles on Lawyers.²⁸

17. Free and fair elections and long-term stability: The judiciary plays a crucial role in elections: its members make up and oversee the Election Commission, hearing a range of complaints and disputes. Problems identified by observers in past elections are likely to persist. Even before martial law was imposed, an NDI pre-election mission found that “[t]he importance of preserving the independence of the judiciary has never been more critical in Pakistan and cannot be overstated.”²⁹ Without an independent judiciary, there cannot be “genuine elections” as contemplated under the UDHR.³⁰

18. Responding to violence: Although the Pakistan Bar Council demanded a judicial inquiry into the assassination of Benazir Bhutto, an editorial in the Dawn newspaper concluded: “If the independence of the judiciary had not been compromised as a result of the extra-constitutional measures taken by President Musharraf on Nov. 3, perhaps that institution could have stepped in to bridge the credibility gap that the government so desperately needs filled today.”³¹

Recommendations

19. To give effect to its obligations under the international documents discussed above, the Pakistani government should immediately:

- Withdraw all orders and amendments issued during martial law
- Reinstatement of those judges dismissed because they would not take an oath under the PCO
- Release those lawyers and judges still held under house arrest
- Invite the Special Rapporteur on the Independence of Judges and Lawyers for a country visit
- Ratify and abide by the requirements of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²⁷ See Legal Practitioners and Bar Councils (Amendment) Ordinance 2007, Ordinance No. LXIX of 2007, § 4 (Nov. 24, 2007) (giving the executive final authority over disciplinary action against lawyers), *available at* http://www.dailytimes.com.pk/default.asp?page=2007%5C11%5C25%5Cstory_25-11-2007_pg7_52.

²⁸ See Basic Principles on the Role of Lawyers, ¶¶ 16(c) (freedom from administrative sanctions or the threat thereof “for any action taken in accordance with recognized professional duties, standards and ethics”), 27 (requiring that “[c]harges or complaints . . . be processed expeditiously and fairly under appropriate procedures” and “a fair hearing”), 28 (requiring that “[d]isciplinary proceedings against lawyers . . . be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and” that such proceedings “be subject to an independent judicial review”), U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990); see also Declaration on Human Rights Defenders art. 11.

²⁹ NDI Report: Statement of the NDI Pre-Election Delegation to Pakistan, Oct. 21, 2007.

³⁰ See UDHR art. 21(3).

³¹ Kim Barker, *Judicial spark stifled in Pakistan*, CHICAGO TRIBUNE, Jan. 18, 2008.