

REFORMING PAKISTAN'S CRIMINAL JUSTICE SYSTEM

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REFORMING PAKISTAN'S CRIMINAL JUSTICE SYSTEM

EXECUTIVE SUMMARY AND RECOMMENDATIONS

The ineffectiveness of Pakistan's criminal justice system has serious repercussions for domestic, regional and international security. Given the gravity of internal security challenges, the Pakistan Peoples Party (PPP)-led government in Islamabad, and the four provincial governments should make the reform of an anarchic criminal justice sector a top domestic priority.

The low conviction rate, between 5 and 10 per cent at best, is unsurprising in a system where investigators are poorly trained and lack access to basic data and modern investigation tools. Prosecutors, also poorly trained, are not closely involved in investigations. Corruption, intimidation and external interference in trials, including by the military's intelligence agencies, compromise cases before they even come to court. Given the absence of scientific evidence collection methods and credible witness protection programs, police and prosecutors rely mostly on confessions by the accused, which are inadmissible in court. Militants and other major criminals are regularly released on bail, or their trials persist for years even as they plan operations from prison. Terrorism cases, too, produce few convictions.

The failure of prosecutors to achieve convictions in major cases, such as the June 2008 Danish embassy bombing, the September 2008 Marriott Hotel bombing in Islamabad, and the March 2009 attack on a police academy in Lahore, has weakened public confidence in the state's ability to respond to terrorism. Despite the increasing urgency of reform, Pakistan's police, and indeed the whole criminal justice system, still largely functions on the imperative of maintaining public order rather than tackling 21st century crime.

A military-led counter-terrorism effort, defined by haphazard and heavy-handed force against some militant networks, short-sighted peace deals with others, and continued support to India and Afghanistan-oriented jihadi groups, has yielded few successes. Instead, the extremist rot has spread to most of the country. The military's tactics of long-term detentions, enforced disappearances and extrajudicial killings provoke public resentment and greater instability, undermining the fight against violent extremism.

Wresting civilian control over counter-terrorism policy, a key challenge of the current democratic transition, will require massive investments in police and prosecutors, specifically to enhance investigative capacity and case building. Successes in combating serious crime, including kidnappings-for-ransom and sectarian terrorism, during the democratic transition of the 1990s demonstrate that civilian law enforcement agencies can be effective when properly authorised and equipped. With the scale of violence far greater today, the government needs all the more to utilise political and fiscal capital to modernise the criminal justice sector.

Criminal justice cannot, however, be isolated from the broader challenges of the democratic transition. The repeated suspension of the constitution by military regimes, followed by extensive reforms to centralise power and to strengthen their civilian allies, notably the religious right, have undermined constitutionalism and the rule of law. General Zia-ul-Haq's Islamisation of the constitution and laws during the 1980s altered the basic structure of parliamentary democracy, introduced religious, sectarian and gender biases into law and made the violation of fundamental rights not just common practice but a matter of state policy. As a result, Pakistan moved farther and farther away from international standards of justice. The current parliament has, through the eighteenth constitutional amendment, reversed many of these distortions and added new provisions that, if implemented, may indeed strengthen constitutionalism and political stability. More legal reforms are needed. Discriminatory religious laws remain in force, and the justice system is still predisposed towards miscarriage.

In May 2009, the National Judicial (Policy Making) Committee (NJPC), headed by the Supreme Court chief justice, produced the National Judicial Policy (NJP) 2009 to make the justice system more responsive to citizen needs. The policy applies enormous pressures on civil and criminal courts to resolve cases within a fixed timeframe. However, with a lopsided emphasis on speedier delivery, the NJP has failed to address critical weaknesses in the judiciary, including the criminal justice system. An already low conviction rate could decline even further. While

slow delivery remains a critical problem, policymakers should avoid resorting to quick fixes and procedural shortcuts such as parallel court systems and informal dispute resolution mechanisms. Such measures, including anti-terrorism courts, have failed to produce the desired results, and have also undermined the quality of justice. An enhanced and reformed criminal justice sector remains the best and only sustainable option.

International allies, particularly the U.S. and the EU, should allocate the necessary resources to make Pakistan a strong criminal justice partner. A lopsided partnership with Pakistan's military has yielded few sustainable counter-terrorism successes. Al-Qaeda affiliated jihadi groups continue to operate in the Pakistani heartland, undermining the country's security and the security of its neighbours and the international community more broadly. The international community must shift the focus of security assistance to the civilian law enforcement agencies, which would yield long-term counter-terrorism dividends.

RECOMMENDATIONS

To the Federal Government of Pakistan and Provincial Governments:

1. Repeal all laws that discriminate on the basis of religion, sect or gender, including the blasphemy laws, anti-Ahmadi laws and Hudood Ordinances.
2. Amend the 1997 Anti-Terrorism Act to refine its definition of terrorism to include only those acts that are large in scale and intend to create a sense of fear and insecurity among segments of the public; and disband anti-terrorism courts (ATCs) and try terrorism cases in regular courts.
3. Amend the Criminal Procedure Code to establish a robust witness protection program, and make the protection of witnesses, investigators, prosecutors and judges in major criminal cases, particularly terrorism cases, a priority.
4. Address over-crowding in prisons by:
 - a) enforcing existing bail laws;
 - b) holding to account any trial judge failing to set bail where required by law;
 - c) passing a new law requiring judges to allow bail unless there are reasonable grounds to believe the prisoner would abscond or commit further offences; and
 - d) reforming the sentencing structure for non-violent petty crimes to include alternatives to imprisonment such as fines, probation and treatment.
5. Guarantee the rights of all prisoners under remand by:
 - a) ensuring that prison facilities are fully resourced, including with enough vehicles to transport prisoners to court on the designated dates;
 - b) ensuring that they are taken to court on the dates of their hearings;
 - c) taking action against jail authorities who assign labour to remand prisoners, prohibited by law; and
 - d) providing free legal aid to remand prisoners who cannot afford counsel.
6. Initiate a broad dialogue with stakeholders, including serving and retired senior police officials, jurists, criminologists, NGOs and other civil society groups to assess the strengths and weaknesses of the original Police Order (2002), and produce fresh bills in each legislature to strengthen law enforcement that have public support and political sanction.
7. Develop mechanisms for individual police stations to articulate resource needs and for these to be reflected in provincial police budgeting processes.
8. Carry out a comprehensive assessment of the gaps in investigation and prosecution, based on analyses of crime patterns, with the goal of identifying personnel, training and resource needs at the national, provincial and district levels; invest in producing cadres of specialists within investigation branches and agencies, in such fields as kidnapping, homicide, counter-terrorism and cyber-crime.
9. Engage the public as an effective partner in policing by establishing and empowering neighbourhood committees, citizen-police liaison committees and public safety commissions at the national, provincial and district level to oversee critical aspects of policing and by ensuring that police have adequate resources and operational independence.
10. Strengthen the police's investigative capacity by:
 - a) computerising and maintaining centralised, serviceable records of all FIRs;
 - b) amending the Telegraph Act to establish clear protocols for investigators' access to mobile phone data, and ensuring that this access is not undermined by the military's intelligence agencies;
 - c) amending the Evidence Act to require investigators to incorporate scientific methods and data in investigations;
 - d) modernising the police force by enhancing scientific evidence collection, including DNA analysis, automated fingerprinting identification systems, and forensics, with particular emphasis on the provincial and district levels; prioritising completion

- of forensics science laboratories in Islamabad, in the case of the federal government, and Lahore, in the case of the provincial Punjab government; and allocating resources for similar laboratories in Sindh and Khyber Pakhtunkhwa provinces;
- e) bringing the national forensics science laboratory under the Federal Investigation Agency, and the provincial laboratories under the respective criminal investigation departments, while guaranteeing operational independence and oversight;
 - f) appointing highly qualified scientists to head the forensics science laboratories, and making recruitment open to the private sector, with competitive salaries; and
 - g) requiring all potential candidates to the investigation branches to first serve as understudies to senior investigators; recruiting those who show potential; requiring them to undergo specialised training in specific fields such as homicide, counter-terrorism, cyber-crime and counter-narcotics; and providing regular refresher training, including through foreign exposure.
11. Prevent external interference in investigations by:
 - a) requiring the approval of the relevant public safety commission before an investigating officer in an ongoing investigation can be replaced; and
 - b) publicising instances of military interference in investigations, including pressure on the police to surrender prisoners to the military's intelligence agencies, and raise such cases with the higher judiciary.
 12. Strengthen the criminal prosecution services and police-prosecutor coordination by:
 - a) raising police and prosecutors' salaries;
 - b) providing security of tenure to prosecutors, empowering them to reject weak cases, as well as specialised training in such fields as homicide and counter-terrorism, and integrating it with related police training programs;
 - c) mandating joint police-prosecutor committees to oversee investigations; and
 - d) establishing a committee within each prosecution service, headed by the prosecutor general and comprising respected jurists, to examine the number of cases an individual prosecutor prosecutes, reasons for trial delays, and the number of convictions and acquittals, including identifying causes for acquittals.
 13. Disband all state-supported *lashkars* (militias) and take action against any individuals or groups pursuing vigilante justice, including against alleged militants.
 14. Commit to impartial justice and end all deviations from the rule of law and constitutionalism by:
 - a) repealing parallel courts systems such as qazi (Sharia), National Accountability Bureau and anti-terrorism courts;
 - b) repealing all laws that discriminate on the basis on religion, sect and gender, including the blasphemy and anti-Ahmadi laws and the Hudood Ordinances; and
 - c) prosecuting any civilian or military officials responsible for enforced disappearances, extrajudicial killings and other human rights violations.
- To Pakistan's Higher Judiciary:**
15. Shift the focus of the National Judicial Policy from short-term solutions for speedier delivery towards establishing a justice system that tackles the primary threats to internal stability and instills public confidence in the state.
 16. Circumscribe the doctrine of the constitution's basic features by limiting it to amendments that negate the spirit of parliamentary democracy, judicial independence and federalism, and remove reference to Islamic provisions, given their vagueness.
 17. Respect the separation of powers enshrined in the constitution by:
 - a) limiting the Supreme Court's use of suo motu powers to extreme cases of fundamental rights violations;
 - b) strictly interpreting Article 184 of the constitution to provide a clear definition of "public interest" that would prevent its broad use or abuse; and
 - c) prohibiting the provincial high courts from taking suo motu action, in accordance with the constitution.
 18. Strike down all laws that discriminate on the basis of religion, sect and gender, as unconstitutional, if the government fails to repeal them.
- To the International Community, particularly the United States and the European Union:**
19. Make Pakistan a strong criminal justice partner by shifting the focus of security assistance to civilian law enforcement agencies and criminal prosecution.

20. Support the modernisation and enhance the counter-terrorism capacity of the police and civilian security agencies, including by training investigators in modern methods of evidence collection, equipping forensic laboratories and assisting the computerisation of police records.
21. Send unambiguous signals to the military that illegal detentions, extrajudicial killings and other human rights violations in the name of counter-terrorism are unacceptable, by conditioning military aid on credible efforts by the military leadership to hold any military and intelligence officers and officials found committing such acts to account.

Islamabad/Brussels, 6 December 2010

REFORMING PAKISTAN'S CRIMINAL JUSTICE SYSTEM

I. INTRODUCTION

In 2009, Pakistan was worse hit by terrorist violence than in any previous year, with civilian casualties outpacing those in Iraq and Afghanistan, with this pattern continuing in 2010. Indeed the enormity of the problem is the direct consequence of the criminal justice system's failure to pre-empt, investigate and convict militants.¹ A significant number of militant attacks have targeted civilian law enforcement agencies. Although they are the frontline of the fight against terrorism, these civilian agencies remain too under-resourced to counter such attacks and to bring militant groups to justice. Terrorist violence is not confined to the north-western tribal belt bordering Afghanistan. It is rampant in urban centres such as the federal capital Islamabad, Karachi, Quetta and Lahore and other major cities, particularly in the most populous province, Punjab.²

Police investigations are undermined by the absence of professional autonomy, poor training and reliance on blunt investigative tools. In 2002, then-President Pervez Musharraf promulgated the Police Order 2002 to transform an ineffective, brutal and politicised force into an efficient, service-oriented one. Drafted with the input of many senior police officials, the ordinance could have made the police a more autonomous and accountable institution. However, the military regime's extensive amendments in 2004 diluted

many of the provisions for internal and community oversight and limited operational and political independence.³ The Police Order 2002 had also separated the prosecution branch from the police, a necessary but still unfinished step. Eight years later, prosecution services remain under-resourced and the same factors that impede the police's independence, including political interference and corruption, result in weak cases that fail to hold up in court.

With the constitutional cover for the Police Order 2002 now lapsing, provincial governments, who are responsible for law and order, must pass legislation to enable the police to tackle Pakistan's multiple internal security challenges. Any reform process must, however, prioritise police and prosecutors' capacity to build strong cases that lead to convictions against militant groups and other criminal networks.

Since the rule of law is central to Pakistan's democratic transition, an effective criminal justice system is essential. The failings of the civil or criminal court system have forced many citizens to rely on informal dispute resolution mechanisms that are quicker and less cumbersome. This dangerous trend undermines state authority and the quality of justice. There is urgent need for reforms that reconcile demands for timely justice with effective prosecution. The eighteenth constitutional amendment, passed unanimously by both houses of parliament in April 2010, includes many positive measures to enhance judicial independence, protect democracy and buttress fundamental rights, including the right to "a fair trial and due process".⁴ But these constitutional changes alone will not rebuild a deteriorating justice sector where conviction rates are between 5 to 10 per cent, prisons are overcrowded and the capacity of courts sorely stretched by backlogs.

Many domestic and international stakeholders see putting terrorists through the regular justice system as a losing bet. The alternatives, however, are counter-productive. The military continues to dominate counter-terrorism strategy but has delivered few sustainable successes in the last nine

¹ For earlier Crisis Group analysis on the rule of law sector, see Crisis Group Asia Reports N°160, *Reforming the Judiciary in Pakistan*, 16 October 2008; N°117, *Reforming Pakistan's Police*, 14 July 2008; and N°86, *Building Judicial Independence in Pakistan*, 10 November 2004.

² According to the Pakistan Institute for Peace Studies (PIPS), in September 2010 alone there were 297 people killed and more than 700 injured in terrorist and insurgent attacks, and another 51 people killed in political violence. Pakistan Security Report (September 2010), PIPS, 11 October 2010. More than 3,000 people were killed in terrorist attacks in 2009. For Crisis Group analysis of Islamist militancy in Pakistan, see Asia Reports N°178, *Pakistan: Countering Militancy in FATA*, 21 October 2009; N°164, *Pakistan: The Militant Jihadi Challenge*, 13 March 2009; N°125, *Pakistan Tribal Areas: Appeasing the Militants*, 11 December 2006; N°95, *The State of Sectarianism in Pakistan*, 18 April 2005; N°73, *Unfulfilled Promises: Pakistan's Failure to Tackle Extremism*, 16 January 2004; and N°49, *Pakistan: The Mullahs and the Military*, 20 March 2003.

³ See Crisis Group Report, *Reforming Pakistan's Police*, op. cit.

⁴ Text of the Eighteenth Amendment to the Constitution at www.pak.gov.pk/Constitution/Full%20text%20of%2018th%20Amendment%20Bill.pdf.

years. In fact, military operations in Khyber Pakhtunkhwa (KPK) province and the Federally Administered Tribal Areas (FATA) create public resentment, and more importantly, fail to address militancy in the Pakistani heartland.

Law enforcement agencies, currently prime targets for terrorist groups, should be the front line in the state's fight against violent extremism. The government must build their physical capacity to repel attacks, and even more their ability to curb the growing criminality that allows militancy to flourish. This will require a comprehensive policy that builds on past law enforcement successes, modernises civilian law enforcement agencies and incorporates prosecutors and the courts. This report, based on extensive interviews with retired and serving police officials, prosecutors, judges and criminal lawyers in Islamabad, Lahore, Karachi and Peshawar identifies critical gaps in the criminal justice system and proposes reforms to strengthen investigations and prosecutions, so that fair trials becomes a viable and indeed the first option to counter criminality and, by extension, radical extremism.

II. RULE OF LAW AND THE LEGACY OF MILITARY RULE

The legal framework for criminal trials is provided in three bodies of law, inherited from the British colonial regime: substantive law is contained in the Pakistan Penal Code (PPC) of 1860; principles and procedures for evidence in the Evidence Act of 1872 (amended and renamed Qanun-e-Shahadat in 1984); and criminal procedures for registration, investigation and trial in the Criminal Procedure Code (CrPC) of 1898. Parts of the country are excluded from the procedures and protections of these texts as well as the constitution as a result of parallel legal frameworks. These include the Frontier Crimes Regulation (FCR), 1901, that applies to FATA,⁵ and the Nizam-e-Adl 2009 that imposes Sharia (Islamic law) in the Provincially Administered Tribal Areas (PATA) of KPK province.⁶ There are also numerous special laws, including the Anti-Terrorism Act (ATA) 1997, the National Accountability Ordinance (NAB), and the Hudood Ordinances, discussed in more detail below.

Except for some amendments by military regimes, the PPC, CrPC and Evidence Act have been largely untouched since independence. Even where there have been major reforms, these have been largely regressive since military regimes have amended these laws to legitimise their rule and sideline their civilian opponents. Indeed, political and constitutional distortions are largely responsible for the breakdown of the rule of law. General Zia-ul-Haq's Islamisation program during the 1980s, in particular, fundamentally distorted the justice system, degrading legal standards and introducing religious, sectarian and gender biases. The violation of basic rights became a matter of state policy.

A. THE EIGHTH AMENDMENT

In 1979, the Zia regime Islamised the Pakistan Penal Code and enacted the Hudood Ordinances, prescribing punishments according to orthodox Islamic law that covered theft, highway robbery, intoxication, blasphemy, rape, adultery

⁵ FATA comprises seven administrative units, or tribal agencies, including South Waziristan, North Waziristan, Kurram, Khyber, Orakzai, Mohmand and Bajaur; and four Frontier Regions adjoining the districts of Peshawar, Kohat, Dera Ismail Khan and Bannu. For analysis of FATA's legal, administrative and political structure, and its impact on conflict, see Crisis Group Reports, *Pakistan: Countering Militancy in FATA*; and *Pakistan Tribal Areas: Appeasing the Militants*, both op. cit.

⁶ PATA comprises districts of the former Malakand Division, including Buner, Chitral, Lower Dir, Upper Dir, Malakand, Shangla and Swat. On the Nizam-e-Adl's impact on peace and security in PATA, see Crisis Group Asia Briefing N°111, *Pakistan: The Worsening IDP Crisis*, 16 September 2010.

and extra-marital sex (fornication). Penalties include amputation of limbs, flogging, stoning to death and other forms of capital punishment.⁷ In 1980, the military regime established the Federal Shariat Court to ensure all legislation conformed to Islamic injunctions and to exercise appellate power in Hudood cases. Zia's blasphemy and anti-Ahmadi⁸ laws, which carry a mandatory death penalty, still provide legal cover to the persecution of religious and sectarian minorities.⁹ The *Qisas* (retribution) and *Diyat* (blood money) law allows the relatives of a murder victim to pardon the killer in return for monetary compensation, in effect providing cover for "honour killings" and enabling murder cases to be settled out of court. While the harshest penalties like stoning and amputation have never been carried out, the laws to which they apply are not dead but continue to be used.¹⁰

Zia's regime also altered the Evidence Act, giving it the Islamic name of Qanun-e-Shahadat in 1984. Offences, including theft and rape, which became punishable under Islamic jurisprudence, now require a much stricter level of evidence. Courts must decide the competence of witnesses on the basis of their Islamic character: only those refraining from sin can testify.¹¹ In Hudood cases, two women witnesses are required to provide testimony equal to a man's, and women need four witnesses to prove rape. Women who fail to prove rape by this standard were often charged with extra-marital fornication, also punishable by death, until the Women Protection Act of 2006 separated rape and fornication, returning the former offence to the PPC.¹²

The eighth constitutional amendment, passed by a rubber stamp parliament in 1985, adopted and provided constitutional cover for these and other ordinances. Failing to uphold the fundamental rights contained in the 1973 constitution, the judiciary validated the eighth amendment. "As a result", said an Islamabad-based senior advocate, "you have a marked shift from international and common law standards".¹³ The eighth amendment also gave the indirectly elected president authority to dismiss elected governments, a power that was used to destabilise the democratic transition of the 1990s, with four parliaments dismissed before it was repealed in 1997 through the thirteenth constitutional amendment, passed by the ruling Pakistan Muslim League-Nawaz (PML-N) with the support of its PPP (Pakistan Peoples Party) parliamentary opposition.

Zia's Islamisation program was accompanied by patronage to radical Sunni outfits for the twin purpose of fighting the U.S.-supported anti-Soviet jihad in Afghanistan and promoting ultra-orthodox interpretations of Sunni Islam at home. With state support, groups like the Sipah-e-Sahaba Pakistan (SSP) and its later offshoot, the Lashkar-e-Jhangvi (LJ), established headquarters primarily in Punjab. Their countrywide network of mosques and madrasas (religious seminaries) remain major centres of jihadi recruitment. During the democratic interlude of the 1990s, the military continued to use Sunni jihadi proxies such as the Lashkar-e-Tayyaba in India-administered Kashmir and in support of the Taliban in Afghanistan.¹⁴ As these groups proliferated countrywide, the state's ability to enforce law and order declined.

B. MUSHARRAF'S SEVENTEENTH AMENDMENT

Ousting Nawaz Sharif's government through a coup in October 1999, Musharraf's military regime further eroded the rule of law and the capacity of state organs and institutions like the police and the judiciary. Like Zia, Musharraf purged the superior courts of independent-minded judges, requiring all justices to swear a fresh oath to his Provisional Constitution Order (PCO). His regime's subsequent reforms served three broad purposes: to provide cover for the October 1999 coup; to ensure electoral victories for Musharraf's civilian allies in local, provincial and national elections; and to exempt him from legal and constitutional limits. As with Zia's reforms, the result was a sharp deviation from the letter and spirit of the constitu-

⁷ With Zia's Third Amendment Order of 1980, Article 227 of the constitution stipulated: "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions". See Crisis Group Report, *Reforming the Judiciary in Pakistan*, op. cit. See also Rubya Mehdi, *The Islamization of the Law in Pakistan* (Richmond, 1994).

⁸ Ahmadias are a minority Sunni sect, declared non-Muslims by the second constitutional amendment (1974).

⁹ In November 2010, a Christian woman was sentenced to death for blasphemy by a district court, the country's first such sentence for a woman.

¹⁰ See Crisis Group Reports, *Reforming the Judiciary in Pakistan*, and *The State of Sectarianism in Pakistan*, both op. cit.

¹¹ Another Zia-era amendment to the constitution, under Article 62, requires that a candidate for election to parliament must be "of good character and is not commonly known as one who violates Islamic Injunctions"; have "adequate knowledge of Islamic teachings and practises obligatory duties prescribed by Islam as well as abstains from major sins"; and be "sagacious, righteous and non-profligate and honest and amen [faithful]".

¹² See Crisis Group Report, *Reforming the Judiciary in Pakistan*, op. cit.

¹³ Crisis Group interview, Islamabad, 22 April 2010.

¹⁴ See Crisis Group Reports, *Pakistan: The Militant Jihadi Challenge*; *The State of Sectarianism in Pakistan*; *Unfulfilled Promises: Pakistan's Failure to Tackle Extremism*; and *Pakistan: The Mullahs and the Military*, all op. cit.

tion. Even as Musharraf pledged to crack down on home-grown militant groups following 11 September 2001, the military regime continued to patronise India and Afghanistan-oriented jihadi groups, including the LeT¹⁵ and Afghan insurgent groups including Mullah Omar's Quetta Shura and the Haqqani network. New groups were also created, such as the Jaish-e-Mohammad, formed in 2000 with the support of the military's intelligence agencies.¹⁶

Musharraf also passed a number of ordinances ahead of the 2002 general elections to bolster military-backed political parties – primarily the Pakistan Muslim League-Quaid-e-Azam (PML-Q) and the six-party religious right-wing alliance, the Muttahida Majlis-e-Amal (MMA) – and to sideline his moderate opposition, including Benazir Bhutto's PPP and Nawaz Sharif's PML-N. In July 2002, the military government issued the Qualification to Hold Public Offices Order 2002, which established a two-term limit on prime ministers, an anomaly among parliamentary democracies, to prevent Bhutto and Sharif from returning to office.¹⁷ The following month, it enacted the Legal Framework Order (LFO), a set of amendments that institutionalised the military's political dominance, tilting power from the prime minister, the head of government, to the president, the indirectly elected titular head of state, and restoring the presidential power to dismiss elected parliaments. These changes were later enshrined in the seventeenth constitutional amendment.¹⁸

The LFO placed restrictions on joining or forming a political party, based on the dubious justification of maintaining "public order". The Conduct of General Elections Order 2002 contained a clause requiring a bachelor's degree or its equivalent for anyone seeking elected office, disenfranchising the vast majority of Pakistanis and disqualifying scores of opposition political party leaders and officers, including those from the PPP and PML-N. The military regime, however, recognised madrasa degrees, allowing many MMA members without bachelor degrees to contest elections.¹⁹ In response, many candidates sought

fake degrees in order to contest the 2002 and 2008 elections. In 2010, the Supreme Court called for investigations by the election commission into fake degrees, resulting in the disqualification of several legislators under what remains a highly flawed and unconstitutional law.

The seventeenth constitutional amendment passed by the PML-Q-led parliament – with crucial support from the rightwing religious parties – validated the military's legal distortions and prevented them from being "called (into) question by any court or forum on any ground whatsoever".²⁰ To reward his religious allies, Musharraf allowed the MMA-led government in then Northwest Frontier Province (NWFP) to pass a radical Hisba Bill to Islamise the province, including the establishment of a *mohatasib* (ombudsman) empowered to regulate the morality and religious conduct of citizens.

As it did with Zia's eighth amendment, the Supreme Court rejected challenges to the seventeenth amendment. By repeatedly validating ad hoc changes to the law to either exempt military regimes from legal and constitutional limits, or to tilt the political playing field in favour of their preferred political parties, the judiciary failed to enforce the constitution as the highest law of the land. The incumbent parliament, therefore, inherited a chaotic legal and constitutional legacy. Some of the damage has been reversed. However, many of Musharraf's regressive institutional reforms remain in force. These continue to impede the government's ability to stabilise a fragile democratic transition, guarantee constitutional rule and enforce the law. Two reform packages merit particular focus: the National Accountability Bureau (NAB) Ordinance and the Police Order 2002.

1. The National Accountability Bureau (NAB) Ordinance

The NAB Ordinance was one of the first and most far-reaching of Musharraf's reforms. Ostensibly promulgated to curtail official corruption and hold politicians and officials accountable, in reality, it was a political tool used to break the military's opposition. The ordinance transferred authority over corruption investigations from the Federal

¹⁵ Renamed the Jamaat-ud-Dawa, after Musharraf banned the organisation under U.S. pressure following the attack on the Indian parliament in 2001, the LeT/JD was responsible for the November 2008 attacks in Mumbai.

¹⁶ See Crisis Group Report, *Unfulfilled Promises: Pakistan's Failure to Tackle Extremism*, op. cit.

¹⁷ Chief Executive's Order, No. 24 of 2002, 21 August 2002.

¹⁸ Nullifying the thirteenth constitutional amendment, the seventeenth amendment granted the president the power to dismiss the National Assembly, appoint service chiefs, approve superior court appointments; it gave similar powers to provincial governors, appointed by the president, over provincial parliaments. See Crisis Group Asia Report N°40, *Pakistan: Transition to Democracy?*, 3 October 2002.

¹⁹ In a resolution on the 2002 elections, the European Parliament declared that it: "Deplores the introduction of arbitrary

criteria for nomination, particularly the requirement to have a BA degree, which deprive 96 per cent of Pakistani citizens (including 41 per cent of existing legislators) of the right to run for office, thereby diluting the representative nature of democracy in Pakistan". Text of the European Parliament Resolution on Pakistan Election, 21 November 2002. At www.europarl.eu.int/. See also Ashraf Mumtaz, "Graduation: record number of politicians out", *Dawn*, 19 July 2005; and Massoud Ansari, "A foregone conclusion?", *Newsline*, October 2002.

²⁰ Text of the Seventeenth Amendment to the Constitution, available at <http://pakistani.org/pakistan/constitution/amendments/17amendment.html>.

Investigation Agency (FIA) to the newly created National Accountability Bureau (NAB) although the FIA, notwithstanding its limited resources, is better equipped to investigate corruption.²¹

The NAB chairman is a quasi-judicial office, undermining the separation of judicial and executive powers. The NAB Ordinance also undermines three basic principles of justice by being retroactive; shifting the burden of evidence to the accused; and turning breach of contract, a civil matter, into a criminal offence. Applicable retroactively to 1985, the ordinance introduced a new criminal offence of “wilful default”, not originally part of the penal code or the anti-corruption act, thus violating a constitutional ban on retroactive crime.²² A senior NAB prosecutor, who said he joined because he believed that corruption was a major problem, argued: “The menace of corruption needs to be curbed to keep our society intact, but that does not justify unconstitutional measures”.²³

Section 19 of the NAB law empowers it to seek information from and therefore compelling the accused to act as a witness against himself, in violation of the CrPC and Evidence Act. The rationale for shifting the burden of evidence to the accused was based on the difficulty of proving white collar crimes since offenders can cover their tracks through intermediaries and indirect transactions. Defenders of the law argue that the procedure allows the accused to account for his or her assets, and that money laundering laws in other countries, including European states, similarly place the burden of proof on the accused. Some believe the Evidence Act and the CrPC imposes too

strict a standard on police and prosecutors. Indeed a former NAB prosecutor argued: “If we go by the Qanun-e-Shahadat, it is virtually impossible to prove anything beyond a shadow of doubt”.²⁴ However, merely shifting the burden of proof to the accused is a legal shortcut to evade the enormous gaps in the justice system. The flaws in investigation and prosecution are far deeper than a simple procedural change could address.

The NAB law has major implications not only for constitutional rule but also for long-term political stability since many elected parliamentarians in the current dispensation, including cabinet ministers, are still under investigation by this bureau. While elected representatives should be held accountable for any misdeeds, the accountability process should not violate the letter and spirit of the constitution. Nor should the process be guided by a military-created organ that was not designed to seek justice but to suppress political opposition.²⁵

2. The Police Order 2002

Musharraf promulgated the 2002 Police Order as part of his restructuring of the local government system.²⁶ The

²¹ According to a senior NAB official, NAB prosecutors often lack the necessary training. During the Musharraf regime, moreover, NAB teams were frequently headed by a military official with no knowledge of the CrPC, the Evidence Act, or how to record evidence, including entering investigation reports and other related documents into evidence. Crisis Group interview, NAB prosecutor, Karachi, June 2010. See also Tariq Butt, “Shortage of prosecutors impedes NAB work”, *The News*, 12 April 2010.

²² Article 12 of the constitution guarantees that “no law shall authorise the punishment of a person: a) for an act or omission that was not punishable by law at the time of the act or omission; or b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed”. Hearing challenges to the NAB ordinance on these grounds, the Supreme Court ordered numerous changes. To establish “wilful default”, the amended law requires banks to issue a 30-day notice to the borrower to repay a loan; if the party still fails to repay, the bank refers the case to the State Bank of Pakistan, which scrutinises the case and then issues a seven-day notice to the borrower. If the loan is still not settled, the State Bank refers the case to the NAB, converting it into a criminal liability. Lawyers criticise the process. Crisis Group interview, NAB official, Karachi, June 2010.

²³ Crisis Group interview, Karachi, June 2010.

²⁴ Crisis Group interview, Islamabad, April 2010.

²⁵ The Musharraf-backed PML-Q was largely forged through defections from the PPP and PML-N, obtained by threats of NAB charges and promises of lucrative ministries. A PML-Q central working committee member said: “The process [of engineering a defection] is to file corruption charges with the NAB, offer to drop the charges and, in some cases, offer an attractive ministry, if the person comes on board”. Quoted in Crisis Group Asia Report N°102, *Authoritarianism and Political Party Reform*, 28 September 2005. With the PML-Q failing to win a majority in the 2002 elections, the military regime suspended a constitutional bar on floor-crossing in parliament, and used the same carrot-and-stick approach to achieve defections of ten PPP parliamentarians to the PML-Q-led coalition. NAB had charged one of these parliamentarians, Faisal Saleh Hayat, for defaulting on a loan; after defecting to the PML-Q, he was appointed interior minister. Another former PPP leader, Aftab Sherpao – also charged with corruption – was allowed to return to the country after agreeing to join the PML-Q-led government. He was appointed water and power minister, and later succeeded Hayat as interior minister. See *ibid*.

²⁶ In 2001, the newly created National Reconstruction Bureau (NRB), headed by a retired lieutenant general, devised a Devolution of Power Plan that established three tiers of local government at the district, *tehsil* (sub-district) and union council levels. The plan delegated administrative and development powers to locally elected officials. Constitutional protection to the Local Bodies Act lapsed on 31 December 2009, restoring provincial authority over legislation on local government. All four provincial assemblies dissolved Musharraf's local government system, and are considering new legislation to replace it. For detailed analysis on the plan, see Crisis Group Asia Report N°77, *Devolution in Pakistan: Reform or Regression?*, 22

ordinance envisioned making the police an efficient service-oriented and accountable force. In 2004, the president extensively amended the order, diluting earlier provisions that ensured greater operational independence, accountability and civilian oversight. The military regime also used the police against its political opposition,²⁷ even as it deprived the force of the technical, administrative and fiscal resources it needed to combat crime and maintain internal security. As a result, crime rates, unsolved cases and police excesses, including illegal detention, torture and extrajudicial killings, continued to rise.²⁸ Public safety commissions and a police accountability authority, the cornerstones of civilian oversight and police accountability in the Police Order 2002, were diluted through later amendments and never properly formed or authorised; corruption, cronyism and political interference in the police continued as before.²⁹

The Police Order 2002 also created a separate hierarchy for investigations, requiring cases to be registered at the police station, but then investigated by a separate wing outside the station. Whereas previously the station house officer (SHO), who oversees all functions of a police station, was ultimately responsible for an investigation, the new order sought to limit the SHO's powers – seen as a major source of corruption in police stations – by placing investigations beyond the effective control of either the SHO or the district police officer (DPO). Accountability began only at the level of the additional inspector general (AIG).³⁰ “This model is not present in any democratic

country in the world”, said Shaukat Javed, a former Punjab inspector general (IG), the highest office in the provincial police hierarchy. “Serious and heinous crimes like gangs, kidnapping, serial rapes and homicides, and terrorism should be dealt with by a specialised staff at the district or sub-division level but 90 per cent of crime should be investigated at the level of the police station”.³¹

To be sure, police stations need separate investigation branches, rather than concentrating all powers in the SHO and giving investigators vague and overlapping mandates that include other responsibilities such as watch and ward and protection to VIPs. But these investigation branches should not be separated from the police station. “The SHO should be involved in providing vital information and intelligence on his area – where are the drug dens, the rackets, the gangs?” said Jamil Yusuf, the former head of the Karachi-based Citizen Police Liaison Committee (CPLC). “The head of investigation needs to be in the same place as the SHO”.³²

Although policing is a provincial subject under the constitution, the Police Order 2002 was placed under the sixth schedule of the constitution, requiring presidential assent for amendments. That protection lapsed on 31 December 2009. Provincial governments can now replace this with a new bill. The Punjab government has drafted such a bill, the Police Order 2010, but has yet to present it to the Punjab assembly. The central political leadership, along with the four provincial governments, should initiate a broad dialogue with stakeholders, including serving and retired senior police officials, jurists, criminologists, NGOs and other civil society groups, to assess the merits and demerits of the original police order. The resultant bills should address the many gaps in law enforcement, and also have the broad public acceptance and political sanction that will be needed for their implementation.

March 2004; and Asia Briefing N°43, *Pakistan's Local Polls: Shoring Up Military Rule*, 22 November 2005.

²⁷ For example, during nationwide protests against Musharraf's decision to sack Supreme Court Chief Justice Iftikhar Mohammad Chaudhry in March 2007, and during the imposition of emergency rule from 3 November-16 December 2007, the police brutally attacked demonstrators. See Crisis Group Report, *Reforming Pakistan's Police*, op. cit.; and Crisis Group Asia Briefing N°70, *Winding Back Martial Law*, 12 November 2007.

²⁸ See, for example, Waqar Gillani, “Force to serve”, *The News*, 27 February 2010.

²⁹ The Police Order 2002 also merged police complaint cells with public safety commissions. An informed observer argued: “The police complaint authority is a full-time job. They need their own investigations. The public safety commissions are the think-tanks. It was a disaster to merge them”. Crisis Group interview, Jamil Yusuf, former head, Citizen Police Liaison Committee (CPLC), Karachi, 15 June 2010. The CPLC was established in Karachi in 1989 as a non-political statutory body to improve citizen-police cooperation. It is operationally independent and managed by citizens on a voluntary basis.

³⁰ Under the Police Act of 1861, the inspector general (IG) heads the police force in a province, with deputy inspectors general (DIGs) and additional inspectors general (AIGs) serving directly under him and supervising specific police functions. A superintendent (SP) heads the force in districts, with a senior superintendent (SSP) leading larger districts and provin-

cial capitals. At the sub-district level, assistant superintendents (ASPs) and deputy superintendents (DSPs) command the police. Under the 2002 Police Order, the IG is now known as the provincial police officer (PPO). The police force is headed by a capital city police officer (CCPO) in each provincial capital, recruited from officers of at least AIG rank; a city police officer (CPO) in each city district, recruited from officers of at least DIG rank; and a district police officer (DCO) in each district, who is recruited from officers of at least SSP rank. Each region also has a regional police officer (RPO). See Crisis Group Report, *Reforming Pakistan's Police*, op. cit.

³¹ Crisis Group interview, Lahore, 26 May 2010.

³² Crisis Group interview, Karachi, 15 June 2010.

C. UNDOING THE LEGACY: THE EIGHTEENTH AMENDMENT

The governments of Benazir Bhutto and Nawaz Sharif during the democratic transition of the 1990s had a mixed record on law and order. Successes included the creation of the CPLC in Karachi in 1989, and the Sindh Criminal Investigation Department (CID) to tackle sectarian terrorism in the mid-1990s, later replicated in Punjab. When in government, both parties, however, allowed political objectives to determine police appointments, promotions and transfers, and often diverted police forces from their primary law and order duties to serve narrow political agendas. They also ceded law enforcement duties to the military, in the name of counter-terrorism, as in the second Sharif government's ill-advised promulgation of the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998, which extended broad judicial powers to the military to tackle lawlessness in Sindh, through military courts authorised to try civilians.³³ These mistakes should not be repeated during the current democratic transition.

Deviations from constitutionalism for short-term ends have already occurred, specifically the National Assembly's March 2009 endorsement of the Nizam-e-Adl 2009 to impose Sharia in PATA, in an effort to appease Swat-based militants.³⁴ However, the political leadership has also taken some critical steps to undo the legacy of military rule and restore constitutional functioning. In April 2010, both chambers of parliament unanimously passed the eighteenth constitutional amendment, containing more than one hundred provisions to restore parliamentary supremacy, devolve greater authority to the provinces, and bolster judicial independence. The presidential power to dismiss the elected government was repealed, along with Musharraf's LFO and seventeenth amendment. A new article in the eighteenth amendment also guarantees the right to a fair trial and due process. Another clause prohibits the superior judiciary from validating the abrogation, subversion or suspension of the constitution.

Delivering on the PPP and PML-N's pledges to build judicial independence, the reforms also call for a new mechanism for appointments to the Supreme Court through a judicial commission chaired by the Supreme Court chief justice, and comprising the two next most senior Supreme Court judges; a retired Supreme Court judge; the federal law minister; attorney general; and a senior advocate nominated by the Pakistan Bar Council. Final approval lies with an eight-member bipartisan parliamentary committee, with four members from the treasury and four from the opposition benches. The committee requires six votes to reject the judicial commission's nomination.³⁵ Parallel commissions are to be established for provincial high court appointments. These changes will help prevent arbitrary appointments, limiting the power of any single individual, whether the president or the chief justice, to stack the bench, which has undermined judicial functioning and the quality of justice in the past.³⁶

The eighteenth amendment is possibly the most significant legislative achievement since the 1973 constitution. The parliament now needs to consolidate and build on the intended reforms. Religious discriminatory laws have yet to be repealed. Nor should reforms stop there. In the words of a former Supreme Court chief justice: "An independent justice system doesn't just refer to judges; it also means police, prosecutors and independent investigations".³⁷

³³ The jurisdiction of this ordinance was later extended to the whole country. In February 1999, the Supreme Court ruled that the ordinance was unconstitutional. The Sharif government subsequently repealed it. For more detail, see Charles H. Kennedy, "The Creation and Development of Pakistan's Anti-Terrorism Regime, 1997-2002", in Satu P. Limaye, Robert G. Wirsing, Mohan Malik, (eds.), *Religious Radicalism and Security in South Asia* (Honolulu, 2004), pp. 387-413.

³⁴ For analysis on the Nizam-e-Adl's impact, see Crisis Group Briefing, *Pakistan: The Worsening IDP Crisis*, op. cit.; and N°93, *Pakistan's IDP Crisis: Challenges and Opportunities*, 3 June 2009.

³⁵ Previously, the president, in consultation with the Supreme Court chief justice, made Supreme Court appointments.

³⁶ Criticising the appointment process, on 21 October, in a short order, the Supreme Court referred the new mode of senior judicial appointments to parliament procedure, recommending that the judicial parliamentary committee articulate its reasons for rejecting a judicial nominee in writing. The parliamentary committee on constitutional reform is now considering the Supreme Court's recommendations. "Chief Justice names two members of judicial commission", *Dawn*, 26 October 2010.

³⁷ Crisis Group interview, Justice (r) Saeeuduzaman Siddiqui, Karachi, 16 June 2010.

III. AN OVERBURDENED INFRASTRUCTURE

A. COURTS AND PRISONS

Pakistan's courts and prisons are overburdened. At the start of 2010, excluding those before special courts and administrative tribunals, there were more than 177,000 cases pending in the superior courts, including the Supreme Court, the provincial high courts and the Federal Shariat Court; and more than 1.3 million in the subordinate judiciary.³⁸ Police, lawyers and judges argue that the numbers of courts need to be doubled at a minimum. Staffing those courts will be an even more crucial task. Around 900 magistrates with civil and criminal jurisdiction for a population of roughly 160 million handle around 75 per cent of all criminal cases. While there have been some improvements in recruitment and salaries, with the Punjab government for example tripling judicial officers' salaries, the benefits are not yet visible, and trained judges are scarce.

Prisons are overcrowded, with prisoners on trial accounting for more than 80 per cent of the prison population. Only 27,000 of the country's roughly 81,000 prisoners have been convicted.³⁹ In early 2010, a major prison in Lahore, with a capacity for 1,050, held 4,651 prisoners.⁴⁰ There has been some improvement in recent years. In August 2008, for instance, Sindh's prison population was over 20,000;⁴¹ by September 2010, Sindh's prisons held 18,234 prisoners but still significantly above the prison capacity of 9,541, and with only 2,641 convicts.⁴² Prison resources, which would be inadequate even for a smaller prison population, are vastly overstretched. A Sindh provincial minister told the Sindh Assembly that the government had only 155 vans to bring more than 13,000 prisoners to court.⁴³ Prisoners are seldom transported to court on the date of their hearing. "It seems to take more time to bring a person to court than to actually dispose of the case", said a former Sindh advocate general.⁴⁴ Conditions are abysmal and prisoners' rights regularly violated.

Remand prisoners, for example, are assigned to labour in contravention of the law.⁴⁵

Pakistan's death row population – roughly 7,700 – is more than one third of the total global death row population of about 20,000, a statistic aggravated by the high number of offences – over two dozen – punishable by death.⁴⁶ Because of a 1991 Federal Shariah Court decision, for example, blasphemy crimes carry a mandatory death sentence. This includes cases involving members of the Ahmadi community. Under the Hudood Ordinances, extra-marital sex is also punishable by death⁴⁷ as is the possession of 100 or more grams of narcotics such as heroin.⁴⁸

This huge prison population has serious security implications. Law enforcement officials refer to prisons as the "think-tanks" of militant groups, where networks are established and operations planned, facilitated by the availability of mobile phones and a generally permissive environment. Prisons have thus become major venues of jihadi recruitment and activity.⁴⁹

There have been few sustained efforts to address overcrowding and the conditions of under-trial prisoners, or even to implement existing codes and procedures. In 1972, Pakistan's first elected government, led by Zulfikar Ali Bhutto's PPP, passed a reforms package aimed at improving justice delivery and providing relief for prisoners, including through the provision of bail. Under Section 426 (I-A) of the CrPC:

An appellate court shall, unless for reasons to be recorded in writing it otherwise directs, order a convicted person to be released on bail who has been sentenced –

- a) to imprisonment for a period not exceeding three years and whose appeal has not been decided within a period of six months of his conviction;
- b) to imprisonment for a period exceeding three years but not exceeding seven years and whose appeal has not been decided within a period of one year of his conviction;

³⁸ See Masood Rehman, "1.5 million cases pending in courts countrywide", *Daily Times*, 1 February 2010.

³⁹ Crisis Group interview, Lahore, 27 May 2010.

⁴⁰ "State of Human Rights in 2009", Human Rights Commission of Pakistan (HRCP), annual report, February 2010.

⁴¹ See "Sindh prisons overcrowded: adviser", *Dawn*, 6 August 2008.

⁴² See the website, www.sindh.gov.pk/dpt/home/prisons.htm.

⁴³ "Plight of under-trials", *Dawn*, 29 January 2010.

⁴⁴ Crisis Group interview, Hafeez Lakhro, Karachi, 16 June 2010.

⁴⁵ According to a report, "mysterious" deaths and suicides in prison more than doubled in 2009 to 240, up from 108 in 2008. Answer Hussain Sumra, "Mysterious deaths, suicides at jails more than double in 2009", *Daily Times*, 5 January 2010.

⁴⁶ See "State of Human Rights in 2009", op. cit.

⁴⁷ The sentence for extra-marital sex is death by stoning.

⁴⁸ According to HRCP's Kamran Arif: "Nobody checks if it is actually 100 grams of heroin, or if it is 10 grams of heroin and 90 grams of some other ingredient". Crisis Group interview, Islamabad, 1 April 2010.

⁴⁹ Crisis Group interviews, police officials, Karachi, Lahore and Islamabad, May-August 2010.

- c) to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of his conviction.

The ordinance also targeted under-trial prisoners, under Section 497:

Provided further that the court shall, except where it is of opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail:

- a) who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year and whose trial for such offence has not concluded; or
- b) who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded.⁵⁰

These rights were steadily eroded as the judiciary negated the concept of bail,⁵¹ and as reforms under military government added several non-bailable offences. The result is overcrowding in prisons, mostly with remand prisoners whose conditions in jails the incumbent Supreme Court chief justice has described as “sub-human”.⁵² I.A. Rehman, director of the independent Human Rights Commission of Pakistan (HRCP) said: “For years, the courts have been saying that bail should be easy, the bonds should be light”. Yet the prisons remain overcrowded although only 27,000 of the country’s roughly 81,000 prisoners have been convicted.⁵³

After the democratic transition began in 2008, the national and provincial assemblies have taken some steps to improve conditions and provide relief to prisoners. The Sindh and KPK governments have approved 300 million rupees (about \$3.5 million) and 20 million rupees (about \$235,000), respectively, to improve jail conditions, raise prison staff

salaries, and enhance security. The Sindh government also funds legal aid facilities across the province.⁵⁴ In mid-2008, the Punjab government began building new jails in nine districts.⁵⁵ Prime Minister Yusuf Raza Gilani, too, has identified jail reform as a major government priority.

Building more prisons, however, is not sustainable, given the country’s strained resources, nor does it address the rights of remand prisoners. The national and provincial governments must ensure that cases are processed through the courts according to constitutional provisions. They should equip prisons with the necessary resources to bring prisoners to court on the day of their hearings, ensure that remand prisoners’ rights are respected and that they are not treated as convicts, and provide legal aid to those who cannot afford it. Most importantly, granting bail should become the norm. Judges should only deny bail if there are grounds to believe that the defendant would abscond or commit further offences while on bail; and the authorities must allocate the necessary resources to maintain a basic infrastructure for bail.

The burden on the justice system is also aggravated by the scarcity of trained trial lawyers. According to a former law minister and practicing Supreme Court advocate: “In any big district, there are five to ten leading trial lawyers. Those who can afford to, or have been accused of serious crimes, will seek to engage them. There are about twenty to 30 trial lawyers in the next tier. These lawyers cannot deal with the burden [of cases]. So increasing the number of courts will not reduce pendency [the suspension of cases]”.⁵⁶

Many lawyers and law enforcement officials support creating alternative dispute resolution mechanisms for lesser offences to reduce the burden on courts and prisons. “More than 50 per cent of cases would go away if you separated minor offences from criminal jurisprudence”, said Gilani.⁵⁷ Police have experimented with alternative mechanisms at the level of the police station such as peace committees comprising respected members of the community to adjudicate petty crimes and minor civil disputes, where the parties involved would sign an agreement that either side could take the matter to the regular courts if it believed

⁵⁰ Pakistan Code of Criminal Procedure.

⁵¹ “In the 1960s and 1970s, bail was invariably granted. Today, no bail is granted even for minor theft”, said a former law minister. “Courts do not make a distinction between minor and serious offences with respect to bail”. Crisis Group interview, Syed Iftikhar Gilani, Islamabad, 24 May 2010. Lawyers and human rights activists attribute this to a lack of will on the part of the government and the judiciary to address overcrowding or defendants’ rights. Crisis Group interviews, Islamabad and Karachi, June-August 2010.

⁵² Justice Iftikhar Mohammad Chaudhry, “Justice at the grass-roots level”, Introductory speech to 4-day meeting of the National Judicial Policy Making Committee, 18 April 2010.

⁵³ Crisis Group interview, Lahore, 27 May 2010.

⁵⁴ Crisis Group interview, Justice (r) Nasir Aslam Zahid, retired Supreme Court justice and former Sindh High Court chief justice, Karachi, 18 June 2010. Zahid runs a Karachi-based legal aid centre that is expanding its operations across Sindh, with government support.

⁵⁵ Muhammad Faisal Ali, “Nine new jails to reduce overcrowding”, *Dawn*, 6 August 2008.

⁵⁶ Crisis Group interview, Iftikhar Gilani, Islamabad, 24 May 2010.

⁵⁷ *Ibid.*

the judgment to be unfair.⁵⁸ This initiative, however, lacks the sanction of the law.

Instead, the government should reform sentencing structures for non-violent petty crimes, to include alternatives to imprisonment, such as fines, probation and community confinement, community service, and drug and psychological treatment. Existing provisions for probation have never been properly implemented because, according to a former law minister, successive governments have proved unwilling to invest in the required infrastructure, such as hiring and training probation officers.⁵⁹ In the long term, however, the costs – political as well as fiscal – of sustaining and indeed increasing the number of prisons would likely outweigh those of an effective probation regime.

B. POLICE STATIONS

Police stations are also inadequately equipped, even sometimes lacking proper premises. In one sector in Karachi, for example, the local police station was a makeshift structure located under a major bridge, without proper walls and encroaching on public land.⁶⁰ Police budgets do not cover individual stations. Instead, allocations for arms and ammunition, transport, maintenance, stationery and other necessary items are centralised in provincial police budgets and then distributed to stations. Many stations do not have their basic requirements met and their monthly expenditures outpace their allocation. Most stations are self-financed to a significant extent. For example, police pay for their own stationery, and maintenance of vehicles, including petrol.⁶¹ “The SHO becomes beholden to others because he is relying on them to provide his station with the cars, equipment, and so on, to be able to do his job”, said a serving SHO.⁶² The SHO is similarly beholden to superiors who often interfere in police station business on behalf of outsiders, including intelligence officials, discussed in more detail below.

The Police Order 2002 made the force even more top heavy, further weakening police stations' operational independence and efficacy. A defence analyst noted: “The Police Order of 2002 increased senior police posts by 300 per

cent. More than 15 per cent of the police budget funds police administrators in the form of a long chain of supervisors above the DSP [deputy superintendent police] level”.⁶³

Small committees of honorary magistrates, composed of respected citizens, should be formed that visit their local police station weekly to ascertain recent activities, including the number of first information reports (FIRs – the initial complaint made to the police) filed and for what kinds of crimes, the number of people in lock-ups, and the duration of their confinement. The committee should also assess the station's facilities and resources, identify gaps in capacity, and help articulate needs to senior officials. Involving local residents in police stations, said a former judge and founder of Karachi's CPLC, would significantly improve citizen-police relations, and make community oversight more effective.⁶⁴

Under Police Order 2002, CPLCs were established in other parts of the country but they lacked proper funding, authority and political support to be effective.⁶⁵ The Karachi CPLC provides a good working model of community-police coordination, which should be replicated throughout Sindh and countrywide. Shortly after being created in 1989, for example, a CPLC team visited the Ferozabad police station in one of Karachi's major residential areas. “The conditions were atrocious”, said retired justice and former governor Ebrahim. “We said, ‘Let's fix this’. Initially, the police there didn't trust us, so they posed resistance, but they soon came to realise that we were there to support them, and that we in turn had support from the Inspector General [Khawar Zaman] and the Deputy Inspector General [Afzal Ali Shigri]. The result was that the people of that area got better service”.⁶⁶ The Karachi police and the CPLC also agreed to establish an independent registration centre that would keep a computerised record of all FIRs.

The importance of police stations maintaining computerised records of all FIRs cannot be over-emphasised. A process should also be devised for citizens to check the status of their FIRs and to complain to the proper authority in case of neglect.

Provincial and district public safety commissions should also be established, according to the original 2002 Police Order, with half of their members being elected officials

⁵⁸ This was tried in Punjab's Gujranwala and Rawalpindi districts. Crisis Group interviews, Punjab police officials, Lahore, May 2010.

⁵⁹ Crisis Group telephone interview, Iftikhar Gilani, Islamabad, 24 November 2010.

⁶⁰ Crisis Group interviews, police officials, Karachi, June 2010.

⁶¹ In a recent case, a complainant whose wife was being held against her will in an Islamabad hostel had to drive the police in his own car to the site to retrieve her and arrest her abductor because his was the only transport available. Crisis Group interview, police station, Islamabad, September 2010.

⁶² Crisis Group interview, Islamabad, July 2010.

⁶³ Ikram Sehgal, “Thoughts on police reform”, *The News*, 16 September 2010.

⁶⁴ Crisis Group interview, Fakhruddin G. Ebrahim, 17 June 2010. (As Sindh governor, Ebrahim founded the Citizen-Police Liaison Committee (CPLC) in Karachi.)

⁶⁵ See Crisis Group Report, *Reforming Pakistan's Police*, op. cit., p. 19.

⁶⁶ Crisis Group interview, Fakhruddin G. Ebrahim, Karachi, 17 June 2010.

nominated by the speaker of the relevant legislature, with equal representation from the government and opposition, and the other half comprising independent members appointed by the provincial governor from a list of candidates nominated by independent selection panels. Once an FIR is registered, they should also play a proactive role to ensure that criminal activity is properly reported and investigated, including the activities of banned extremist groups and dissemination of hate materials and incitements to violent jihad, including by madrasa and mosque leaders. These commissions should also be required to approve any premature transfers of police officials, and investigators, as mandated under the original Police Order. This should also include any transfers of investigators before the conclusion of their investigations.

IV. REFORMING THE CRIMINAL JUSTICE SYSTEM

A. INSTITUTIONALISED CORRUPTION

Criminal justice begins with an FIR at a police station. The constitution requires any person taken into police custody to be presented before a court within 24 hours, with the judge then determining whether, *prima facie*, there are grounds for a case. This process is more often than not honoured in the breach. Magistrates commonly order a remand without even seeing the accused. Moreover, when judges do not remand the accused, the police often re-arrest him or her. By law, the accused cannot be in police custody for more than fourteen days, although courts typically grant extensions on the grounds that the police need more time to recover evidence. "Meanwhile, the police are beating up the accused to get a confession", said the HRCP's I.A. Rehman.⁶⁷

After police custody, the accused is transferred to a prison, under judicial remand, and is eligible for bail – which is seldom granted, as discussed. Magistrates hear minor criminal cases, while a sessions judge tries offences that carry longer prison sentences or are punishable by death.⁶⁸ Although trials are supposed to be completed within one year, they can continue for several, mostly due to administrative delays, including the failure to bring prisoners to court on trial dates.

A trial can only begin after the submission of a *challan*, or case brief.⁶⁹ Until 1972, once the police received a complaint, they would determine on their own whether a case should be registered. This authority was widely abused. Zulfikar Bhutto's 1972 law reforms tried to limit the potential for abuse by requiring every complaint to be registered and, by extension, an arrest made. Nevertheless, bribery and political pressure frequently dissuade police from registering cases. The law now allows private parties to go straight to the courts to register a case if the police fail to do so. This provision, however, is similarly

⁶⁷ Crisis Group interview, Lahore, 27 May 2010.

⁶⁸ Pakistan's judicial structure comprises civil and judicial magistrates at the base of the hierarchy, who hear minor civil and criminal disputes. They are supervised by district and sessions judges, whose courts act as appellate courts in some cases, and as trial courts for more serious offences. The higher or superior judiciary comprises four provincial high courts, whose principal seats are in the provincial capitals. They hear appeals from district and sessions courts. The apex court, the Supreme Court, hears appeals from the high courts and also exercises original jurisdiction in fundamental and public interest cases.

⁶⁹ See Crisis Group Report, *Reforming the Judiciary in Pakistan*, op. cit.

misused to register false cases, often turning private disputes into criminal matters.

“Right now, no one gets punished for registering a false case”, said a senior advocate. “You need to have a much stronger deterrent in the law. Even though there is a law in place, it is an eyewash”.⁷⁰ A retired Supreme Court justice and former Peshawar High Court chief justice said: “A lot of the time, so-called witnesses are not even present at the crime scene, but they accuse someone and an FIR is lodged. But if the IO [investigating officer] is honest, he won't be bound by that FIR. He will investigate, conclude that the FIR is not credible, and refuse to issue a *challan* [case file]”.⁷¹

The 1972 law reforms amended the CrPC to allow judges to acquit if there is a “probability that the person will not be convicted”. Judges seldom apply this. The CrPC also requires magistrates to review cases and decide if they should be sent to a sessions judge, who also has a duty to evaluate the material before cases go to trial. Frivolous cases nevertheless continue to clog trial courts.⁷²

Pakistan has a very low conviction rate – around 5 to 10 per cent. The statistics are misleading since many convictions are achieved through guilty pleas, often in drug possession cases, to obtain lighter sentences and avoid the long and arduous pre-trial phase; while legal, these guilty pleas do not reflect the level of trial advocacy. According to Nasir Aslam Zahid, a retired Supreme Court justice and former Sindh High Court chief justice: “Very few cases – not even 1 per cent– are decided on merit, where the prosecution and the defence have adequate opportunity to present evidence and argue”.⁷³ The conviction rate dips below the average for more serious crimes such as murder and acts of terrorism, where cases depend mainly on confessions to the police, usually obtained through force and inadmissible in court.

Defendants with financial and political capital often evade punishment, while those without remain in jail, most often without being convicted or convicted on half-baked and concocted evidence. Few, even within the law-enforcement agencies, trust the trial process as a credible mechanism to combat serious crime. This encourages indefinite

detentions, extrajudicial killings, discussed in more detail below, and other unconstitutional crime-fighting methods that have further contributed to the breakdown of the rule of law.

The un-amended Police Order 2002 had called for the creation of a criminal justice coordination committee in each district comprising a district and sessions judge, the head of the district police, a district public prosecutor, the district superintendent of jails, the district probation and parole officers and the head of investigation. The committee was to convene once a month, and its functions were to review and work towards improving the criminal justice system. If properly resourced, these bodies could have been effective but they were never established. All four provincial governments should include such a provision in their police reform bills.

An ombudsman's office should also be created to supervise criminal courts. This official's responsibilities should include examining ways to ensure that courts and judges have proper facilities; as well as to monitor a judge's monthly caseload, including which cases were disposed, which were not, and reasons for any delay; cases where bail was and was not granted; and the availability of judges, including the hours they spent in court.

B. SPEEDY JUSTICE OR JUSTICE DENIED

In a June 1998 Mehram Ali case, the Supreme Court, while calling for remedies to trial delays, particularly in terrorism cases, acknowledged that the “sacrifice of justice to obtain speedy disposition of cases could hardly be termed as justice”. It added: “A balance ought to be maintained between the two commonly known maxims, ‘justice delayed is justice denied’ and ‘justice rushed is justice crushed’”.⁷⁴ Yet the higher judiciary is focusing almost exclusively on clearing the enormous backlog. The proposed reforms could do more harm than good. In May 2009, the National Judicial (Policy Making) Committee (NJPC), headed by the Supreme Court chief justice, produced the National Judicial Policy (NJP) 2009 to make the judicial system “responsive to the present-day requirements of society”.⁷⁵ Concentrating on speedier justice delivery, pressuring the police and courts to dispose of cases within a fixed timeframe, the NJP identifies the problem as one of inadequate budgetary allocation and infrastructure.

⁷⁰ Crisis Group interview, Islamabad, 22 April 2010.

⁷¹ Crisis Group interview, Justice (r) Abdul Karim Kundi, Islamabad, 10 June 2010.

⁷² One such example is a 2009 murder case in KPK's Swabi district. The accused murderer was acquitted due to lack of evidence one year after his arrest. Subsequently, five people who were allegedly present during the killing were arrested as accessories, even though the main accused had been acquitted; their trial continues. Crisis Group interview, senior advocate, Islamabad, 24 May 2010.

⁷³ Crisis Group interview, Karachi, 18 June 2010.

⁷⁴ Mehram Ali v. Federation of Pakistan (Ajmal Mian, CJ), PLD 1998 Supreme Court 1445, Dates of hearing: 11 May-15 May 1998.

⁷⁵ “National Judicial Policy 2009: A Year for Focus on Justice at the Grassroot Level”, National Judicial (Policy Making) Committee, Secretariat, Law and Justice Commission of Pakistan, 2009, p. 5.

In reducing justice delivery to a numbers game, the judiciary has failed to analyse the system's weaknesses. In criminal cases, the focus on the backlog rather than on the low conviction rate will only yield more acquittals and fewer successful convictions. While protecting the rights of the accused, the strategy overlooks the rights of the victim to get justice. "The trend now [after the NJP] is to dispose of a case rather than properly decide it, so you will try to find some loophole rather than adhere to the spirit of the case and of justice", said Abid Hassan Minto, a prominent senior advocate and former Supreme Court Bar Association (SCBA) president.⁷⁶ Other former SCBA presidents and several prominent jurists have similarly criticised the NJP's emphasis on speedy justice, with a former SCBA president, Ahmed Ali Kurd arguing that cases would be "compromised due to paucity of time".⁷⁷

As it is, trial court judges commonly seek short cuts to dispose of cases quickly, a trend that the NJP will exacerbate. In a recent example, in May 2010, female officers in a Punjab police station who brutally beat up a woman in an attack captured on video were acquitted because the victim claimed the incident never took place – presumably under pressure. Neither the prosecution nor the court called for the video footage to be entered into evidence, despite the judge's authority, under the CrPC, to "order the production of any document or things and neither the parties nor their agents shall be entitled to make any objection to any such order or question".⁷⁸ By and large, judges seldom invoke their authority to demand that evidence be brought to court, instead adopting, as what one criminal lawyer described, a "lethargic approach" to the trial process – including in terrorism trials.⁷⁹

The fixation on swift justice is certainly hampering the government's fight against terrorism. A Karachi-based civilian counter-terrorism official said: "We investigate for six years, we get the guy, and then it takes two hours for the court to let him off the hook".⁸⁰ Provincial home depart-

ments, moreover, do not maintain serviceable records of withdrawn cases, even though they have the authority to approve the withdrawal of a case. This reduces accountability for such decisions.

The demand for swift justice has also, as discussed below, been used to justify parallel, highly discriminatory systems such as the Nizam-e-Adl 2009 in PATA as well as illegal detentions and extrajudicial killings. In reforming the justice sector, the government and other stakeholders, including the legal community, should shift the focus from short-term solutions for speedier delivery towards establishing a system that tackles the primary threats to internal stability and instils public confidence in the state. This will not be achieved through short-cuts that undermine legal and constitutional norms, as in PATA. Instead, there is urgent need for a comprehensive assessment of the gaps in investigation and prosecution, the identification of mechanisms that have worked successfully in the past, and the provision of adequate resources and personnel at the national, provincial and district levels.

C. THE PRE-TRIAL PHASE: STRENGTHENING INVESTIGATIONS

1. The state of investigations

A severely deficient pre-trial phase is the main cause of weak prosecution cases. Evidence is poorly recorded and stored, lost, compromised, falsified or simply inadequate; crime scenes are regularly contaminated.⁸¹ Corruption and political interference, including by the military's intelligence agencies, also compromise investigations;⁸² and there is a severe shortage of qualified personnel. "You cannot ever undo the [fraudulence] of the investigation phase, no matter how high it goes after that", said Khawar Zaman, a former Sindh IG.⁸³

Provincial police forces have an investigation branch with two wings, crime and investigation, each headed by a deputy inspector general (DIG). A special branch collects and disseminates information on individuals and organisations suspected of subversive activities. The Criminal Investigation Departments (CIDs) are responsible for

⁷⁶ Crisis Group interview, Lahore, 27 May 2010.

⁷⁷ Crisis Group interviews, retired superior court judges and senior advocates, Islamabad, Lahore, and Karachi, April-July 2010. See also Iftikhar A. Khan, "Kurd unhappy about SC verdict on NRO", *Dawn*, 23 December 2009.

⁷⁸ Section 161, Qanun-e-Shahadat.

⁷⁹ Crisis Group interview, Hina Jilani, Lahore, 28 May 2010.

⁸⁰ Crisis Group interview, Sindh CID official, Karachi, June 2010. In October 2009, the Lahore High Court quashed FIRs against Hafiz Saeed, leader of JD, the renamed LeT, who was accused of exhorting supporters to wage jihad against the U.S., India and Israel. Hina Jilani argued: "There must be a wealth of evidence against [Saeed]. Where is it? Police don't get and judges are happy to throw [the case] out". Crisis Group interview, Lahore, 28 May 2010. Many lawyers and police officials attribute the high acquittal rate in terrorism cases, in part, to judges' eagerness to dispose of cases rather than order police

and prosecutors to seek more evidence. Crisis Group interviews, lawyers and police officials, Lahore, Karachi and Islamabad, May-July 2010.

⁸¹ In arguably the best-known instance, the site of former prime minister Benazir Bhutto's assassination in December 2007 was washed and cleared before investigators arrived on scene.

⁸² See Crisis Group Report, *Pakistan: The Militant Jihadi Challenge*, op. cit. For more on interference by the military's intelligence agencies, see also Maqbool Ahmed, "Tug of war", *Herald*, December 2008.

⁸³ Crisis Group interview, Lahore, 27 May 2010.

anti-terrorism operations, investigations and intelligence gathering, and serve as coordination points between federal and international agencies with respect to terrorism.⁸⁴

Investigating officers (IOs) make up roughly 13 per cent of the police force. According to a senior investigator in Punjab: "If you analyse the ratio of crime to the number of available investigators, you find a huge imbalance. The police force does not have a proper shift system. What you need is to distinguish between shifts (for example, day and night; urban and rural), and then determine the number of investigators you need in each shift based on population and crime rate. You say, 'This is how many people we have got, these are our requirements. Now make up the difference'".⁸⁵ In Lahore, the capital of Pakistan's most populous province, an overall case load of 3,000 per month is common – typically divided between no more than ten investigators. "One investigating officer has to handle 30 to 40 cases [at a time]. These officers are not even focusing exclusively on investigations. How do they tackle this, while doing the cases justice?" said former IG Khawar Zaman.⁸⁶

Like the police service in general, investigation agencies face major difficulties in recruiting qualified personnel due to low pay, poor working conditions and adverse public perceptions. Compared to other departments, investigation agencies are at a further disadvantage because potential candidates "know they would have to work with blunt tools, and investigation is generally seen as less glamorous and lower profile than other departments such as operations".⁸⁷

Civilian counter-terrorism officials complain that, given the major gaps in their investigative capacity, they are forced to rely on "buying" information and running paid informants, but have extremely limited funds even for this.⁸⁸ According to former Supreme Court justice Nasir Aslam Zahid: "When preparing the budget there are no demands from the police department saying we need this many investigating officers, this many trained, these police academies to be reinforced in these ways".⁸⁹ The high volume of criminal cases demands a thorough analysis of how many investigators are required, and their training and resource needs, which should then be reflected in provincial budgets. Although the national police budget does contain provisions for investigations, Islamabad has

failed to institute mechanisms to spend the money effectively and accountably.⁹⁰

Investigating officers seldom write their own investigation reports, which a constable prepares by hand. The report is based on the IO's notes although the constable rarely accompanies the IO to the crime scene or other locations where evidence is collected and statements recorded. Unqualified translators record witness testimonies in two languages. This produces confusing and inaccurate reports, with many criminal lawyers and prosecutors claiming that they can seldom follow the logic of charge sheets. The Punjab home department has proposed reforms to the Anti-Terrorism Act (ATA) 1997 to require that investigation reports in terrorism cases be written by an officer at the assistant superintendent or deputy superintendent level. This should be a requirement in all major criminal cases.

"Police have fourteen days to submit a charge sheet, so the IOs are in a hurry, it's always a rushed job", said a Karachi-based former anti-terrorism prosecutor. "They find weak witnesses when they get the complainant to find the witnesses rather than finding them independently ... then they submit a charge sheet".⁹¹ The NJP's demand for speedier justice will further encourage rushed investigations and miscarriages of justice.⁹²

"The police file cases under the influence of the complainant or the accused, so there is no factual basis, and evidence is cooked up", said Abid Hasan Minto, a senior lawyer.⁹³ Investigators are regularly replaced during the process. "An investigation always goes against someone", said a former Sindh IG. "If that person is influential they will go to a parliamentarian or an SP [Superintendent of Police] to have the IO changed, and this will go on and on until a 'friendly' investigator comes along". During his stint as inspector general in Sindh, Zaman calculated an SHO's average tenure as three months. He said that this was especially prevalent in rural areas, where pressure from local elite on the police is the norm.⁹⁴

Criminal lawyers, prosecutors and police officials argue that while the current investigation procedure might be appropriate for murder, theft, rape and other criminal cases, new challenges like money laundering, cyber-crime and terrorism require joint investigation teams, including legal experts conversant with such cases, rather than a single

⁸⁴ See "Police Organisations in Pakistan", HRCP and Commonwealth Human Rights Initiative report, May 2010.

⁸⁵ Crisis Group interview, Lahore, June 2010.

⁸⁶ Crisis Group interview, Lahore, 27 May 2010.

⁸⁷ Crisis Group interview, senior investigation official, Punjab police, Lahore, 2010.

⁸⁸ Crisis Group interviews, civilian counter-terrorism officials, Sindh police, Karachi, June 2010.

⁸⁹ Crisis Group interview, Karachi, 18 June 2010.

⁹⁰ Crisis Group interviews, serving and retired police officials, Islamabad and Karachi, October 2010.

⁹¹ Crisis Group interview, Karachi, June 2010.

⁹² "An IO is given maximum commendation if the maximum number of people are convicted, so there is no weeding out [at the investigation stage]", said a former law minister. Crisis Group interview, Syed Iftikhar Gilani, Islamabad, 24 May 2010.

⁹³ Crisis Group interview, Lahore, 27 May 2010.

⁹⁴ Crisis Group interview, Lahore, 27 May 2010.

IO. They also advocate forming teams of multiple IOs and experts to tackle crimes with clear connections to terrorism or to criminal syndicates, such as kidnappings-for-ransom, bank robberies and money laundering. Former Sindh IG Afzal Ali Shigri has called for a national committee of provincial police chiefs, and similar provincial committees of district chiefs, to share information and coordinate activities. "Terrorists do not work locally", he said. "Province to province, district to district, these officers need to regularly come together".⁹⁵

Military intelligence agencies also too often investigate terrorism cases without a legal mandate, with their teams forcing the police to surrender suspects who are then either kept in indefinite illegal detention or released. Since 2001, between 4,000 to 6,000 people are reportedly missing, with many secretly detained by such agencies, discussed in more detail below.⁹⁶ The federal government also commonly deploys federal paramilitary forces, including the Rangers (in Sindh and Punjab) and the Frontier Corps (in KPK and Balochistan) to tackle law and order crises. In June 2010, for instance, the Rangers' authority in Karachi was expanded to include investigations, with these powers extended for one year the following month.⁹⁷ "Once these forces come, they never go back because everyone wants the powers of arrest and interrogation. This does not build the capacity of the police forces, while at the same it requires a huge amount of resources to keep [the federal forces] there. Police capacity building, therefore, remains neglected", said a former Punjab IG.⁹⁸

Maintaining the Rangers, particularly in large cities like Karachi, where the paramilitary force has had a substantial presence since the early 1990s, not only consumes enormous funds for training and resources but also undermines the chain of command. Although the Rangers formally fall under the federal interior ministry, in practice they report to the military high command.⁹⁹ In September 2010, the major Baloch political parties, as well as the police, opposed a federal interior ministry decision to expand the Frontier Corps' policing powers in Balochistan.¹⁰⁰ The police's ability to enforce law and order will

be undermined as long as the government relies on these paramilitary forces for policing. Centre-state relations will also be adversely affected since these military controlled forces have little knowledge of local dynamics and are inclined to rely far more on the use of force. Instead, the federal and provincial governments should provide the police the resources and authority needed for effective law-enforcement.

The police should also invest in building internal capacity. Currently all police recruits undergo the same courses and training, regardless of their seniority or skill sets. Due to political appointments, patronage and corruption, many continue to serve even without the modest training and examination requirements.¹⁰¹ The federal and provincial governments should develop specialised training and professional development courses. All new recruits should be required to serve as understudies for a fixed amount of time under senior officers, and after internal assessment, assigned to one of the various departments. Those departments should offer further specialised courses. In investigation branches, even more specialised training should be offered, for example in homicide, crimes against property, cyber-crimes, terrorism and other crimes. Additionally recruits should receive regular foreign exposure and training. These specialists should also have direct access to sensitive data stored in all provincial Criminal Records Offices (CROs), fingerprinting bureaus, statistical offices and anti-terrorism monitoring cells.

2. Evidence gathering

Police training in evidence collection is negligible. With police budgets focused on the procurement of arms and ammunition, communication, transport and other infrastructure, the allocation for scientific resources is disproportionately low. A senior counter-terrorism official described Pakistan's forensics capacity as "rudimentary" at best.¹⁰² Investigators' knowledge of what constitutes good scientific evidence, and its importance in trials, is similarly limited. "I don't remember any trial where DNA and fingerprinting were taken into account", said Hina Jilani, a prominent criminal and human rights lawyer.¹⁰³ In rape

⁹⁵ Crisis Group interview, Islamabad, 21 October 2010.

⁹⁶ See Carlotta Gall, "Picture of secret detentions emerges in Pakistan", *New York Times*, 19 December 2007. See also, "Wife of 'missing' man embodies cause of 'disappeared'", *Daily Times*, 20 July 2007.

⁹⁷ See "Rangers powers extended for one year in Karachi", *Express Tribune*, 19 July 2010.

⁹⁸ Crisis Group interview, Shaukat Javed, Lahore, 26 May 2010.

⁹⁹ A director-general, appointed by the military, heads each branch of the Rangers and Frontier Corps.

¹⁰⁰ See Mohammad Zafar, "Political parties reject new FC powers", *Daily Times*, 9 September 2010. For Crisis Group analysis on security challenges and conflict in Balochistan, see Crisis Group Asia Briefing N°69, *Pakistan: The Forgotten Conflict in*

Balochistan, 22 October 2007; and Crisis Group Asia Report N°119, *Pakistan: The Worsening Conflict in Balochistan*, 14 September 2006.

¹⁰¹ For example, in April 2009, close relatives of influential Sindh government officials were reportedly either inducted into the Sindh police as deputy superintendents of police, or seconded to the police from other provincial departments. See "Out-of-turn inductions in Sindh police", *The News*, 12 April 2009. For more detail on political appointments in the police, see Crisis Group Report, *Reforming Pakistan's Police*, op. cit.

¹⁰² Crisis Group interview, Karachi, June 2010.

¹⁰³ Crisis Group interview, Lahore, 28 May 2010.

cases, for example, DNA samples are seldom examined; in one rape case in June 2010, police officers disposed of the victim's clothes, not realising they were vital evidence. In a recent kidnapping case, the police threw away the ransom note.¹⁰⁴

In Karachi, which has a high crime rate and where ethnic and sectarian violence has spiked in 2010, IOs did not even have fingerprinting kits.¹⁰⁵ Modern electronic fingerprinting cards are now available to the police, with some international funding, and the Karachi police have made their use mandatory in all investigations.¹⁰⁶ Priority for their distribution should be given to the FIA, the provincial CIDs – the lead counter-terrorism agencies at the national and provincial level, respectively – and police stations in urban centres and large districts with high crime rates. In the long term, automated electronic fingerprinting should replace paper fingerprinting at all levels of investigation.

The National Police Bureau, a federal policymaking body, has initiated projects for an automatic fingerprint identity system, discussed above. A national database of crime and criminals is being created and land in Islamabad has already been allocated for a federal forensic laboratory. Progress in establishing the laboratory, however, has been slow. Moreover, it comes under the National Police Bureau, rather than the FIA, which, as the top federal investigation agency, would be the appropriate authority. The Punjab government, too, has launched a project to establish such a laboratory in Lahore.

Forensics laboratories should not be limited to the federal and provincial capitals, but should be established in all major districts to avoid delays. It is equally important that they remain independent from the police and prosecutors since evidence is easily – and often – manipulated. These laboratories should be financially accountable to either the public accounts committee in the relevant legislature, or a subcommittee under the interior (federal) and home (provincial) ministries. As a member of the National Police Bureau, Ali Afzal Shigri, a former Sindh IG, recommended that the federal forensics science laboratory, while falling under the interior ministry's purview, should be headed by a criminologist. He also proposed that the laboratory should be semi-autonomous, charging the police for its services and thus generating income to self-finance part of its operations.¹⁰⁷

Forensics laboratories and CROs should also have the authority to recruit scientific experts from the private sector, for example biologists and chemical experts, rather than only from the police. Salaries and benefits would have to be competitive to attract talent from the private sector. The Police Order 2002 gives the police leeway to involve the private sector, but such appointments still have to be approved by the home department. According to a senior counter-terrorism official in Sindh, "it takes a long, sometimes more than a year, and many hurdles to hire someone [from the private sector]".¹⁰⁸

Given that trials often begin after delays of two or three years, the preservation of evidence is crucial, including chains of custody. This is seldom done in provincial CROs, thus compromising the evidence by the time it is finally presented in court. A former Supreme Court justice advocates that IOs should keep close account of scientific evidence, and serve as "a check against corruption or inefficiency in forensic laboratories. They should send the sample to another lab if they have doubts". He added: "Doctors often don't do the post-mortems themselves, and erroneous post-mortems are prepared. An IO can hold that doctor to account, but this never happens".¹⁰⁹

Yet the government must establish appropriate mechanisms that subject forensic laboratories to proper oversight, while also ensuring their independence from police or political interference. A subcommittee of the standing committee of the interior (or home department in the provincial assemblies), with equal government and opposition representation, should maintain fiscal accountability over laboratories, while also overseeing investigations into the conduct of personnel. Federal and provincial criminal justice coordination committees, established under the Police Order 2002, should also be authorised to review complaints by investigators and prosecutors about the conduct of forensics labs, and act on credible reports of corruption and malpractice. According to a former senior police official, another potentially effective check against the manipulation of forensic evidence would be to conceal the identity of the case and the individuals involved from those testing the samples, which would be classified instead by numbered codes.¹¹⁰

The lack of direct police access to telephone data, the starting point of many investigations, is another critical gap in investigations. To obtain telephone records, investigators must request access through the Directorate of

¹⁰⁴ Crisis Group interviews, criminal lawyers, Lahore, May 2010.

¹⁰⁵ Crisis Group interview, anti-terrorism prosecutor, Karachi, June 2010.

¹⁰⁶ "Police Organisations in Pakistan", *op. cit.*, p. 59.

¹⁰⁷ Crisis Group interview, Ali Afzal Shigri, Islamabad, 21 October 2010.

¹⁰⁸ Crisis Group interview, Sindh CID official, Karachi, June 2010.

¹⁰⁹ Crisis Group interview, Justice (r) Abdul Karim Kundi, Islamabad, 10 June 2010.

¹¹⁰ Crisis Group interview, Afzal Ali Shigri, former Sindh IG, Islamabad, 21 October 2010.

Inter-Services Intelligence (ISI), the military's intelligence agency, which rarely does so on time, thus squandering the momentum of investigations. In kidnappings-for-ransom cases, which are often connected to terrorism and terrorist financing, the delays and lack of access to telephone records can be especially costly; some police officials blame these problems for the rapidly increasing number of kidnappings.¹¹¹ "It is incredible that the first line of defence doesn't have access to phone data", said a Karachi-based civilian counter-terrorism official. A Pakistan-based foreign expert who works with Pakistani prosecutors said: "It would be inconceivable for telephone evidence not to be used in [his country]".¹¹²

The CPLC's success in solving several major kidnapping cases in Karachi is attributable to its efforts in maintaining data, including telephone records, under arrangement with the Pakistan Telecommunication Company Ltd. (PTCL), and voice matching technology, and then guiding the police in seeking and linking circumstantial evidence. In a 2001 kidnapping, the organisation monitored and taped telephone calls from the kidnapper to the victim's parents, experts analysed geographic patterns to narrow the probable location to three pay phone booths, and, involving the police at this stage, the kidnapper was arrested. The CPLC and the victim's parents then engaged a private criminal lawyer as special public prosecutor, Mohammad Ilyas Khan, who subsequently supervised all aspects of the police investigation.¹¹³ "This was an example of how a lawyer who knows the law and knows what constitutes solid evidence gets good results", said a former special prosecutor.¹¹⁴ While recourse to the private sector and organisations like the CPLC has helped the police, they do not compensate for systemic gaps in investigative and prosecutorial capacity.

Police officials have recommended creating mobile crime scene units within each specialised police squad, with the necessary equipment, including GSM locators, which could then process crime scenes in a timely and scientific manner. In 2010, the Sindh police attempted to buy a GSM locator but faced objections from the federal interior ministry. The Punjab police have tried on several occasions to acquire direct access, but have similarly been blocked. "The military's will prevailed", said a senior Punjab police official, when describing his department's failed attempts.¹¹⁵

Such disputes will likely continue unless there is a law that establishes clear protocols for access and use of such data. In April 2010, the senate standing committee on the interior called for direct police access to mobile phone records in criminal investigations, rather than through the military's intelligence agencies. The Punjab home department proposed the same in July 2010.¹¹⁶ Parliament should make this a major priority, and legislate appropriately to overcome military-imposed barriers to the police's access to vital data.

D. PROSECUTORS

The decision to take a case to trial ultimately rests with the prosecutor. While the courts, prisons and police represent the public face of the justice system, the relatively small prosecution services have lesser infrastructure needs than the other three. Nevertheless, they form the core of the criminal justice system and their effectiveness determines the effectiveness of the system.

Until 2002, the prosecution services were part of the police and came under the provincial home department. Each provincial force maintained its own prosecution wing, comprising law graduates of the rank of sub-inspector, inspector or deputy superintendent. The Police Order 2002 separated the prosecution services from the police, bringing them under the law department. Between 2003 and 2006, all four provinces passed a Criminal Prosecution Service Act to establish "an independent, effective and efficient service for prosecution of criminal cases, to ensure prosecutorial independence, for better coordination in the criminal justice system of the Province".¹¹⁷ A prosecutor general heads each provincial service, appointed by the provincial government. Below him are additional prosecutors general, deputy prosecutors general and assistant prosecutors general; there are district public prosecutors, deputy district public prosecutors and assistant district public prosecutors at the district level.

Separating police and prosecution was overdue, but the nascent setup faces major difficulties. The Police Order 2002 did not require additional training for prosecutors recruited into the new service. Inducting recruits with criminal law expertise remains a major challenge, particu-

¹¹¹ See Crisis Group Report, *Pakistan: The Militant Jihadi Challenge*, op. cit., p. 19.

¹¹² Crisis Group interviews, Islamabad, March 2010.

¹¹³ Crisis Group interview, Mohammad Ilyas Khan, Karachi, 19 June 2010. See also Mohammad Ilyas Khan, *A Father's Quest for Justice* (Karachi, 2009).

¹¹⁴ Crisis Group interview, Shaukat Hayat, senior criminal lawyer and former prosecutor, Karachi, 18 June 2010.

¹¹⁵ Crisis Group interview, Lahore, May 2010.

¹¹⁶ See "Punjab government seeks access to phone call records", *Daily Times*, 14 July 2010.

¹¹⁷ Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006, Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006. The same or similar language is used in the Sindh Criminal Prosecution Service (Constitution, Functions, and Powers) Ordinance 2006; Balochistan Prosecutorial Service (Constitution, Functions, Powers) Act VI of 2003; and North-West Frontier Province Prosecution Service (Constitution Functions And Powers) Act 2005.

larly as the prosecution services have yet to develop an institutional identity and are starved of resources. A large number of posts remain vacant;¹¹⁸ political appointees, with little training, fill many posts. "Prosecutors with only three or four years experience are serving as district attorneys or assistant district attorneys", said a former Punjab IG.¹¹⁹ A former Supreme Court chief justice added: "To separate prosecution from the police, you need to properly fund it and man it with a competent lawyer. That has not happened".¹²⁰

There is no separate training academy for prosecutors, nor is there any follow-up training after a prosecutor is recruited. According to Salim Akhtar, the dean of the Sindh Judicial Academy, although his institute is mandated to train prosecutors, and reached an agreement with the provincial advocate general to do so in 2007, not a single prosecutor had enrolled by the end of the 2009-2010 academic year.¹²¹ Low salaries compound the challenge. Under Section 9 of the Criminal Prosecution Act, a prosecutor must formally approve a case for it to go to trial. As such, prosecutors play an important pre-trial role, which begins once a charge sheet is submitted and a court assigns the case to an individual prosecutor. The prosecutor's interaction with the IO starts at this stage, with the latter guiding the former on which witnesses should be present in court, and their quality.

The prosecutor's twofold function – scrutinising case files so that legal lacunae are addressed before they come to court and prosecuting cases – is compromised by highly flawed investigations as well as the prosecutors' inability or unwillingness to address those flaws during the pre-trial phase. Prosecutors very often do not speak to witnesses until the case comes to court, undermining their effectiveness against the defence, and making them over-dependent on the police. While prosecutors have the authority to direct investigators to obtain particular forms of evidence, and have arguably the highest stake in preserving a crime scene and evidence, many refrain from even visiting crime scenes.

Weak cases come to trial because "prosecutors do not want to weed out cases they believe it makes them look weak or dishonest", said a former public prosecutor.¹²² According to Hina Jilani: "Prosecutors generally have no confidence to tell the police to back off, that this *challan* will not work".¹²³ Said Hafeez Lakho, a former Sindh advocate general: "When I was advocate general, I would tell the court, 'I don't have a case'. Judges appreciated it and never accused me of corruption. If a prosecutor wrongly claims he has no case, a judge can easily catch him out".¹²⁴ But judges do not always do so. Moreover, a former Supreme Court judge added, when charges against a party are dismissed or dropped, "prosecutors and investigating officers generally consider the case closed, rather than follow up and use the resources at their disposal to catch the real guilty party".¹²⁵

With public prosecutors widely perceived as incompetent, if not corrupt, victims of crime or their relatives often solicit private counsel to prosecute a case. The private party is deeply invested in the outcome of the case but handicapped by a very limited capacity to collect evidence. "Police will shirk their duty [in such cases]", said a prominent Lahore-based senior advocate. "They feel it is not their case, and will demand bribes to collect the evidence".¹²⁶ Some laws, such as the Domestic Violence Act, place the burden of prosecution on the victim. A human rights lawyer said: "When the victim has to shoulder the burden of prosecution, you can never expect results. Who is going to testify on the victim's behalf in a domestic violence case?"¹²⁷

The CPLC in Karachi routinely engaged private lawyers to prosecute cases, or encouraged complainants to do so, usually with better results.¹²⁸ Prosecutors also engage in private practice, raising doubts about their commitment to pursuing criminal cases. In December 2008, the Punjab law minister, noting that prosecutors' private practices were damaging justice delivery, considered imposing restrictions. He also threatened to dissolve the Punjab prose-

¹¹⁸ According to Supreme Court records, as of March 2010, only nine of eighteen, and 27 of 50 vacancies had been filled respectively for posts of additional prosecutor general and deputy prosecutor general in Punjab. There were 119 vacancies against 328 posts for deputy district public prosecutors; and 249 vacancies against 795 posts for assistant district public prosecutor, in the province. Only 23 of Punjab's 40 posts for district public prosecutor were filled. Similar figures were found for Sindh and Khyber Pakhtunkhwa. "Supreme Court Annual Report April 2009-March 2010", Supreme Court of Pakistan, pp. 197-198.

¹¹⁹ Crisis Group interview, Shaukat Javed, Lahore, 26 May 2010.

¹²⁰ Crisis Group interview, Justice (r) Saeeduzaman Siddiqui, Karachi, 16 June 2010.

¹²¹ Crisis Group interview, Karachi, 18 June 2010.

¹²² Crisis Group interview, Islamabad, April 2010.

¹²³ Crisis Group interview, Lahore, 28 June 2010. Some investigators deny this, arguing that prosecutors often make frivolous objections to details in case files, creating unnecessary delays. Crisis Group interviews, investigating officers, Karachi, June 2010.

¹²⁴ Crisis Group interview, Karachi, 16 June 2010.

¹²⁵ Crisis Group interview, Justice (r) Abdul Karim Kundi, former Supreme Court justice and Peshawar High Court chief justice, Islamabad, 10 June 2010.

¹²⁶ Crisis Group interview, Abid Hasan Minto, Lahore, 27 May 2010.

¹²⁷ Crisis Group interview, Hina Jilani, Lahore, 28 May 2010.

¹²⁸ Crisis Group interview, former CPLC head Jamil Yusuf, Karachi, 15 June 2010.

cution department if it failed to improve its performance.¹²⁹ Earlier that year, the Punjab government had terminated the appointments of 488 public prosecutors from almost all ranks of the department for inefficiency and for failing to meet the eligibility criteria.¹³⁰

Given that the prosecution services are still new, provincial governments must not undercut their credibility through such public threats and/or mass firings and transfers. Instead, public prosecutors should be guaranteed security of tenure, while training and higher salaries would attract better candidates. They should, moreover, be encouraged to exercise discretionary authority to reject weak cases and to pressure investigators to provide evidence that will hold in court, ensuring that no evidence is ignored, contaminated or lost.

The federal and provincial governments should also create a supervisory authority to examine the number of cases an individual prosecutor prosecutes; the seriousness of the offences; the number of cases in which bail was recommended; the numbers of cases abandoned; and reasons for delays in starting a trial. Prosecutors should be required to analyse and report on acquittals, providing clear reasons and identifying gaps in the investigation and prosecution. Provincial and district committees comprising respected retired judges and senior advocates could perform this function. Mechanisms should also be created to strengthen police-prosecutor interactions and to institutionalise the prosecutor's role in investigations, for example by creating joint police-prosecutor committees and joint police-prosecutor training.

The Punjab home department has proposed that special public prosecutors prepare the drafts of FIRs in terrorism cases.¹³¹ In April 2010, the Punjab minister for law and parliamentary affairs, Rana Sanaullah Khan, directed the province's prosecutors to visit their respective police stations once a week to assist investigations.¹³² However, a clear demarcation of duties is needed to address the mistrust between investigating officers and prosecutors,¹³³ and the resulting turf battles. According to a former IG, the Karachi CPLC's role in crime-solving was accompanied by a "clear message that the CPLC was not going to

be the policeman".¹³⁴ A similar message should underlie all police-prosecutor coordination. Both institutions have a stake in successful prosecutions, and should recognise their interdependence and the importance of good coordination to raise the low conviction rate.

E. LEGAL REFORMS

Many lawyers and police officials argue that the failure to implement existing laws and procedures has resulted in poor criminal justice delivery; new laws are unlikely to significantly improve matters.¹³⁵ For example, Schedule 4 of the Anti-Terrorism Act (ATA) 1997 calls for constant surveillance of proscribed groups, including of their offices, which law enforcement agencies seldom do. Any new regulation against proscribed outfits would likely be similarly flouted. The legal community and law enforcement agencies also realise that new laws are often passed without repealing old laws, resulting in multiple, sometimes contradictory, laws on the book. Executive ordinances, by military and civilian governments alike, add to the confusion. "Nobody in the law ministry or the judiciary can claim to know what the valid laws of the land are", said Iqbal Haider, a former law minister, while also noting that the Pakistan Code, a compendium of valid laws, has not been published since 1970.¹³⁶

Indeed, police officers' ignorance of existing laws and procedures is widespread, especially among fresh recruits and junior officers. More important than adding offences to the PPC, the government should repeal all laws that discriminate on the basis of religion, sect and gender, including the blasphemy and anti-Ahmadi laws, and the Hudood Ordinances. As well as violating fundamental constitutional rights, these laws embolden militant outfits and encourage vigilante violence, including sectarian attacks.¹³⁷

While a more vigorous application of existing laws and constitutional rights would resolve serious internal security challenges, some major legal reforms are vital. The government should introduce substantial amendments to the PPC, CrPC and Evidence Act (Qanun-e-Shahadat) to improve the police's ability to bring terrorists and other major criminals to justice. The rise of information tech-

¹²⁹"Prosecutors warned to mend ways", *The Nation*, 26 December 2010.

¹³⁰Musharraf's military government had appointed all of these prosecutors.

¹³¹"Punjab govt seeks access to phone call records", *Daily Times*, 14 July 2010.

¹³²Crisis Group telephone interview, Zahid Bokhari, former Punjab prosecutor general, 25 November 2010.

¹³³According to a former Sindh advocate general, "If IOs are working with a dishonest prosecutor, they know their investigation will be affected". Crisis Group interview, Hafeez Lakho, Karachi, 16 June 2010.

¹³⁴Crisis Group interview, Afzal Ali Shigri, Islamabad, 21 October 2010. Shigri was the deputy inspector general (DIG) of the Sindh police when the CPLC became functional in Karachi.

¹³⁵Crisis Group interviews, jurists and serving and retired police officials, Islamabad, Karachi and Lahore, May-June 2010.

¹³⁶Haider added: "Don't keep changing statute laws, especially procedure, over and over. It will just keep getting more confusing". Crisis Group interview, Karachi, 19 June 2010.

¹³⁷See Crisis Group Reports, *Reforming the Judiciary in Pakistan*; *The State of Sectarianism in Pakistan*; and *Pakistan: The Mullahs and the Military*, all op. cit.

nology-related crime, for instance, requires an effective cyber-crime law. Changes to the Explosive Substance Act should be made to regulate the use and sale of substances like ammonium nitrate and potassium chloride that can be used to make explosives.¹³⁸ Amendments to the Telegraph Act should specify the terms and limitations of civilian law enforcement agencies' access to telephone records, as discussed above.

Procedural changes, including to the Evidence Act, should require that investigating officers are conversant with computer technology and other modern methods to ensure that *challans* are supported by scientific evidence. This would help ensure that cases that go to trial are substantiated by scientific proof. Some police officials support the admissibility of confessions before a police official only if the accused's lawyer is present, along other safeguards such as allowing only senior officers, deputy superintendents and above, to extract confessions. They also advocate that the Evidence Act should allow police officers to serve as witnesses in terrorism cases.¹³⁹

Reforms to the CrPC must also address the lack of protection to witnesses, judges and prosecutors. A robust witness protection program is urgently needed. None exists currently. Given the widespread and unchecked proliferation of arms, and the reach of criminal and terrorist networks – including collusion with corrupt local officials – witnesses are understandably reluctant to risk their lives by testifying in major criminal cases. Between 1 January–30 September 2010, the prosecution failed to achieve convictions in 306 high-profile terrorism cases in Punjab province because witnesses retracted their testimony out of “fear, distrust of police, social pressure and compromise between the parties through political and influential people”, according to Punjab's chief public prosecutor.¹⁴⁰ An anti-terrorism prosecutor stressed: “Nobody is prepared to depose against militants in any court”.¹⁴¹ Along with other measures to protect witnesses, police investigation branches could have a separate wing responsible for witness protection.

¹³⁸ Ammonium nitrate from Pakistan is reportedly smuggled into Afghanistan, which has banned the chemical. Legislation to regulate the use of ammonium nitrate is being considered in parliament, according to government officials. See Mark Lander, “U.S. tries to end flow of bomb items to Afghanistan”, *New York Times*, 14 November 2010.

¹³⁹ The ATA had originally included such a measure. This was struck down by the Supreme Court, which ruled that the change should be introduced into the Evidence Act rather than through the ATA.

¹⁴⁰ Khalid Hassnain, “ATCs acquit about 700 for lack of evidence”, *Dawn*, 17 October 2010.

¹⁴¹ Crisis Group interview, anti-terrorism prosecutor, Islamabad, April 2010.

The protection of judges and public prosecutors is equally important. In September 2010, special public prosecutors responsible for high-profile cases in anti-terrorism courts (ATCs) expressed concerns about their safety after receiving death threats. They complained that the government had yet to provide them with additional security despite several written requests.¹⁴² At present, many of these prosecutors even use public transport to reach their anti-terrorism courts. In November 2010, special public prosecutors in two Karachi ATCs said they would not prosecute members of Lashkar-e-Jhangvi, an extremist Sunni organisation, because of repeated threats and lack of security.¹⁴³ A former Sindh advocate general similarly refused to continue prosecuting the kidnappers and murderers of *Wall Street Journal* reporter Daniel Pearl.¹⁴⁴

Jihadi outfits have intimidated and even murdered judges. For instance, a Lahore High Court judge who acquitted a teenaged boy of blasphemy was shot dead in his chambers in October 1997.¹⁴⁵ In June 2010, militants threatened an ATC judge and his family at their home in Swat.¹⁴⁶ The judge was one of two in the district trying detained militants, including Tehreek-e-Nifaz-e-Shariat-e-Mohammadi (TNSM) leader Sufi Mohammad and his sons.¹⁴⁷ The government subsequently decided to hold Sufi Mohammad's trial in a fortified detention centre near Mingora rather than the ATC.¹⁴⁸

To counter such threats, some civilian counter-terrorism officials have called for measures similar to ones taken by Columbian courts in serious narco-terrorism cases. There, courts conceal the identity of judges, and some cases are tried not by a single judge but a panel of judges whose identities are disguised by one-way mirrors and voice modulators. “The alternative is to have kangaroo courts like we do now”, said a senior civilian counter-terrorism official.¹⁴⁹

¹⁴² “Special public prosecutors receive death threats”, *The Nation*, 9 September 2010.

¹⁴³ Asghar Azad, “Public prosecutors refuse hearings in militants' cases”, *Daily Times*, 14 November 2010.

¹⁴⁴ “Lawyer in Daniel Pearl murder case refuses to continue”, *Express Tribune*, 8 November 2010. In 2002, the trial of Pearl's kidnappers and murderers was shifted from Karachi to Hyderabad (and heard by three different judges) due to militant threats. See Karl Vick and Kamran Khan, “Pearl trial moving to new site after threats”, *The Washington Post*, 3 May 2002.

¹⁴⁵ See Crisis Group Report, *Reforming the Judiciary in Pakistan*, op. cit.

¹⁴⁶ Rauf Klasra, “Swat anti-terrorism judge, family threatened by Taliban”, *The News*, 29 June 2010.

¹⁴⁷ The TNSM is a Swat-based militant group allied to the Afghan and Pakistani Taliban.

¹⁴⁸ Delawar Jan, “Security fear: Sufi couldn't be produced in Swat court”, *The News*, 30 June 2010.

¹⁴⁹ Crisis Group interview, Sindh CID official, Karachi, June 2010.

V. COUNTER-TERRORISM AND THE RULE OF LAW

A. THE FRONTLINE FORCE

The military is still the principal counter-terrorism actor. Having directed internal security policy especially since the attacks of 11 September 2001, the military remains disinclined to cede control to the elected government or share information and resources with civilian law enforcement agencies. At the same time, the military continues to support India and Afghanistan-oriented jihadi groups including the LeT/JD and the Jaish-e-Mohammad as well as the Taliban's Quetta Shura and the Haqqani network. It also maintains peace deals with some Pakistani Taliban groups even as it targets others. This dubious distinction between militants undermines the military-led counter-terrorist policy. The military's policy, moreover, of illegally detaining thousands of suspected militants, with no access to lawyers, or contact with family members, arguing that they would be freed if brought to trial, undermines the rule of law. Similar methods are used against political opponents, particularly Balochi nationalists and activists, as well as journalists and other civil society actors.¹⁵⁰

There have been some, albeit limited, attempts to assert civilian control over counter-terrorism. In December 2009, the government established the National Counter-Terrorism Authority (NACTA), which, however, lacks resources and authority.¹⁵¹ At the provincial level, in June 2010, the Punjab police approved plans to give the CID sole responsibility for counter-terrorism, with a highly qualified staff and a new command structure, but it is too early to assess results. In KPK, the federal and provincial governments are recruiting and training personnel, with international support, particularly from the U.S., for an elite 7,500-strong counter-terrorism police force.¹⁵² The focus appears to be more on the use of force and tactical training

¹⁵⁰ See Crisis Group Briefing, *The Forgotten Conflict in Balochistan*, op. cit. According to Amnesty International (AI), more than 40 political leaders and activists have been tortured and killed in Balochistan between July-October 2010. AI called on the government to investigate the military and the Frontier Corps. See "Amnesty calls for probe into Balochi killings", *Daily Times*, 27 October 2010. In 2009, most enforced disappearances were in Balochistan, according to the HRC. "State of human rights in 2009", op. cit., p. 104.

¹⁵¹ Placing NACTA under the interior ministry, rather than directly under the prime minister, as originally conceived, critics believe has undermined its authority and operational and fiscal independence. Crisis Group interviews, serving and retired police officials, Islamabad, September-October 2010.

¹⁵² See Crisis Group Briefing, *Pakistan: The Worsening IDP Crisis*, op. cit.; and Crisis Group Reports, *Pakistan: Countering Militancy in FATA*; and *Reforming Pakistan's Police*, both op. cit.

than on enhancing the KPK police's investigative and case-building capacity.¹⁵³ Other initiatives include the Sindh police's creation of a Special Protection Group, an elite counter-terrorism force.¹⁵⁴

While such initiatives are insufficient given the enormity of the challenge, they are evidence of the federal and provincial governments' desire to empower the police, who are the frontline of the fight against violent extremism and continue to be a primary target for jihadi groups.¹⁵⁵

B. PARALLEL JUSTICE

1. Anti-terrorism courts

Faced with a dysfunctional criminal justice system, successive governments have established parallel courts to expedite criminal trials, including anti-terrorism, anti-narcotics and accountability courts. The Anti-Terrorism Act (ATA) 1997 was passed by the second Nawaz Sharif government, in response to intensifying sectarian terrorist violence. To expedite justice, the ATA requires that anti-terrorism courts (ATCs) conduct trials on a daily basis, to be completed within seven days. A committee headed by a Supreme Court justice, and comprising the law minister, prosecutor general, law secretary and other stakeholders, meets regularly to monitor the functioning of the ATCs.

Complainants, police and prosecutors support the ATCs because of procedural short cuts that supposedly make it quicker and easier to gain convictions.¹⁵⁶ However, given the ATA's vague definition of terrorism,¹⁵⁷ these courts

¹⁵³ These conclusions are drawn from Crisis Group interviews with federal and provincial law enforcement officials in Peshawar, July 2010. The U.S., too, has emphasised tactical training in assistance programs for KPK's law enforcement agencies. See "Quarterly progress and oversight report on the civilian assistance program in Pakistan: as of 30 September 2010", USAID, 2010.

¹⁵⁴ Personnel are given an additional 5,000 rupees (almost \$60) monthly above their regular salaries. Crisis Group interviews, Sindh police officials, Karachi, June 2010.

¹⁵⁵ On 11 November 2010, a truck bomb exploded inside the premises of the Sindh CID in Karachi, killing at least twenty and wounding more than 100 people.

¹⁵⁶ Acid victims, for example, believe their attackers will get a stricter punishment if convicted in an ATC. The law allows the accused to challenge his/her trial by an ATC.

¹⁵⁷ The ordinance includes within the ambit of terrorist acts "violence against a person" or to property that "create[s] a sense of fear or insecurity in society". The Musharraf regime's amendments to the ATA in 2001 broadened the term to include, among others, any act that "involves the doing of anything that causes death"; "involves grievous violence against a person or grievous bodily injury or harm to a person"; "involves the doing of anything that is likely to cause death or endangers a person's life"; "involves stoning, brick-batting or any other form of mis-

receive a vast range of criminal cases, from public disorder to assault to murder, causing the very delays and large caseloads that they were meant to avoid. Ironically, the Supreme Court has not applied the same demands for a faster resolution of terrorism cases as it demands from the normal court system. In one judgment, the Supreme Court ruled that the ATA's timeframe is "directory" and not mandatory; hence anti-terrorism courts do not have to decide cases on time. As a result, said a former special prosecutor, "cases in the ATCs linger even for two years, and are not quashed. Since the ATA came into force in 1997, there has been no Supreme Court order directing ATC judges that if they do not decide a case in the time given, action will be taken".¹⁵⁸

The higher judiciary has also produced confusing and contradictory interpretations of the ATA. In a January 2003 case, for example, the Supreme Court made a distinction between "terror" and "terrorism", the "critical difference" being identified as "design and purpose". Fear and insecurity would have to be the "main purpose" of such a crime, rather than "only an unintended consequence or fall out". The judgment said:

Every crime, no matter what its magnitude or extent, creates some sort of fear and insecurity in some section of the society but every felony or misdemeanour cannot be branded or termed as terrorism. As against that, an act of terrorism designed to create fear and insecurity in the society at large may or may not succeed in achieving the desired effect but nonetheless it can be accepted as nothing but terrorism because of the object or purpose behind such act. Thus, the real test to determine whether a particular act is terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act.¹⁵⁹

Yet in a later case of a revenge killing in a mosque, Supreme Court Justice Abdul Hameed Dogar said that although the motive was a "previous enmity ... paramount consideration to be taken note of is the cumulative [sic] fallout" of the offence, deeming the venue, a mosque and hence a public place, as "sufficient to attract the provisions of section 6 of the [ATA]". The case was transferred from an

ordinary to an anti-terrorism court.¹⁶⁰ Other decisions also deemed the fallout of an act as relevant to determining whether it was an act of terrorism, regardless of motive.

In July 2007, in a case of extortion at gunpoint in Karachi, the investigating officer submitted the case to both an administrative judge and an ATC. In January 2008, the ATC dismissed an application to transfer the case to an ordinary sessions court, finding that the manner in which the crime had been committed "created [a] sense of fear and insecurity in [the] minds of the general public" and therefore fell within the ATA's ambit. Accepting the revision petition on appeal, however, the Sindh High Court found that if such cases are to be tried in anti-terrorism courts, "then there remains nothing for ordinary courts".¹⁶¹

With no clear higher court interpretation of the ATA, cases of all hues inundate the anti-terrorism courts. On 30 September 2010, members of the Lahore Bar Association, who tried to barge into the Lahore High Court chief justice's courtroom to protest an administrative decision, were charged under the ATA.¹⁶² Children, too, some as young as twelve years, have been arrested under the law in violation of the Juvenile Justice System Ordinance 2000, which abolishes the death penalty for juveniles (defined as up to age eighteen), prohibits children from being handcuffed, fettered or subjected to corporal punishment, and requires that juveniles be tried exclusively in juvenile courts regardless of the offence.¹⁶³ As in the regular justice system, prisoners without political or financial clout, including political opposition figures, are easily victimised.

The value of the ATCs is questionable given that they largely rely on the same judiciary, prosecution service and investigation agencies as regular courts. Sindh, for example, has 23 judicial districts but more than 80 district or sessions judges who are posted to ex-cadre posts, including as ATC judges, for which they have no additional training. Anti-terrorism prosecutors, too, are drawn from the provincial prosecution services, with no special training or protection, and dependent on the same standard of evidence as in all criminal investigations. Given the militants' ample resources, they are typically pitted against

chief to spread panic"; and "designed to seriously interfere with or seriously disrupt a communications system or public utility service". Anti-Terrorism (Amendment) Ordinance, 2001.

¹⁵⁸ Crisis Group interview, Mohammad Ilyas Khan, Karachi, 19 June 2010.

¹⁵⁹ Basharat Ali vs. Special Judge, Anti-Terrorism Court-II, Gujranwala, Writ Petition No. 15843 of 2003, decided on 14 January 2003. Pakistan Legal Decisions 2004 (Lahore).

¹⁶⁰ Muhammad Farooq vs. Ibrar and 5 others, Supreme Court 36, C.P. No. 1131 of 2004, decided on 12 July 2004. Pakistan Legal Judgments 2005.

¹⁶¹ Huzoor Bux v. State, Criminal Revision Application No. 20 of 2008, Karachi 487, decided on 1 July 2008. Pakistan Legal Decisions 2008.

¹⁶² Wajih Ahmad Sheikh, "Lawyers attack CJ's court in proceeding", *Dawn*, 1 October 2010.

¹⁶³ See Abdullah Khoso, "Trying children for terror", *Dawn*, 21 August 2010. According to Khoso: "One of the accused assassins of Benazir Bhutto is a child, who was declared a juvenile during his first appearance in court. After two years the Lahore High Court ordered that his fetters be removed".

highly paid defence counsels.¹⁶⁴ Nor do the ATCs provide special protection to witnesses, prosecutors or judges.

As a result of intimidation and political influence, including from the military's intelligence agencies, militant suspects often obtain major concessions from the courts. According to a Sindh CID official: "We busted a gang that attacked NGOs and religious minorities, mostly Christians, and most of them are out. After five or six months, they become eligible for bail. Terrorists get jail remissions that people accused under NAB (National Accountability Bureau) do not get".¹⁶⁵ A Karachi-based counter-terrorism official said: "The ATCs were supposed to have a low threshold of evidence so you could send terrorists to jail. [The system] has failed so miserably that now we are thinking it's better to go to the normal courts".¹⁶⁶

With terrorism cases taking years in courts, alleged militants who are not out on bail often plan operations from prison, using easily available mobile phones. One Karachi-based police described prisons as the "think-tanks" of jihadi networks because of this unchecked use of mobile phones.¹⁶⁷ Another claimed that prison officials are "deferential to terrorists" due either to threats or bribery.¹⁶⁸ In mid-2010, the Sindh government launched a scheme to install cameras for round-the-clock surveillance of prison inmates, along with mobile phone jamming devices.¹⁶⁹

As of September 2010, only two of Karachi's three anti-terrorism courts were functioning.¹⁷⁰ From 1 January 2010-30 September 2010, Punjab's public prosecution department initiated proceedings in 1,324 cases under the ATA, achieving only 199 convictions and transferring another 235 cases to normal lower courts. While overall statistics

have not been adequately compiled, law enforcement officials, retired judges and lawyers believe that ATCs have even lower conviction rates than regular courts.¹⁷¹

Trials where success could have restored a measure of public confidence in the state's ability to confront terrorism have not ended in convictions. In May 2010, an ATC in Rawalpindi acquitted four people charged with involvement in the September 2008 Marriott Hotel bombing for lack of evidence.¹⁷² The same court rejected the FIA's request for more time before submitting the case file against four suspects accused of involvement in Benazir Bhutto's assassination, held in detention for two years. In September 2010, an ATC acquitted three men accused of involvement in a May 2008 car bomb attack on the Danish embassy in Islamabad. The prosecution claimed that it had produced 32 witnesses, and said it would appeal the decision.¹⁷³

2. PATA and FATA

Any law enforcement efforts in PATA, including the elite counter-terrorism force described above, will be undermined by the ambiguous, unconstitutional legal framework established under the Nizam-e-Adl 2009, the militants' central demand during negotiations with the military and the KPK government from 2007-2009. Islamabad has not repealed this parallel system despite declaring its resolve to dismantle PATA-based militant networks.¹⁷⁴

Under the regulation, Sharia is enforced by *qazi* (Sharia) courts, run by government-appointed judicial officers trained in Islamic law. The framework excludes many national laws, including ones that provide legal protections to women.¹⁷⁵ The regulation also calls for the creation of an appellate court, the *Dar-ul-Qaza*, at the level of the High Court, and a final appellate court, the *Dar-ul-Dar-ul-Qaza*, at the level of the Supreme Court. KPK's appel-

¹⁶⁴ "These prosecutors cannot match the kind of defence lawyers you see in ATCs", said a senior Sindh counter-terrorism official. Crisis Group interview, Karachi, June 2010.

¹⁶⁵ Crisis Group interview, Karachi, June 2010.

¹⁶⁶ Crisis Group interview, Karachi, June 2010.

¹⁶⁷ In one prominent example, on 28 November 2008, two days after the Mumbai attacks, Omar Sheikh, the main accused in the kidnapping and beheading of Wall Street Journal journalist Daniel Pearl, reportedly tried to provoke conflict between India and Pakistan by pretending to be the Indian external affairs minister and threatening President Asif Ali Zardari over his mobile phone, using a UK-registered SIM from his Hyderabad cell. Azaz Syed, "Jailed militant's hoax calls drove India, Pakistan to brink of war", *Dawn*, 26 November 2009.

¹⁶⁸ In June 2010, four under-trial militants escaped Karachi's city courts reportedly with the help of police escorts. Fawad Ali Shah, "Scathing report on UTPs' escape hints at inside job", *Express Tribune*, 25 June 2010.

¹⁶⁹ Crisis Group interviews, Sindh CID officials, Karachi, June 2010. See also Imran Ayub, "Plan to install cameras, phone jammers in jails", *Dawn*, 14 June 2010.

¹⁷⁰ See "Special public prosecutors receive threats", *Nation* (Lahore), 9 September 2010.

¹⁷¹ "Less than 5 per cent, or abysmally low", according to a Sindh counter-terrorism official. Crisis Group interview, Karachi, June 2010.

¹⁷² Khalid Iqbal, "Accused in Marriott Hotel suicide attack acquitted", *The News*, 6 May 2010.

¹⁷³ "Danish embassy bombing suspects acquitted", Reuters, 25 September 2010.

¹⁷⁴ The KPK government has budgeted 272 million rupees (almost \$3.5 million) for the Nizam-e-Adl's implementation at the local level, and an additional ten million rupees (\$125,000) for the appellate courts in its 2010-2011 budget.

¹⁷⁵ These include Muslim Family Laws Ordinance 1961, Protection of Women (Criminal Laws Amendment) 2006, and Protection Against Harassment of Women at the Workplace 2010. See Simi Kamal, "Nizam-e Adl – Inside Out: A study of Nizam-e Adl in the light of the constitution, women's policies and the perceptions of the Pakistani society", National Commission on the Status of Women, draft report, May 2010, p. 23.

late courts are already refusing to hear appeals against *qazi* court verdicts, even though the *Dar-ul-Qaza* and *Dar-ul-Dar-ul-Qaza* have yet to be established.¹⁷⁶ District level courts are, therefore, applying their own interpretations of Sharia, without reference to a codified body of law or direction from the higher judiciary. This gives district-level judicial officers unchecked authority in a parallel justice system that denies citizens constitutionally guaranteed fundamental rights.

Even if the *Dar-ul-Qaza* and the *Dar-ul-Dar-ul-Qaza* were established, this would not resolve the constitutional crisis since these appellate benches would enforce a distinct body of law from that enforced by the principal higher courts, the Peshawar High Court and the Supreme Court. These courts would also apply Sharia, which, without being embedded in a text, can yield extreme interpretations, as demonstrated by various judgments of the Federal Shariat Court.¹⁷⁷

In 2003, the Supreme Court struck down the Muttahida Majlis-e-Amal's Hisba bill, passed by the NWFP Assembly, to impose Sharia in the province. The judges said: "Islamist jurists are unanimous on the point that except for *Sallat* [prayer] and *Zakat* [alms] no other obligation stipulated by Islam can be enforced by the state". Therefore, a state official, in this case an ombudsman, "cannot be empowered to determine in his discretion whether any act is consistent with Islamic moral values and etiquettes or not".¹⁷⁸ The Supreme Court should apply this precedent to the Nizam-e-Adl 2009.

Speedy justice is one of the ostensible purposes of the Nizam-e-Adl. It imposes a four-month deadline for courts to decide criminal cases (and six months for civil cases). With acute criminal jurisprudence challenges in PATA, rushed justice will likely see many more militants and their criminal allies released than convicted. This poses

serious security risks in a region still recovering from military operations and, since July 2010, major flooding.¹⁷⁹

Substandard policing and prosecution capacity in Malakand will likely provoke the government and, in particular, the military to continue circumventing the trial process. While thousands of alleged militants have been detained, police have issued few FIRs, and the courts very few convictions – amid widespread reports of secret detentions, mass graves and extrajudicial killings by military personnel. In a missing person hearing in the Peshawar High Court (PHC), the (federal) deputy attorney general claimed that the military's intelligence agencies, which have no legal mandate of arrest and detention, had detained about 6,000 suspected militants in KPK. One PHC judge likened suspects to "rolling stones" passed from agency to agency.¹⁸⁰ In July 2010, a two-member bench of the same high court issued a notice to the ISI's director-general, Lieutenant General Ahmed Shuja Pasha, to clarify his agency's role in missing person cases – the second such notice, after the first was ignored.¹⁸¹

A July 2010 Human Rights Watch report reported 238 "suspicious" killings in Swat since September 2009.¹⁸² The military has repeatedly denied involvement. In October 2010, a video showing men in military uniform lining up and shooting unarmed civilians, presumably in Swat, was widely circulated. Military officials argued that the video was forged.¹⁸³ Chief of Army Staff General Ashfaq Kayani announced an internal investigation. Based on such allegations, the U.S. has applied the Leahy Law on Human Rights (1997) to six military units, allegedly responsible for the extrajudicial killings in Malakand.¹⁸⁴

¹⁷⁶ Akhtar Amin, "NWFP govt 'less interested' in implementing shariah", *Daily Times*, 8 March 2010.

¹⁷⁷ In 1991, for example, it ruled that a blasphemy conviction should carry a mandatory death penalty, with no possibility of pardon. In 1992, it ruled that the Qisas and Diyat Law, which allows a party to seek monetary compensation from another where bodily harm has occurred, should permit senior family members of a murder victim to pardon the killer, in return for monetary compensation. This has practically provided legal cover for the practice of "honour killings". The Shariat Appellate Bench of the Supreme Court later ruled that even if such a law was not passed, its "content and purpose could not be challenged because they formed part and parcel of Islamic common law". Quoted in Crisis Group Report, *Reforming the Judiciary in Pakistan*, op. cit. See also "Honour killings: weak bill is evidence of weak will", *Daily Times*, 23 October 2004.

¹⁷⁸ See Crisis Group Report, *Reforming the Judiciary in Pakistan*, op. cit., p. 9.

¹⁷⁹ According to a Peshawar-based lawyer, a significant volume of criminal case records was destroyed during the operations. Crisis Group interview, Kamran Arif, Islamabad, 1 April 2010.

¹⁸⁰ Akhtar Amin, "PHC puts military officers on notice in missing person's case", *Daily Times*, 28 September 2010.

¹⁸¹ Akhtar Amin, "PHC reissues notice to ISI DG in missing person's case", *Daily Times*, 8 July 2010.

¹⁸² "Pakistan: Extrajudicial Executions by Army in Swat", Human Rights Watch, 16 July 2010. An editorial in a major Pakistani daily called for an inquiry into such allegations, arguing: "The security establishment cannot operate within a legal black hole and expect to promote the rule of law. Apart from constituting poor counter-insurgency tactics, such measures are bound to perpetuate the cycle of violence, fear and revenge that the security establishment is meant to be bringing to an end". "Allegations of abuse", *Dawn*, 19 July 2010.

¹⁸³ "Pakistan army says 'extra-judicial killing' video faked", BBC News, 1 October 2010, available at www.bbc.co.uk/news/world-south-asia-11455858. This website contains a link to the video.

¹⁸⁴ Named after its principal sponsor, Senator Patrick Leahy, the law prohibits U.S. military assistance to foreign military units that violate human rights with impunity. Details are available on Senator Leahy's website: <http://leahy.senate.gov>.

The military has delegated a counter-insurgency role to untrained and unaccountable tribal militias, or *lashkars*. These militias are often nothing more than renegade squads comprising former Taliban foot soldiers. The founding head of one Peshawar-based *lashkar*, for example, supported the Taliban until his arrest in 2008; his *lashkar* eventually refused to cooperate with the KPK police in anti-Taliban operations, citing insufficient weapons.¹⁸⁵ A *lashkar* in KPK's Dera Ismail Khan district was commonly referred to as the "government Taliban".¹⁸⁶ These militias have been responsible for gross human rights violations, including extrajudicial killings, torching homes and collective punishment.¹⁸⁷

Informal and brutal justice is even more rampant in FATA, which retains an oppressive parallel legal and administrative structure, contained in the Frontier Crimes Regulation (FCR) 1901. Each tribal agency's administration is presided over by a political agent who enjoys extensive executive, judicial and fiscal powers. The FCR allows for collective punishment and preventive detention and does not provide the right of legal appeal. Law enforcement is conducted by levies (militias), *khassadars* (tribal police) and the Frontier Corps. The latter categorises detainees according to a three-tier colour-coded system:

White: minor criminals who are returned to their districts, where their individual tribes assume responsibility for their conduct.

Grey: foot soldiers and facilitators of militant groups, but not their leaders and planners, who are given seven to fourteen years imprisonment.

Black: known terrorists and planners, including those with links to international networks, who are handed over to the military's intelligence agencies; they are not processed through the justice system.

"We keep a record but we do not ask [the intelligence agencies] about these cases again", said the then-FC inspector general, Major General Tariq Khan.¹⁸⁸

Collective punishment and indefinite detention are customary, violating even the limited checks that the FCR

demands. Like extrajudicial killings, these beget rather than contain radicalisation. All major political parties and the FATA public acknowledge the need for comprehensive political, legal and administrative reform to incorporate the tribal belt into the mainstream. In August 2009, President Asif Ali Zardari announced a FATA reforms package to amend some of the FCR's arbitrary provisions.¹⁸⁹ Major political parties and FATA-based civil society groups welcomed the proposal. Facing resistance from the military and FATA bureaucracy, the government has not passed the planned reforms. In July 2010, Prime Minister Yousaf Raza Gilani said the government would introduce "the gift of democracy" in FATA only once security was restored.¹⁹⁰ The prospects of peace in FATA will remain at best limited until the tribal agencies are incorporated into the constitutional, political and legal mainstream, with a functional criminal justice system.

¹⁸⁵ Ali Hazrat Bacha, "Adezai lashkar to part ways with police", *Dawn*, 25 August 2010.

¹⁸⁶ Crisis Group Report, Pakistan: *Countering Militancy in FATA*, op. cit., p. 18.

¹⁸⁷ Crisis Group interviews, KPK residents, 2009-2010. See also Crisis Group Report, Pakistan: *Countering Militancy in FATA*, op. cit.

¹⁸⁸ Crisis Group interview, Major General Tariq Khan, inspector general of the Frontier Corps (KPK), Peshawar, 13 July 2010. In September 2010, General Khan was promoted to Lieutenant General and appointed as Mangla Corps Commander.

¹⁸⁹ The amendments included lifting restrictions on political party activity; curtailing the bureaucracy's arbitrary powers of arrest and detention; excluding women and minors from collective responsibility under the law; establishing an appellate tribunal; and envisaging audits of the civil administration's funds by the auditor general. For more detail, see Crisis Group Report, *Pakistan: Countering Militancy in FATA*, op. cit.

¹⁹⁰ "Only politics of reconciliation can resolve issues: PM", *Daily Times*, 26 July 2010.

VI. THE HIGHER JUDICIARY AND THE DEMOCRATIC TRANSITION

A. IMPARTIAL JUSTICE

The Supreme Court is the guardian of the constitution and guarantor of the standard of justice. The higher judiciary is still redefining its role after decades of validating military interventions and sanctioning legal, political and constitutional reforms that have fundamentally altered the nature of the state, and undermined parliamentary functioning and the supremacy of the constitution. On 3 November 2007, the Supreme Court passed a restraint order against Musharraf's imposition of emergency rule, the first time that it rejected rather than acquiesced in the military's suspension of the constitution.¹⁹¹ Around 60 judges, among them the Supreme Court chief justice and three provincial high court chief justices (of the Lahore, Karachi and Peshawar high courts) refused to swear a fresh oath under the Provisional Constitution Order (PCO) of 2007 and were hence deposed. In March 2009, after a prolonged standoff between the government, opposition and bar, the PPP-led government agreed to restore all deposed judges to the bench.

Judges must admit past mistakes that have undermined democracy. In a 31 July 2009 decision, the Supreme Court rightly declared Musharraf's proclamation of emergency, and all executive orders and decisions, taken from 3 November to 15 December 2007, unconstitutional and void, including the appointment of judges under the PCO. All fourteen judges that heard the case had previously sworn an oath to Musharraf's first PCO, after the military's October 1999 coup. Although the judgment described the decision of other judges to swear a fresh oath to the 2007 PCO as "quite saddening", it did not adequately address the earlier PCO. The judgment distinguished between the October 1999 coup, which overthrew the entire government, and the 3 November 2007 imposition of emergency, which specifically targeted the judiciary. The latter was "singular in nature, in that, the onslaught was on the judiciary alone. All other institutions were intact"; the action, therefore, delivered a "serious blow" to judicial independence.¹⁹² The court based much of its argument on the fact

that it had issued a restraint order on 3 November 2007 – whereas it issued no such order upon the military's October 1999 coup.

By drawing distinctions between a military coup and the imposition of emergency rule, the judges largely overlooked, if not justified, past actions. A former Supreme Court justice said, "the judges have never assumed responsibility for 1999. They should have clearly stated that they were wrong [in swearing an oath to Musharraf's first PCO], that 2007 was a watershed and that they were moving forward from this point on".¹⁹³

Recent decisions and orders also prompt doubts about the judiciary's impartiality. Although the constitution guarantees presidential immunity from criminal proceedings, the Supreme Court has repeatedly ordered the government to request courts in Switzerland to reopen corruption cases against President Zardari. In a December 2009 judgment, the court had struck down the National Reconciliation Ordinance (NRO), Musharraf's political amnesty ordinance allowing the national and provincial governments to withdraw politically motivated cases under trial that were initiated from 1 January 1986-12 October 1999. The court had earlier prolonged the NRO's life by allowing parliament to enact it into law. The judges justified striking down the ordinance in part on the constitutional provision introduced by Zia's military regime, under Article 62, requiring parliamentarians to be "sagacious, righteous, and non-profligate and honest".

The NRO decision has been applied selectively. While the Supreme Court has pressed the NAB to reopen cases against other elected and un-elected officials, possibly including cabinet members, it has not issued similar calls for trial courts to reopen cases against members of the Muttahida Qaumi Movement, including its leader Altaf Hussain, with 72 criminal cases pending in the courts, the most of any NRO 'beneficiary'. Such actions have caused many in and outside the legal community to question whether the judiciary is again allowing political motives to inform its decisions. Criticising the NRO decision, then-HRCP chairperson Asma Jahangir argued: "Witch-hunts, rather than the impartial administration of justice, will keep the public amused. The norms of justice will be judged by the level of humiliation meted out to the wrongdoers, rather than strengthening institutions capable of protecting the rights of the people".¹⁹⁴

¹⁹¹ On 9 March 2007, President Musharraf tried to illegally dismiss Chief Justice Chaudhry. In July 2007, a full bench of the Supreme Court struck down the order as unconstitutional, and reinstated Chaudhry.

¹⁹² Short Order of Supreme Court in Constitution Petition No. 08 and No. 09, Nadeem Ahmed and Sindh High Court Bar Association through its secretary vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad, and others, decided on 31 July 2009. Available at: www.supremecourt.gov.pk/web/user_files/File/CONST.P.9OF2009.pdf.

¹⁹³ Confidential Crisis Group interview, retired Supreme Court justice, June 2010.

¹⁹⁴ Asma Jahangir, "Another aspect of the decision", *Dawn*, 19 December 2010. Asma Jahangir is on the Crisis Group Board of Trustees.

B. RESPECTING THE SEPARATION OF POWERS

The judiciary has taken some important steps to safeguard democracy. In a 1996 case, widely known as the Mahmood Khan Achakzai case, the court ruled that basic characteristics of the 1973 constitution, including parliamentary democracy and federalism, embedded in Islamic provisions, cannot be subverted even by parliament. In the Zafar Ali Shah case in 2000, the Supreme Court advanced this doctrine by ruling that neither parliament nor the executive could amend the constitution's basic features of parliamentary democracy, federalism and an independent judiciary. In the context of successive military regimes massively amending the constitution, and two-third majorities in rubber stamp parliaments sanctioning them, such a doctrine could reverse this pattern – but only if consistently applied. In the Achakzai and Shah decisions, the court nevertheless upheld Zia's eighth amendment and Musharraf's coup, respectively. Many of the judges who heard the latter case are still on the bench, including the current chief justice.

The eighth amendment's Islamic provisions should in fact be the first test of the doctrine of the basic features. "The Federal Shariat Court exercises quasi-legislative powers. It violates the basic structure of parliamentary democracy enshrined in the constitution, so why is this not being looked at?" said Abid Hassan Minto, the former SCBA president. "In the original constitution, no mullah is placed over and above parliament. This whole character [of the constitution] changed with the Federal Shariat Court, so which 'basic structure' are you talking about?"¹⁹⁵

Upholding Musharraf's seventeenth amendment in 2005, the Supreme Court had stated that only parliament, and not the superior judiciary, could strike down amendments violating the constitution's three basic features. The bench was, however, willing to hear challenges, on the basis of the basic features doctrine, to the eighteenth amendment – which unlike the eighth and seventeenth amendments was passed not by a military-backed rubber stamp parliament, but unanimously by a legitimately elected assembly.¹⁹⁶

The Supreme Court should clarify its interpretation of the constitution's basic features, and limit possible abuse of the concept of "Islamic provisions" to strike down progres-

sive reforms, as has happened in the past.¹⁹⁷ "The basic features doctrine should be circumscribed and not open-ended", said Zain Sheikh, a constitutional expert.¹⁹⁸ This could prevent legislatures from writing narrow partisan objectives into the constitution, as occurred under Generals Zia and Musharraf. It should not, however, impede elected institutions from pursuing democratic reform.

The judiciary's recent more proactive stance has helped restore a measure of public confidence in the courts. But judges must nevertheless be cautious not to overstep their mandate. Superior court judges frequently take suo motu action under article 184 of the constitution,¹⁹⁹ particularly since 2006-2007 when such cases escalated, and received significant positive media coverage. In some instances, the use of this constitutional authority has been both positive and necessary, as in missing person cases. Yet, the Supreme Court has been expanding the use of these powers beyond matters of fundamental rights, including executive appointments and even, in the extreme, ordering the Karachi government in 2007 to ban the movement of heavy vehicles during daytime hours.²⁰⁰ In July 2009, the court issued an interim order to suspend the government's carbon surcharge tax on petroleum products. The Lahore High Court chief justice took suo motu notice of a rise in the price of sugar, and in September 2009 directed the Punjab government to keep the sale price at 40 rupees (\$0.47) per kilogram.

The constitution does not confer original jurisdiction to the provincial high courts: these benches can enforce fundamental rights only when moved by an applicant. A 1982 Supreme Court ruling reaffirmed this. Nevertheless, provincial high courts have also used suo motu powers extensively. In July 2010, the chief justice of the Peshawar High Court stopped other judges from the court from taking suo motu notices without his permission. The Peshawar High Court Bar Association (PHCBA) welcomed the decision, stating, "regular cases were most often delayed due to suo motu notices".²⁰¹

¹⁹⁵ Crisis Group interview, Lahore, 27 May 2010.

¹⁹⁶ After four months of deliberation, the judges decided not to strike down any of the eighteenth amendment's provisions, but, as mentioned, ordered parliament to amend the judicial appointment procedure to include a requirement that the judicial parliamentary committee articulate its reasons for rejecting a judicial nominee in writing.

¹⁹⁷ Some opponents of the eighteenth amendment, for example, appealed to Islamic injunctions in their petitions to strike down parts of the reform package. Theoretically, whether any provision violates Islamic provisions would be up to the Council of Islamic Ideology, the Federal Shariat Court and the Supreme Court's Shariat bench, to decide, not the current apex court bench.

¹⁹⁸ Crisis Group interview, Karachi, 18 June 2010.

¹⁹⁹ Article 184(3) gives the Supreme Court the power to take suo motu action and to pass enforceable orders on "a question of public importance with reference to the enforcement of any of the Fundamental Rights" conferred by the constitution.

²⁰⁰ See Crisis Group Report, *Reforming the Judiciary in Pakistan*, op. cit.

²⁰¹ The PHCBA president did, however, say (incorrectly) that every provincial high court judge had a constitutional authority

Not only can judicial activism blur the lines between judicial and executive authority, it also adds to the case backlog that the superior judiciary has resolved to reduce. Many civil and criminal cases, as earlier mentioned, have been pending in the high courts for years, as they have in the lower courts. A Supreme Court advocate argues that suo motu cases “discourage people from following due process Why would anyone want to spend long and arduous years in court following the procedure prescribed by law when it is quicker to get justice if you attract media coverage by protesting on Mall Road?”²⁰² A former prosecutor said: “Today, a judge is waiting for his name to come on television and print. Suo motu encourages false cases. People feel they can get the chief justice’s attention and they’ll have a case The judiciary should instead be punishing false cases”²⁰³.

Democracy and political stability depends on the rule of law – and vice versa. Public perceptions of a perpetual institutional clash between the executive and the judiciary will encumber both branches of government from consolidating the authority conferred by the restoration of democracy. While the elected government must respect judicial independence and directives, the judiciary, too, must observe constitutional limits and refrain from encroaching on the executive and the parliament’s mandate. Blurring institutional parameters will only threaten judicial independence, by encouraging other state organs to do the same. If the judiciary is perceived as a political actor rather than guardian of the rule of law, it will reverse the gains it has made in regaining the public’s respect.

VII. THE ROLE OF THE INTERNATIONAL COMMUNITY

Pakistan’s international allies have provided limited support to the criminal justice system with mixed results. The Asian Development Bank-funded \$350-million Access to Justice Program (AJP) concluded in mid-2008. Funded mostly through loans, the program focused on caseload management, justice administration, legal empowerment, and police, prosecution and judicial reforms, including fiscal reform. While lawyers, judges and police were critical of the heavy emphasis on infrastructure needs,²⁰⁴ the AJP had some successes. Delays were reduced in the Peshawar High Court, owing significantly to then-chief justice Mian Shakirullah Jan’s management of AJP efforts.²⁰⁵ Other achievements included reform of the Punjab motorway police and Islamabad traffic police; the establishment of separate prosecution services; and improvements in the functioning of family courts. With respect to criminal justice, however, the program’s lopsided focus on basic infrastructure failed to address the urgent need to improve evidence collection and other investigative and prosecutorial functions.

Future international programming should avoid these pitfalls by shunning the numbers game and devoting more resources to modernising critical areas – rather than simply enlarging – the justice system. The opportunities for reform certainly exist. A November 2008 USAID assessment on rule of law in Pakistan concluded that “reformist-oriented leaders exist among most of the key institutions, including the judiciary, the Bar, the government and the police, who are interested in tackling key challenges within their institutions and supporting improvements in the judiciary and the legal professions more broadly”²⁰⁶. The same appetite exists in provincial investigation agencies.

In 2009, the U.S. committed \$51 million for police and rule of law assistance, and \$66.6 million in 2010, including tactical training for law enforcement agencies in KPK, and “investigative and case management training to provincial and federal law enforcement agencies to increase their ability to conduct both proactive and after-the-fact investigations leading to the arrest, prosecution, and successful conviction of terrorist organisations operating in Paki-

to take suo motu action, and that therefore the chief justice had no authority to impose his ban. See “PHC judges restrained from taking suo motu notices”, *Daily Times*, 14 July 2010. The constitution does not authorise a provincial high court to exercise original jurisdiction in fundamental rights cases.

²⁰² Ashtar Ausaf Ali, “The exercise of suo motu”, *Dawn*, 30 March 2010. Mall Road is one of Lahore’s main roads.

²⁰³ Crisis Group interview, Karachi, June 2010.

²⁰⁴ The largest part of the funding included improving court facilities and purchases of judicial residences, computers, vehicles and air-conditioning. For a detailed USAID assessment of the AJP, see “Pakistan rule of law assessment – final report”, USAID, November 2008.

²⁰⁵ See Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit.

²⁰⁶ “Pakistan rule of law assessment – final report”, op. cit., p. 31.

stan".²⁰⁷ Other international programs to enhance prosecution capacity include UN Office on Drugs and Crime's efforts to improve police-prosecutor coordination.

In March 2010, the European Union launched an 11.5 million Euro (about \$16 million) Civilian Capacity Building for Law Enforcement (CCBLE) program, with the memorandum of understanding signed in November, to support the government's counter-terrorism efforts by building NACTA's capacity, and that of the KPK and Punjab police to handle criminal investigations by improving investigation standards, as well as strengthening prosecutorial functions in Punjab.²⁰⁸ Rather than assuming too broad a mandate by supporting NACTA, an international expert working on the program believes it should focus instead on regular police and prosecutors, specifically the "collection of evidence and direction of investigation".²⁰⁹ The U.S., UK and EU are also supporting the federal and Punjab government plans for forensics science laboratories.

The international community should also invest in the smaller provinces where criminality and terrorism are just as rampant. KPK's law enforcement agencies in particular urgently need modern law enforcement tools, in addition to tactical training, to improve security. The international community can and should provide support and training in forensics, evidence collection, investigation, trial advocacy, and development of specialised curricula for both investigators and prosecutors. Efforts to build a cadre of highly trained criminologists, forensics experts and investigators, including trainers, should reach the provincial and district levels.

The international community should send unambiguous signals that the military's gross human rights violations in the name of fighting terror are unacceptable. Such tactics as extrajudicial killings are not isolated. They form part of a heavy-handed military approach that fails to distinguish between civilians and combatants, and between legal and illegal actions. This provokes exactly the kind of public resentment that militants can exploit. The U.S. should condition military aid, including the recently announced \$2 billion in Foreign Military Financing, on credible efforts by the military leadership to make military and intelligence officers and officials responsible for such crimes accountable.

The U.S. should also acknowledge that the rule of law is of a piece with Pakistan's democratic transition. Military

dominance of internal as well as external security policy has created more problems than it has solved. The Enhanced Partnership with Pakistan Act 2009, which U.S. President Barack Obama signed into law in October 2009, provides \$7.5 billion over five years to strengthen civilian institutions, including the police. Its underlying purpose is to broaden U.S. engagement with Pakistan beyond a narrow military partnership. The Obama administration should implement it in letter and spirit, not only by engaging more with civilian institutions, but by supporting those institutions to wrest control over vital policy areas that the military still rigidly guards.

²⁰⁷ "Quarterly progress and oversight report on the civilian assistance program in Pakistan: as of 30 September 2010", op. cit.

²⁰⁸ The implementation period for this program is March 2010-August 2011. Amin Ahmed, "Accord signed with EU on law-enforcement", *Dawn*, 25 November 2010.

²⁰⁹ Crisis Group interview, Islamabad, May 2010.

VIII. CONCLUSION

The state largely derives its authority from the public's confidence in police to maintain security, and the courts to deliver justice. Facing severe challenges to internal stability and to the democratic transition, the federal and provincial governments cannot afford to defer comprehensive judicial reforms. The eighteenth amendment has demonstrated parliament's ability and will to pass extensive democratic reforms. The two major parties, the PPP and the PML-N, should not become complacent in the wake of its passage, but should instead capitalise on this momentum to meaningfully reform the justice sector, including substantive and long-term investment in infrastructure, technology and personnel.

The criminal justice system will be more effective if judges, prosecutors and police are proactive in enforcing the letter and spirit of the law. Indeed the courts' legitimacy, too, depends not just on preventing executive overreach but also on a robust criminal justice system. The superior judiciary and the National Judicial Policy-Making Committee should reconsider the NJP and assign as much priority to strengthening trial processes as to clearing backlogs. Legal short cuts are tempting but counter-productive. The concept of swift justice will no doubt continue to appeal to major segments of the population so long as the courts fail to deliver. Policymakers and judges should not give in to populist fixes that will only limit the justice system's capacity to enforce the law.

Much more attention is needed on the pre-trial phase, so that strong cases are presented in court. Successful convictions in the past are attributable to individuals with knowledge of criminal law and the standards of evidence leading investigations. This should become the norm. Moreover, modern investigation tools should not be the preserve of special police forces – or indeed the military's intelligence agencies – but should be basic tools for the investigation branches.

Any effort to enforce the law will be unsustainable without consolidating a still fragile democratic transition. The military's constitutional and legal distortions have undermined domestic stability and weakened public confidence in the law. They have also disenfranchised major segments of the population, encouraging vigilantism against minorities and creating space for extremists to assert themselves. The challenge for all three branches of government is to put the criminal genie back in the bottle. Clashes between the judiciary and the elected government could reverse the gains made by the political parties and broader legal community when they cooperated to oust the previous military regime. Pakistan's democratic institutions should reinforce each other's efforts to establish constitu-

tional rule and to counter any future attempts to rewrite the law for short-term partisan objectives.

Islamabad/Brussels, 6 December 2010

APPENDIX A

MAP OF PAKISTAN



APPENDIX B

GLOSSARY

Ahmadis	A minority Sunni sect, declared non-Muslims by the second constitutional amendment.
ATA	Anti-Terrorism Act, 1997
ATC	Anti-terrorism court
<i>Challan</i>	Case brief
CID	Criminal Investigation Department
CPLC	Citizen-Police Liaison Committee
CRO	Criminal Record Office
CrPC	Criminal Procedure Code
Eighteenth Amendment	A constitutional amendment package passed unanimously by both chambers of parliament in April 2010, amending over 100 provisions of the constitution to repeal the Musharraf-era Seventeenth Amendment and restore parliamentary sovereignty and strengthen civilian institutions.
Eighth Amendment	A broad constitutional amendment package, passed in November 1985, validating reforms by Zia-ul-Haq's military regime, including discriminatory Islamic laws, and measures to centralise power with the military and civilian proxies.
FATA	Federally Administered Tribal Areas, comprising seven administrative districts, or agencies, and six Frontier Regions bordering on south-eastern Afghanistan.
FCR	Frontier Crimes Regulation, providing the legal framework for the Federally Administered Tribal Areas.
FIA	Federal Investigation Agency
FIR	First information report, the starting point of an investigation.
HRCP	Human Rights Commission of Pakistan
Hudood Ordinances	A set of four Ordinances passed by Zia-ul-Haq's military regime on 16 February 1979, prescribing punishments in accordance with orthodox Islamic law, including amputation of limbs, flogging, stoning and other forms of the death penalty for crimes ranging from theft, adultery and fornication to consumption of liquor. This body of law remains in force.
IG	Inspector General of Police, the head of police in a province.
IO	Investigating officer
ISI	Inter-Services Intelligence Directorate, the military's main intelligence body.
<i>Khassadar</i>	Tribal police
KPK	Khyber Pakhtunkhwa, formerly the Northwest Frontier Province (NWFP).
<i>Lashkar</i>	Tribal militia
LFO	Legal Framework Order, a set of political and constitutional reforms by the Musharraf military regime to centralise power with the military and its civilian allies.
MMA	Muttahida Majlis-e-Amal, an alliance of six major religio-political parties dominated by the JUI-F and JI. During Pervez Musharraf's military regime, it formed the NWFP provincial government and was the major partner in the pro-Musharraf ruling coalition in Balochistan.
MQM	Muttahida Qaumi Movement (United National Movement), the PPP's coalition partner in Sindh.
NAB	National Accountability Bureau
NACTA	National Counter-Terrorism Authority
Nizam-e-Adl Regulation	Act passed by parliament in April 2009 to establish Sharia (Islamic law) in PATA (see below).

NJP	National Judicial Policy
NRO	National Reconciliation Order, promulgated by then-President Pervez Musharraf in October 2007, granting amnesty to politicians and officials for politically motivated charges. The Supreme Court struck it down as unconstitutional in December 2009.
PATA	Provincially Administered Tribal Areas, comprising Malakand division, including the districts of Buner, Chitral, Lower Dir, Upper Dir, Malakand, Shangla and Swat, as well as the Tribal Area adjoining Mansera district and the former state of Amb, administered since 1975 under a separate criminal and civil code from the rest of NWFP.
PCO	Provisional Constitution Order
PML	Pakistan Muslim League, the founder party of Pakistan, originally called the All India Muslim League. Many politicians claim to be leaders of the "real" Muslim League in Pakistan and have their own factions. Former prime minister Nawaz Sharif heads the Muslim League's largest grouping, known as PML(N). PML (Quaid-e-Azam group), a pro-Musharraf party, formed the central government during military rule from 2002-2007.
PPP	The Pakistan Peoples Party, founded by Zulfikar Ali Bhutto in 1967 with a socialist, egalitarian agenda. Since Benazir Bhutto's assassination in December 2007, the party is headed by her widower, President Asif Ali Zardari, and currently heads the coalition government in the centre.
PPC	Pakistan Penal Code
Qanun-e-Shahadat	The Evidence Act, as amended by General Zia-ul-Haq's military regime in 1984, whose amendments remain in force. Commonly still referred to as the Evidence Act.
<i>Qazi court</i>	Sharia (Islamic law) court
<i>Qisas and Diyat</i>	Islamic laws on murder
Seventeenth Amendment	A constitutional amendment package passed by the Musharraf-backed parliament in December 2003 to centralise power with the military and its civilian allies. Repealed in April 2010 by the Eighteenth Amendment.
SHO	Station house officer, the head of a police station.