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PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT

NOVEMBER 2008

This publication was produced for review by the United States Agency for International Development. It was prepared by Dr. Richard Blue and Richard Hoffman, Esq., Management Systems International, and Mr. Louis-Alexandre Berg, USAID.

PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT

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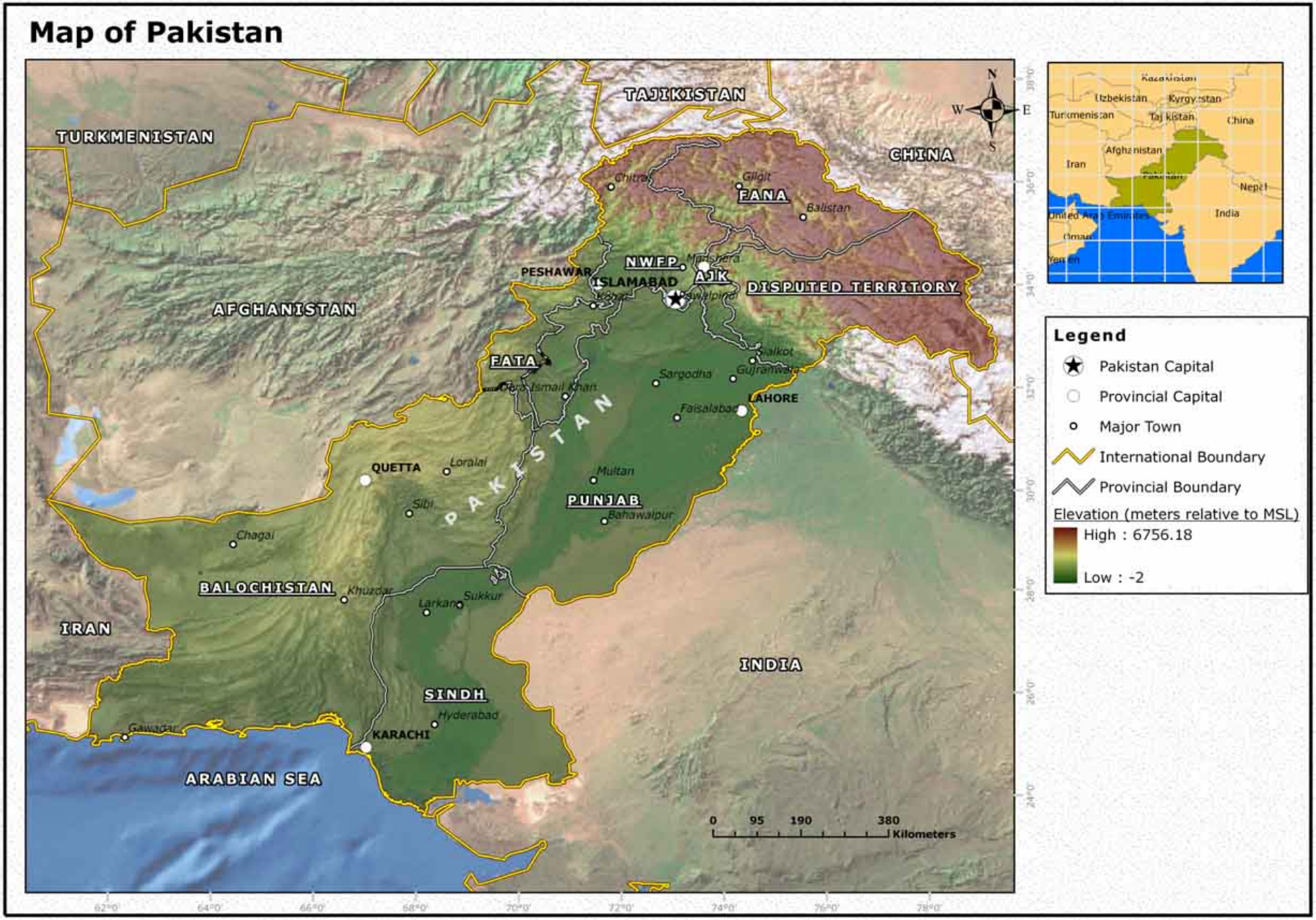
GLOSSARY AND ACRONYMS

ADB	Asian Development Bank
ADR	alternative dispute resolution
AJDF	Access to Justice Discretionary Fund
AJP	Access to Justice Project
CIDA	Canadian International Development Authority
CJP	Chief Justice of Pakistan
CoAS	Chief of Army Staff
DFID	Department For International Development (UK)
DOF	Department of Finance
FATA	Federally Administered Tribal Areas
INL	International Narcotics
L&JC	Law and Justice Commission
LHC	Lahore High Court
LUMS	Lahore University of Management Science
MIT	Member Inspection Team
MMA	Muttahida Majlis-e-Amal (religious party)
MOL	Ministry of Law, Justice, and Parliamentary Affairs
MSI	Management Sciences, Inc.
MTBF	medium-term budgetary framework
NJPMC	National Judicial Policy Making Committee
NRO	National Reconciliation Ordinance
NWFP	North-West Frontier Province
P&D	Planning and Development Department
PCO	Provisional Constitutional Order
PHAA	President to Hold Another Office Act
PML-N	Pakistan Muslim league-Nawaz (party)
PML-Q	Pakistan Muslim League-Quasi (party)
PMU	Program Management Unit
PPP	Pakistan People's Party (party)
SC	Supreme Court
SDC	Swiss Development Corporation
SJC	Supreme Judicial Council
SME	Small to Medium Enterprises
TAF	The Asia Foundation
Qazi	an Islamic scholar serving as a judge
Izzat	prestige, honor
Suo moto	legal proceeding in Pakistan by which Chief Justice of Supreme Court may initiate actions in that court
Pendency	length of time a case has been awaiting disposition since its initiation


Map of Pakistan
TAJIKISTAN
TURKMENISTAN
CHINA
AFGHANISTAN
IRAN
INDIA
ARABIAN SEA
PAKISTAN
FANA
NWFP
AJK
DISPUTED TERRITORY
PESHAWAR
ISLAMABAD
FATA
LAHORE
QUETTA
PUNJAB
BALOCHISTAN
SINDH
KARACHI
Chitral
Gilgit
Balistan
Mansehra
Kohat
Rawalpindi
Sialkot
Gujranwala
Sargodha
Dera Ismail Khan
Faisalabad
Loralai
Multan
Sibi
Bahawalpur
Chagai
Khuzdar
Larkana
Sukkur
Hyderabad
Gawadar
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0 95 190 380
Kilometers
Legend
Pakistan Capital
Provincial Capital
Major Town
International Boundary
Provincial Boundary
Elevation (meters relative to MSL)
High : 6756.18
Low : -2
Kazakhstan
Uzbekistan
Kyrgyzstan
Turkmenistan
Tajikistan
China
Afghanistan
Iran
Nepal
India
United Arab Emirates
Oman
Yemen

EXECUTIVE SUMMARY

This Pakistan Rule of Law Assessment was requested by USAID Pakistan and completed under a contract with Management Systems International (MSI) April through June 2008. Principal researchers were Dr. Richard Blue, Richard Hoffman, Esq. and Louis-Alexandre Berg, assisted by Clifford Wardlaw, Esq., Resident Legal Advisor, US Embassy Islamabad, Mr. Syed Ali Murtaza, Asian Development Bank (ADB) and Professor Moeen Cheema, Lahore University of Management Sciences Law Faculty (LUMS). Messrs Blue and Hoffman are independent consultants. Mr. Berg is an employee of USAID Washington. Following preparatory meetings and document review in April, field research was conducted in Pakistan from May 3 to May 22, and a report draft submitted to USAID Pakistan on June 5, 2008. In addition to a review of primary and secondary documentation and journal articles, the team relied heavily on in depth interviews with Pakistani and foreign experts for data, insights, and opinions about Pakistan's efforts to develop a working Rule of Law.

The report is organized under six major headings. These are: 1) Political Context and Development of Constitutional Framework; 2) Major Findings regarding Legitimacy, Judicial Independence, Case Delay, Management and Administrative Systems, Special Courts and Alternative Dispute Resolution (ADR), Order and Security, and Legal Profession and Standards; 3) Key Actor Analysis; 4) Review of Asian Development Bank's Access to Justice Program; 5) Donor Assistance Programs; and 6) Strategy, Opportunities and Recommendations.

The main findings can be easily summarized and are well known to Pakistani legal experts and practitioners. Pakistan's Rule of Law development has suffered from 38 years of military rule with only short lived and intermittent experience with democratic governance. Since much of the law derives from the British colonial system, it is seen by many as lacking legitimacy. There is also tension between the inherited common law system and the Islamic law based on the Quran, especially in outlying provinces and regions. Questions about legitimacy are compounded by the low level of efficiency, the prevalence of delays, the inferior quality of legal training, corruption, and the perception that the court system is a tool for the delay of justice, manipulated by rich and/or powerful interests in the society. In spite of 13 different reform commissions devoted to improving the justice system and the assistance of the Asian Development Bank during the past six years, the team found that while some progress had been made, for the most part the judicial system did not function well, further undermining any faith in the Rule of Law. The inability of this weak and overburdened system to effectively address a rising level of crime and violence has fueled support for alternatives to the justice system ranging from strict versions of Islamic law to individuals taking the law into their own hands. The weak justice system and lack of public confidence thus contribute to the cycle of rising violence and extremism.

The Strategy and Recommendations section discusses factors that may influence the choice of potential strategies, such as the newly elected government's level of commitment to judicial reform, USAID's funding level, whether the ADB will continue to invest heavily in judicial reform, and the absorptive capacity of Judicial Administration and Civil Society for effective use of funds. Assuming Pakistan government commitment, the report recommends USAID and the USG explore developing activities in five areas, three of which are within the domain of the USAID Democracy and Governance/Rule of Law (DG/ROL) office. A cross cutting recommendation is to focus at the provincial level, while providing coordinating support to the Federal level. The three DG/ROL areas are: 1) Building Judicial Capacity, 2) Enhancing Legal Education, 3) Improving Citizen Legal Awareness and Access to Services. The report also makes recommendations for 1) Better Law Enforcement and 2) Improving Land Titling and Registration.

Of the first three recommended activity areas for USAID consideration, Building Judicial Capacity is perhaps the most complex, including everything from assisting in the development of new case management systems to improving public finance and budgeting procedures for the judicial system. Enhancing Legal Education encompasses both law schools and in-service training for Bar Associations, and envisions a better working relationship among Bars and Law faculties, as well as the introduction of a more case and applied practical experiential approach to legal education. The area Improving Citizen Legal Awareness and Access to Services foresees a better organized and more articulate expression of public demand for judicial reform, including establishment of legal resource centers, advocacy campaigns, court monitoring and improving provision of public defenders to vulnerable and at risk litigants.

A central feature of all the recommended activities is an emphasis on the need for short-term gains while working toward longer-term structural impact. Activities should aim to achieve results in discrete areas, to demonstrate their feasibility, and learn from experience. Also, the team has attempted to suggest activities that can be 'scalable' subject to the availability of USAID funding levels, starting from demonstrated success before scaling up to other districts and provinces. Finally, the report emphasizes the need to involve all relevant justice system actors in the design, implementation and monitoring of activities to ensure their active cooperation in contributing to improvements in the justice system and fostering greater public support for the rule of law.

INTRODUCTION AND ACKNOWLEDGMENTS

This assessment of Pakistan's effort to develop and maintain a Rule of Law regime was undertaken on behalf of the United States Agency for International Development (USAID) Mission in Pakistan, and with the active support of the USAID Office of Democracy and Governance office in Washington. It serves two purposes: the first is to analyze and assess the strengths and weaknesses of all the elements that make up the Pakistan rule of law regime, from citizen expectations to the execution of legal judgments, and everything in between. It includes description and analysis of legal education, the role of civil society, police, the judiciary, and judicial administration.

The second purpose is to identify opportunities and suggest possible strategic and tactical approaches for USAID Pakistan rule of law programs. The new democratically elected government has shown a high degree of interest in pursuing judicial reform. If this interest translates into real commitment, USAID may be willing to enter into this area. However, USAID realizes that the legal and political history of Pakistan is replete with judicial reform initiatives, most of which were not successful in changing the basic structural and institutional constraints, which severely hamper the functioning of a rule of law regime. The latest such effort was the massive Asian Development Bank commitment of $350 million dollars from 2001 to the present time, which while it initiated a wide range of improvement efforts, fell short of its ambitious goal of producing a well-functioning justice system. Obviously, USAID realizes it must harvest the lessons learned from the ADB experience, both to avoid repeating the same mistakes, as well as to build on the areas where a good start has been made and there may be opportunities for effective work. This report addresses, therefore, the ADB's Access to Justice experience in some detail.

The assessment was conducted in May 2008, over a three-week period by a three plus one person team organized through a contract with Management Systems International. The Team Leader, Dr. Richard Blue, is a former USAID Senior Foreign Service Officer and expert in evaluation and Rule of Law assessments. Richard Hoffman, Esq., whose early experience as a legal practitioner led him into the work of judicial administration and case management, in which he is a leading expert, both domestically and internationally, joined him. The third team member is Mr. Louis-Alexandre Berg, who works in the Rule of Law division of the Democracy and Governance Office in USAID Washington. Mr. Berg is expert in both Rule of Law Assessments and in USAID's growing involvement in the development of community policing systems. The fourth team member is Mr. Clifford Wardlaw, the Resident Legal Advisor, who was unable to participate for the full three weeks, but whose local knowledge and well-grounded viewpoint was invaluable to rest of the team who had much less experience with Pakistan's Rule of Law history.

Unfortunately, Dr. Blue became seriously ill only one week into the three-week field research phase of the assessment and had to return to his home in Virginia. Messrs. Hoffman and Berg were left to complete the data-gathering phase, which they did with great energy and professionalism.

Although Dr. Blue had sufficiently recovered to participate fully in the preparation of the report, much more of the original drafting fell on Messrs. Berg and Hoffman than would otherwise have been the case. Both completed their additional assignments with skill and dispatch.

Some sections of this report owe their accuracy and comprehensiveness to our two Pakistani professional colleagues, Mr. Syed Ali Murtaza, who has considerable experience with the ADB project, and Mr. Moeen Cheema, one of Pakistan's leading legal scholars and a professor at Lahore University of Management Science's Law Faculty (LUMS) in Lahore. Both contributed their knowledge, advice and written material which has been used to construct this document.

In conducting such a study, it is always the case that many people have to be involved, providing assistance, coordination, scheduling, and giving of their time and expertise to answer our questions and challenge our conclusions. In this regard, we would like to thank Lynn Carter (MSI) and Jerry Hyman (CSIS), who were part of the MSI team which conducted the more comprehensive USAID Democracy and Governance Assessment in Pakistan just prior to our own fieldwork. They were generous in sharing their own findings and conclusions, including those on Rule of Law. Also at MSI, we acknowledge the constant support of Emily Eckert, our main contract support officer, Suren Avanesyan, the MSI project director, and Marc Shiman, the MSI Chief of Party on another project in Pakistan. Marc gave us good advice, and helped arrange transport for the team.

At The Asia Foundation in Islamabad, Representative Jon Summers and his colleagues were very helpful by sharing their substantive insights into the subject, by organizing meetings with civil society organizations (CSO) and media leaders (including use of their meeting room) and by finding in very short order a Pakistani who provided scheduling and logistic support for the team. Mr. Zia-ur-Rehman did an excellent job in this often undervalued but critical role.

No three-week field research activity can be successful without cooperation from the local USAID and the US Mission office. True cooperation goes beyond the usual “meet and greet” to include total commitment and engagement in the job at hand. We owe a debt to Michael Hryshchyshyn, the Director, Office of Democracy and Governance USAID/Pakistan and his staff, Humaira Ashraf and Farah Imran, and to the entire USAID/Pakistan team, led by Mission Director Ann Aarnes and Deputy Mission Director Edward Birgells.

Finally, we deeply value and respect the time, opinions, knowledge, and suggestions provided to the team by our Pakistani interlocutors from the judicial establishment, the police, the Bar, academia, and civil society organizations. We promised them anonymity, but their names are listed as an annex to this report. They, along with some of the reports their institutions have produced, are the primary source of our findings, conclusions and recommendations. We thank them. We have made every effort to be accurate, balanced, and fair; but, as always, the assessment team alone is responsible for what is included in this Rule of Law Assessment.

PART I. POLITICAL AND SOCIAL CONTEXT

A. Early Constitutional and Political Development (1947-1973)

Pakistan has had a troubled constitutional history since its very inception as a nation state. Not long after partition from India in 1947, Pakistan was plunged into a Constitutional crisis in 1954 when the Governor General dissolved the Constituent Assembly when he did not agree to the proposed constitution. This first major subversion of the constitutional process was challenged before the Federal Court, which validated the dissolution of the assembly in the *Moulvi Tamizuddin* case (1955). Although a new Constituent Assembly adopted the country's first constitution in 1956, it lasted only two years until the first President of Pakistan, Major-General Iskander Mirza, abrogated the Constitution, dissolved the national and provincial legislatures and imposed Martial Law, appointing General Ayub Khan as the Chief Martial Law Administrator.

In the *Dosso* case (1958), the Supreme Court of Pakistan validated once again the extra-constitutional actions of the executive and enunciated the doctrine of 'revolutionary legality.' After passing a new Constitution in 1962 that empowered an autocratic executive, General Ayub Khan ruled until 1969. He was forced to hand over the reins of power to General Yahya Khan after widespread student protests led by Zulfiqar Ali Bhutto and his newly-founded Pakistan Peoples' Party (PPP). General Yahya Khan presided over a disastrous military campaign in East Pakistan, Pakistan's loss to India in the war of 1971, and ultimately the secession of East Pakistan to form Bangladesh.

B. The 1973 Constitution

In 1973 Pakistan adopted its current constitution after thorough deliberation and consensus of all the political parties. The Constitution of Pakistan created a parliamentary form of government following the British model whereby the elected Prime Minister is the locus of executive power and the President is a figurehead. The other key foundational principle of the 1973 Constitution is that of federalism. Pakistan's four provinces each have their own provincial legislatures. Whereas the seats in the National Assembly, the lower house of the national parliament, are distributed between provinces on a demographic basis, each province is entitled to equal representation in the upper house, the Senate. Constitutional amendments require the approval of two-thirds majorities in both the National Assembly and the Senate.

The superior courts, including the Supreme Court and the four provincial High Courts, complete the trichotomy of powers. The superior courts have been granted the power to judicially review legislation as well as executive action and ensure the enforcement of fundamental rights. The 1973 Constitution also incorporates a Bill of Rights, but the constitutional safeguards are weak and the text of some of the more important rights provisions make them subject to the law. Article 9, for instance, states that "No person shall be deprived of life or liberty save in accordance with law," while the freedoms of expression and association are likewise subject to "reasonable restrictions imposed by law" in the interest of public order or national security. Article 10 permits the preventive detention, without judicial scrutiny, of "persons acting in a manner prejudicial to the integrity, security or defense of Pakistan … or external affairs of Pakistan, or public order, or the maintenance of supplies or services" for an initial period of three months which may be extended if a Review Board (consisting of current and former superior court judges) authorizes such extension. Other basic rights, including freedom from slavery and forced labor, double jeopardy and retroactive punishment, self-incrimination, torture and gender discrimination are more absolutist.

Historically, however, Pakistan's superior courts have been reluctant to challenge the executive to enforce fundamental rights, and have not invalidated any major legislation on account of inconformity with these rights provisions. Rather, some of the foundational principles of the 1973 Constitution, including federalism and judicial independence, have been compromised by the weakness of the judiciary, the primacy of federal law over provincial legislation, the dominance of rural and urban elites in political parties, and the subservience of political parties to their leading figures. In practice, these dynamics have led to numerous amendments to the 1973 Constitution and the oscillation between parliamentary and presidential models of government.

C. The Zia Era and its Constitutional Legacy

In 1977, in the aftermath of protests from an alliance of opposition political parties over claims of rigging of the elections, General Zia-ul-Haq deposed Zulfiqar Ali Bhutto as Prime Minister and imposed Martial Law in the country, placing the Constitution in abeyance and replacing it in the interim with a Provisional Constitutional Order (PCO). In the *Nusrat Bhutto* case (1977) the Supreme Court once again validated the coup on the basis of the Common Law "doctrine of state necessity." Zia then made several changes to the Constitution to strengthen the power of the president, including introducing Article 58(2)(b) to the Constitution *via* the notorious Eighth Constitutional Amendment. Article 58(2)(b) granted the President discretionary powers to dismiss the Parliament and call for fresh elections. After a decision by the Supreme Court challenging the jurisdiction of military courts, Zia also sought to undermine the independence of the judiciary by requiring judges to take a fresh oath of allegiance under the PCO. These actions, along with the Supreme Court's capital conviction of Zulfiqar Ali Bhutto – despite a widespread belief that the charges were fabricated – severely undermined the credibility of the legal process and the esteem of the judiciary. The prime legacy of the Zia era, namely enhanced presidential powers and Islamization measures, continued to haunt the nation's political landscape for another decade.

D. The 1990's and Disenchantment with Politics

In the 1988 elections Benazir Bhutto led the PPP to victory and became the first Prime Minister after the Zia era, ushering in a decade of alternation between the elected governments of Bhutto's PPP and the Pakistan Muslim League (PML) led by Mian Nawaz Sharif. The military interfered several times in politics and backed presidential use of Article 58(2) (b) to dissolve the government, usually justifying its actions based on corruption charges against the political leaders. The Supreme Court ruled in most of these cases, mostly upholding the dissolution and other times invalidating presidential action, as when it restored PM Mian Nawaz Sharif in 1993.

Both Bhutto and Sharif had strained relations with the superior judiciary and may be accused of attempting to undermine its independence. Most notable in this regard is Bhutto's disregard for constitutional tradition in her 1994 decision to appoint Justice Sajjad Ali Shah as the Chief Justice of the Supreme Court while superseding two senior judges. This led to the *Al-Jehad Trust* case (1996), in which the Supreme Court elaborated key principles for the appointment process of the High Court and Supreme Court judges, enhancing the power of the Chief Justice and bolstering the independence of the judiciary (see Judicial Independence section below for an elaboration of these principles). In practice, these principles have not been consistently followed, and the judiciary has continued to be subject to pressure and manipulation. Tensions between Chief Justice Sajjad Ali Shah and Prime Minister Sharif, which started in 1997, eventually led to a division within the Supreme Court, an attack on the Supreme Court by PML party members, and the removal of the Chief Justice. This episode is viewed as a low-point in the judicial history of the country.

E. The Musharraf Coup and yet another 'Transition to Democracy'

Immediately after the military's takeover of power in 1999, Pakistan began to experience the unfolding of a blueprint developed by the earlier military regimes and ratified by the superior courts. A Proclamation of Emergency was declared, the constitution was put in abeyance, a Provisional Constitutional Order (PCO) was issued to provide a temporary governing framework, and the general assumed the office of the Chief Executive. In January 2000, when the Supreme Court entertained a challenge to the military coup, the judges of the superior courts were compelled to take a new oath of office pledging to serve under the PCO. Six out of a total of thirteen judges of the Supreme Court refused to take the oath and resigned from the bench, including then Chief Justice Saeduzzaman Siddiqui and Justice (R) Wajih-ud-Din Ahmad, who was a candidate in the 2007 presidential elections. A reconstituted Supreme Court decided the case of *Zafar Ali Shah v Pervez Musharraf* (2000) and validated the coup on the grounds of the doctrine of state necessity. The court granted virtually unlimited powers to the military regime, including the power to amend the constitution. The court, however, required the military regime to hold general elections for the national parliament and provincial legislatures no later than three years from the date of the coup.

The general elections were held on October 10, 2002. An alliance of religious parties, the Muttahida Majlis-e-Amal (MMA), emerged as the prime beneficiary, along with the party loyal to General Musharraf, the Pakistan Muslim League (Q). In December 2003, the regime mustered the two-third majority in parliament necessary to pass the Seventeenth Amendment to the Constitution, which validated almost all of the actions taken during the state necessity phase, including the revival of the presidential power to dismiss the parliament. Musharraf later garnered a simple majority to pass the President to Hold Another Office Act, 2004 (PHAA), which seemed to violate constitutional provisions in allowing Musharaff as the Chief of Army Staff (CoAS) to also assume the office of the President. In the *Pakistan Lawyers Forum* case (2005) the Supreme Court validated both the Seventeenth Amendment and the PHAA, based on an extension of the doctrine of state necessity. In legitimizing the power of the military and executive over the Parliament, this case further strengthened the popular perception of the subservience of the Supreme Court to the military regime.

F. Judicial Activism and the Current Judicial Crisis

Soon after his appointment as the Chief Justice of Pakistan (CJP) in 2005, Iftikhar Muhammad Chaudhry began to exercise the court's *suo moto*[1] judicial review powers.[2] *Suo moto*, meaning "on its own motion,"

[1] Beginning with the case of *Darshan Masih v The State* (1990), where the Supreme Court converted a telegram sent by bonded laborers into a writ petition, the Supreme Court rapidly fashioned for itself the power to take up cases of its own accord, based on letters or media reports. The court also relaxed other procedural requirements and public interest cases have increasingly come to acquire an inquisitorial or administrative inquiry mode rather than the strict adversarial model of adjudication that a common law system envisages.

[2] Articles 184(3) and 199 of the Constitution of the Islamic Republic of Pakistan, 1973, vest judicial review powers in the Supreme Court and the High Courts, respectively. The majority of these powers are based upon the prerogative writs of *certiorari*, *mandamus*, prohibition and habeas corpus. Under Article 199, the High Courts' powers include the power to issue orders (i) directing any person performing "functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; (ii) declaring that any act or proceeding … has been done or taken without lawful authority and is of no legal effect;" (iii) "directing that a person in custody … be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner;" and (iv) "requiring a person … holding or purporting to hold a public office to show under what authority of law he claims to hold that office." In addition, Pakistani courts may, subject to certain restrictions, make an order giving "such directions to any person or authority … as may be appropriate for the enforcement of any of the Fundamental Rights" conferred by the Constitution. Although these powers were conferred on the courts in 1973, it

is an Indian legal term, approximately equivalent to the English term, *sua sponte*. It is used, for example, where a government agency acts on its own cognizance, as in "the Commission took Suo Moto control over the matter." Following the Indian example, the Supreme Court of Pakistan had established in 1997 the power for itself to initiate 'Public Interest Litigation' on its own accord under Article 184(3) of the Constitution.[3] The Court could use this power to respond to individual or collective petitions for a wide range of issues that were not being resolved through legal or administrative means. However the frequency and the robustness with which the CJP exercised these powers were unprecedented. Many of these cases involved abuse of police powers, manipulation of legal processes by rural landed elites and corruption in the bureaucracy. These cases won the Chaudhry-led court increasing popularity amongst the populace as well as grudging respect amongst the legal fraternity.[4] In November 2007, President Musharraf announced he would introduce a constitutional amendment to withdraw the Supreme Court's *suo moto* powers under the authority of his Provisional Constitutional Order (PCO). The Pakistani courts continue to use the power: it was reported that the Chief Justice of the Lahore High Court in September 2008 referred the matter of police releasing an accused to one of the justices for a hearing pursuant to the *suo moto* power.[5]

Two cases pursued by the Supreme Court in the latter part of 2006 became a source of significant unease within government circles. First, the Supreme Court invalidated the privatization of the Pakistan Steel Mills, rendering a judgment that painted a grim picture of economic mismanagement, failure to abide by rules and patronage of businessmen implicated in securities fraud. In the second case, the Supreme Court began to pursue *habeas corpus* petitions brought by the relatives of the 'missing persons' who had allegedly been held by Pakistan's feared intelligence agencies without legal process. This case brought unwanted attention to the government's increasingly unpopular role in the US-led War on Terror and its prosecution of the campaign against separatists in the Baluchistan province. The Supreme Court's decisions in these cases were preceded by several cases decided by the High Courts, which had challenged the abuse of powers by the executive.[6]

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was only in 1988 when the Supreme Court decided Benazir Bhutto v Federation of Pakistan, PLD 1988 SC 416, that these broad constitutional powers were 'discovered' and the seeds of public interest or social action litigation were sown. For an historical overview of the development of public interest litigation in Pakistan, see WERNER MENSKI, AHMAD RAFAY ALAM & MEHREEN KASURI RAZA, *PUBLIC INTEREST LITIGATION IN PAKISTAN* (Pakistan Law House 2000).

[3] For a review of earlier developments in the Indian context, see G. L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, The International and Comparative Law Quarterly, Vol. 40, No. 1, (1991), pp. 66-90 and P. P. Craig & S. L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India* Oxford Journal of Legal Studies, Vol. 9, No. 3. (1989) pp. 356-373.

[4] See, for example, an opinion poll conducted by the International Republican Institute in August 2007 found that 72% of those polled had opposed the removal of the Chief Justice in March. General Musharraf's approval ratings fell from 54% in February to 34% in June 2007. See http://www.iri.org/newsarchive/2007/2007-08-01-News-AP-Pakistan.asp. Likewise, a BBC World Service poll conducted prior to the general elections in 2008 found that 63% of the respondents were in favor of the restoration of Iftikhar Muhammad Chaudhry as CJ. Only 29% of Pakistanis considered General Musharraf's re-election as president to be valid. See http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/02_february/14/poll.shtml.

[5] "LHC CJ takes suo moto notice of police high-handedness," The Nation [Pakistan] Sept. 22, 2008. The team was unable to locate any more systematic polling results assessing Pakistani opinions about the exercise of suo moto.

[6] More notable amongst these cases are the decision by the Supreme Court invalidating the allotment of plots in Gwadar, Balochistan (see *SC cancels all land quotas in Gwadar*, THE NATION, October 22, 2006, *available at* http://www.nation.com.pk/daily/oct-2006/22/index1.php); the Lahore High Court's judgment declaring illegal the appointment of advisors to the Punjab provincial government (see *Appointment of Punjab advisers illegal: LHC*, DAILY TIMES, October 19, 2006, *available at* http://www.dailytimes.com.pk/default.asp?page=2006%5C10%5C19%5Cstory_19-10-2006_pg7_4); and the Sindh High Court's decision overturning a ban on teachers' union (see *SHC overturns ban on teachers' unions*, THE NATION, December 14, 2006, *available at* http://www.nation.com.pk/daily/dec-2006/14/index5.php). For an

The court's approach in these cases also caused some nervousness that the court might create difficulties for the government in the forthcoming elections. In particular, the issues of the President's re-election and the continued occupation of dual office were likely to come up before the court. In a surprise move, General Musharraf, suspended the CJP from office declaring him to be 'non-functional' on March 9, 2007, and moved a reference for the CJP's accountability before the Supreme Judicial Council (SJC) under Article 209 of the Constitution. This move was widely seen as a *de facto* dismissal of a sitting CJP and resulted in widespread protests from the legal community. The CJP's suspension and the proceedings of the SJC were challenged before the Supreme Court of Pakistan. As the lawyers' movement for the reinstatement of the CJP gained momentum, the SC announced its decision in a short order on July 20, 2007. The court invalidated the suspension of the CJP and reinstated him to his position. This case considerably enhanced the powers and the prestige of the position of the Chief Justice of Pakistan.

In the aftermath of the reinstatement, the SC began to focus on political and constitutional issues. The court insisted on ensuring equal opportunities for electioneering to the opposition political parties, including the return of the leaders of the main opposition political parties who had been in exile. The court supported Mian Nawaz Sharif's plea for return to Pakistan, and began to prosecute contempt of court charges against the highest levels of the Executive Office for deporting Sharif in violation of its judgment. Secondly, the SC granted an injunction against a presidential ordinance passed on the eve of the presidential elections, the National Reconciliation Ordinance (NRO), designed to grant immunity from corruption charges to Benazir Bhutto and her party members in return for a softer stance with regard to General Musharraf's re-election for a third term. The court began to display the confidence that it had by far the most 'democratic' support and legitimacy when compared to the outgoing civil executive, the legislatures, and a president whose approval rating had been plummeting in the aftermath of the confrontation with the CJP.

It is in this context that General Pervez Musharraf contested the election for the office of the President of Pakistan on October 6, 2007, and secured more than fifty-five percent of the votes cast by the members of the national and provincial legislatures that form Pakistan's electoral college. However, the SC declared that he may not take the oath of office until the SC decided a number of petitions challenging his candidacy on the grounds that his re-election while still being the CoAS violated the Constitution. On November 3, seemingly fearing an adverse decision by the SC, General Musharraf imposed a state of emergency. The blueprint of the legitimating of military takeovers was put into place once again, with a PCO and fresh oath of office required of the judges. However, an overwhelming majority of the judges of the Supreme Court and the High Court refused to take the oath or to validate the imposition of emergency.

In the run-up to Parliamentary elections, which took place on February 18, 2008, both of the main opposition parties, the PPP and PML-N, elevated the issue of the reinstatement of the judges who had refused to take the oath under the PCO. The elections were an overwhelming rebuke of Musharraf and the PML-Q, which lost many of its Parliamentary seats. The PPP and PML-N formed a coalition government, with the issue of reinstating the judges high on their agenda. Initial efforts failed, however, when the two parties failed to reach an agreement on the appropriate legal process for reinstating the judges. The PPP subsequently drafted a package of constitutional amendments, which would repeal many of the provisions of the Seventeenth Amendment to curtail executive power, and set the stage for reinstatement of the judges while limiting certain powers of the Chief Justice. This proposed constitutional amendment is

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interesting overview of judicial review cases decided in 2006, also see *2006 — a year of judicial activism by Supreme Court*, DAILY TIMES, December 28, 2006, *available at* http://www.dailytimes.com.pk/default.asp?page=2006%5C12%5C28%5Cstory_28-12-2006_pg7_43.

currently in a state of limbo given that the opposition political parties are opposed to its major features, particularly the restriction of the powers of the CJP.

In August 2008, General Musharraf resigned as President amidst a threat of impeachment by the legislators. With the subsequent election of Asif Ali Zardari, chairman of the PPP, as President of Pakistan the ruling coalition's interest in renegotiating the shift back to a more parliamentary structure of governance appears to have dwindled. The installation of an elected government; the populace's preoccupation with shortages of wheat, electricity and natural gas; dramatic inflation and rising insecurity about the country's economic future; the breaking away of the pro-PPP lawyers from the movement; and the decision of several of the judges to re-take the oath of office had pushed the lawyers' movement for the restoration of the judiciary to its pre-Emergency composition in the background for a while. However, as of the writing of this report, the emphatic victory of the pro-Chaudhry lawyers in the elections for the office-bearers of the Supreme Court Bar Association (SCBA) and the continued activism of the movement have put the issue of judicial independence and reform back on the national agenda.

G. 'Islamization' of Laws in Pakistan

The Objectives Resolution of 1949, adopted as the original preamble to the 1973 Constitution of Pakistan (and later incorporated as a substantive provision, Art. 2-A, during the Zia era) made explicit reference to the "principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam" as a foundational principle of the constitution. The 1956 Constitution of Pakistan provided a specific mechanism for the 'Islamization' of laws. The powers of bringing the laws of the land into conformity with Islamic law were granted to the Parliament and an advisory body was created to provide suitable suggestions. The Constitution of 1973 preserved this approach to Islamization.

The project of Islamization of laws did not gather impetus until the later half of the 1970's, when Zulfiqar Ali Bhutto, under pressure from an opposition alliance that included the religious political parties, announced measures such as prohibition on the consumption of alcohol and declaration of Ahmadis to be non-Muslims. With the advent of General Zia ul Haq on the political scene, the landscape changed dramatically and the enforcement of *Shari'a* became the rallying cry of a military regime desperately in need of legitimacy and some level of popular support. Zia's Islamization is most closely associated with the '*Hudood'* laws. These are five presidential ordinances that introduced new sexual and property offenses, maintained the prohibition on the consumption of alcohol, and provided for exemplary Islamic punishments such as stoning to death (for adultery), whipping and amputation (for fornication and theft). These laws caused immense controversy and were criticized for being misogynistic and discriminatory towards religious minorities.

The real impetus for Islamization came not through the above-mentioned legislative interventions but through the Islamic courts, which were created by an amendment to the constitution in exercise of the emergency powers. The Shariat Courts, including the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB), both of which are appellate courts, were empowered to review any law for conformity with 'the injunctions of Islam' and declare any offending law, including parliamentary legislation, to be null and void. In reality, the court could exercise these powers in such a manner as to dictate to the legislature what Islamic law provisions would replace the voided legal provisions. The major decisions of the Shariat courts were delivered in the period immediately following Zia's demise and coincided with the first tenures of Prime Ministers Benazir Bhutto and Nawaz Sharif in the late 1980's and early 1990's. The late 1990's have been an era of emerging Islamic critiques that have pointed out not only the human rights violations resulting from these laws but also focus on their divergences from classical Islamic law in several respects. The Musharraf regime has sought to amend many of these Islamized laws, which have become increasingly notorious internationally.

While in the West the Islamization of the laws of Pakistan is generally perceived to be a retrogressive movement characterized by the introduction of discriminatory and sexist laws, another vital aspect of this movement is generally overlooked. The bulk of Pakistan's laws, especially the criminal laws, dates back to the colonial era and they embody the assumptions of that era. Historically, the state and its laws have been perceived by much of the citizenry to be of mostly alien origin and are followed only to the extent that the coercive power of the state compels such obedience. With the Islamization of laws a new discourse has begun to take shape questioning the legitimacy and moral authority of laws that govern citizens' conduct. This dimension is also beginning to be reflected in the jurisprudence of the superior courts, other than the Shariat courts, where references to Islamic principles are frequently made in justification of rulings concerning subjects as diverse as due process in administrative law, enforceability of contracts and environmental regulation, to refer to a few examples. This shifting discourse on the Islamization of the law forms, along with the constitutional crises and frequent shifts in the locus of authority, provides the backdrop for the current state of the rule of law in Pakistan.

PART II. SUMMARY OF KEY FINDINGS ON THE JUSTICE SYSTEM AND RULE OF LAW

Key Issue: Lack of public confidence in the justice system undermines rule of law and contributes to rising violence.

A. Sources of Legitimacy: Islamic Law, Traditional Practices and the Legitimacy of the Common Law Justice System

As noted in the USAID Guide to Rule of Law Country Analysis, "The perception of law as legitimate and worthy of adherence underpins the rule of law. Rule of law as a concept includes not only the supremacy of the law, but a *democratic* basis for law that makes the law legitimate."[7]

Pakistan's current body of law and legal systems is a product of four main historical forces. First, the British colonial system bequeathed a body of criminal and civil procedural laws that, while amended, are still a main source of law in Pakistan courts today. Examples include the Criminal Procedure Code (1898) and the Civil Procedure Code (1908).[8] Also, the basic tenets of the 'common law' system, with emphasis on evolving precedent based legal decisions, as well as the organization of the various Bar Associations, all have origins in British practice. These practices are reinforced, to some degree, by the significant number of Pakistani barristers who take advanced training in England, returning to Pakistan to form an elite group of lawyers and legal scholars. On the other hand, the evolution of the British common law system is linked in the public perception to the colonial efforts – continued by subsequent military governments – to maintain control over a sometimes-rebellious population.[9] The bulk of Pakistan's laws, especially the criminal laws, are perceived to embody these colonial-era assumptions. As a result, the state and its laws have been perceived by the much of the citizenry to be of alien origin, to be followed only to the extent that the coercive power of the state compels such obedience.

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[7] USAID: *Draft Guide to Rule of Law Country Analysis*, 2008. p7.

[8] Although these are the correct titles for these Codes, sometimes the reference is to "Code of Civil Procedure".

[9] Major pieces of colonial legislation, including the Indian Penal Code (1860), the Police Act (1861) and the first Code of Criminal Procedure (1861) were enacted immediately after the Mutiny or the Great Rebellion, as the British described it but what was the War of Independence for the Indians. These laws were informed throughout by the concerns of strengthening state control, maintaining law and order and avoiding another such uprising.

Second, Pakistan has alternated between democratic law making and military rule. Although Pakistan began its independence as a self-governing democracy, it operated under the 1935 Government of India Act until 1956 when the first of three constitutions was proclaimed. By 1958, the first military government under General Ayub Khan had taken power, beginning a tortured history of swings between military rule under Generals Ayub Khan, Yahya Khan, Zia al Haq, and Perez Musharraf and intermittent periods of elected governments under Zulfiqar Bhutto, his daughter Benazir Bhutto, both of the Pakistan Peoples Party, and Nawaz Sharif, of the Pakistan Muslim League-N. Over the fifty-year history of Pakistan, it has managed to sustain a democratic elected government for 12 of those fifty years. Three constitutions have been written, and major amendments have been made, usually shifting the structure of power to a very strong Executive or President (usually under military rule), or back to a Parliamentary system with a Prime Minister as the chief executive officer (usually under elected regimes).

The contest between laws enacted by parliamentary rule and those ordinances proclaimed by military rulers has probably contributed to a perception of the Pakistan legal framework as confusing, inconsistent and incoherent. Nonetheless, despite the confusion, overlapping and contradictory statutes, one thread appears to run consistently through the bulk of Pakistan's post-independence legislation, whether adopted under civilian or military rule: the focus on 'rule by law' rather than rule of law has been maintained.[10] This, in turn, very likely contributes to a degree of frustration, even among well-educated barristers, that the legal framework does not serve the cause of justice, and may well be a contributing factor to justice delayed.

These three forces, British colonial rule, intermittent democratic law making, and substantial period of military issued ordinances have in complex ways created a framework of laws that is difficult to apply, and which for many Pakistanis is perceived as an obstacle to justice.

A fourth inheritance is the Islamic system of law generally referred to as the *Shari'a*.[11] How to accommodate Islamic law, especially with regard to family relations, commercial transactions, crime and its punishment, and inheritance, with the secular tradition of British law has created challenges for Pakistan's efforts to devise a legal framework widely accepted by all. The project of Islamization of the law developed primarily during the 1970s through the 1990s, fueled in large part by the passage of the *Hudood* Laws and the establishment of the Shariat Courts[12] by General Zia ul-Haq (see Political and

[10] For instance, when in November 2007 the Musharraf regime amended the Army Act of 1952 to allow for the court-martial of civilians, the list of offenses for which civilians may be tried comprised many draconian laws which included statutes adopted under military as well as civilian regimes, such as the Security of Pakistan Act, 1952; the Prevention of Anti-national Activities Act, 1974; Anti-terrorism Act, 1997. Other such laws now in force include the West Pakistan Maintenance of Public Order Ordinance (1960) and certain provisions of the PPC: 121 (waging or attempting to wage war or abetting waging of war against Pakistan), 121A (conspiracy to commit offences punishable by Section 121), 122 (collecting arms, etc., with intention of waging war against Pakistan), 123 (concealing with intent to facilitate design to wage war), 123A (condemnation of the creation of the state and advocacy of abolition of its sovereignty), and 124A (sedition).

[11] Most people are unfamiliar with the difference between *Shari'ah* and *fiqh*, and generally use the first term to encompass the entire corpus of 'Islamic' law. Shari'ah refers to the legal content of the *Qur'an* and *Sunnah* (the example of the Prophet of Islam, as laid out in his words and deeds). *Fiqh* refers to the corpus of rules derived by jurists from an interpretation of the *Qur'an* and *Sunnah*. There are four recognized schools of *Sunni fiqh*, in addition to the fiqh of the *Shi'ites*: each school of fiqh following a slightly different methodology of interpretation (*usul al fiqh*). The important point is that disagreement and plurality of opinions within the Islamic discourse is a recognized and accepted feature of Islamic jurisprudence.

[12] There are two Shariat Courts: the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB) both of which are appellate courts. In Pakistan's judicial hierarchy, the FSC is a step above the High Courts, on whom its decisions are binding. Appeals from FSC's decisions lie to the SAB. All matters under the

Social Context section above). More recently, an increasingly widespread critique of the legal system from an Islamic perspective has emerged. On the one hand, the *Hudood* laws and other codified Islamic laws are criticized for the human rights violations resulting from these laws, as well as their departure from classical Islamic law.[13] At the same time, Islam is seen as a legitimate alternative to the 'alien' legal tradition inherited from the British characterized as a weak and corrupt justice system. This trend is reflected in increasing support for the enforcement of *Shari'a* law through the courts.[14] Several sources provide details of the number and type of cases handled by the Shariat court[15] as well as citing some of the more progressive rulings by the Shariat Court.[16]

In addition, the progressive weakness of the state bureaucracy and the judicial processes since the independence of the country have created greater space, and some may argue need, for community-based adjudication and dispute resolution through local and tribal councils (variously composed according to local customs and referred to as *jirgas*, *panchayats*, etc. in different parts of the country). An important aspect of the British colonial project in India was the simultaneous reinforcement of rule by law in areas most significant to colonial rule while accommodating religious and local laws for the regulation of private matters. The latter was manifested in the toleration of religious and customary laws enforced through community-based adjudicatory mechanisms for family matters and the regulation of religious institutions and practices. Local and tribal councils continue to play an important role in civil dispute resolution, and their incorporation within the formal legal hierarchy in some states in India can be looked at as a model. However, the actions of such local councils towards the furtherance of some customary practices that amount to 'honor crimes,' such as giving of females in marriage as compensation for wrongs done or in settlement of disputes, along with the award of discriminatory and oppressive punishments have caused considerable controversy and highlight the need for effective legal oversight of these institutions.

Hudood Ordinances and the Qisas & Diyat laws are tried before the criminal trial courts (Sessions Courts). Muslim personal law matters (family and inheritance) are tried before civil courts. Appeals lie to the FSC.

[13] A problem that Pakistan's courts are dealing with is the difficulty of applying Islamic legal rules within the framework of a Westernized legal system. As mentioned above, the inherent pluralism of Islamic law enabled a Muslim subject of the classical era to appear before the *qazi* and choose the body of law that would be applied in his case. For example, someone belonging to the *Hanafi* school of *sunni fiqh* could demand that in a family matter the rulings of *hanafi jurists* be applied. The difficulty arises when a modern day court, while laying down rules of universal applicability, is confronted with divergent *fiqh* rulings. For example, the High Courts (note, it is the regular courts and not the Shariat courts) notoriously struggled to decide whether an adult woman can marry of her own accord or whether she needs her wali's (parent's or guardian's) consent. The difficulty arose because a marriage contracted without the wali's consent is void according to Maliki, Shafi' and Hanbali schools of fiqh, but valid according to Hanafi and Shiite fiqh. In such a case, it is problematic for the court to pick and choose from amongst the various positions and opens it up to criticism from all sides.

[14] It must also be noted that every democratically elected government after General Zia's Islamization has avoided the amendment or repeal of the Hudood laws. While the Muslim League of Mian Nawaz Sharif consistently remained to the right of the centre, criticism of Zia era Islamization was a prominent feature of Benazir Bhutto's Pakistan People's Party's (PPP) election manifestos. However, upon forming the government during both her tenures as PM, from 1988-1990 and 1993-1996, Bhutto let her promises over reversing Islamization disappear from the agenda. As a result, the Hudood laws remained throughout the 1990's.

[15] A review of the case statistics of the FSC, available at its website (http://shariatcourt.gov.pk/Judicial%20Activity%20&%20Statistics.pdf) reveals that out of 1608 cases instituted in the court in 2007 all but 21 were criminal appeals, revisions or other criminal matters. These 21 cases were Shariat matters other than criminal that were either filed before the court or taken up suo moto. Most noticeably, there was not a single Hadd case. For a summary of the important cases, please see the Annual Report 2007 available at http://shariatcourt.gov.pk/Annual%20Report/Final%20Annual%20Report%202006.pdf.

[16] The Shariat Courts have given several progressive decisions in the criminal as well as the civil context. Most interestingly, several decisions of the Shariat Courts are significant in expanding due process rights and entrenching them by rooting them in Islamic law.

In certain areas of Pakistan, especially parts of the North Western Frontier Province (NWFP) and the Federally Administered Tribal Areas (FATA), the demand for ceding greater authority to tribal councils has become increasingly coupled with the enforcement of *Sharia'* laws. This is particularly problematic given that the blend of customary and Islamic law interpretations that are frequently advanced as the prototype in this context usually seem to espouse the more conservative and misogynistic rulings within the Islamic legal discourse. The most effective way of countering such movements for the enforcement of *Sharia'* may, in fact, be through the adoption of formal legal and judicial structures for the enforcement of Islamic law that have greater legitimacy than existing laws and judicial structures but espouse the more mainstreamed interpretations of Islamic laws. Examples of Muslim countries that have adopted more progressive interpretations of Islamic law include Morocco and Malaysia. Ironically, Pakistan could be known for such judicial pronouncements. An in-depth review of the recent jurisprudence of the Shariat Courts in Pakistan reveals that these courts more often than not adopt the more progressive positions, especially recently. The regular High Courts and the Supreme Court occasionally pronounce more retrogressive rulings on Islamic law related matters than the Shariat Courts. In fact, a key problem with the enforcement of Islamized criminal laws is that the more progressive precedents of the Shariat Courts do not filter down to the Sessions Courts (trials courts) which keep repeating those mistakes incessantly which have been corrected by the FSC in precedent after precedent.

The relation among the common law tradition, Islamic law and customary practices is complex. According to both Islamic and secular legal scholars, the appeal of Islamic law and tribally-based dispute resolution mechanisms has tended to grow the more the civil justice system is perceived as ineffective, inefficient or unfair. However, Foqia Sadiq Khan, in her study conducted for The Asia Foundation, notes "In reality, the formal and informal institutions of justice complement each other rather than being mutually exclusive – a key finding of this study." [17] The same study reports that "33% of the people involved in disputes approached informal justice institutions." The main reason for use of traditional institutions is not perceived fairness, as the Panchayats tended to decide in favor of locally powerful or higher status litigants. The main deciding factor for using these institutions appears to be ease of access and lower cost. Moreover, decisions made by these institutions in the four provinces lack legally binding authority, and claims can always be taken up in the courts. From a rational choice perspective, rural litigants seem to follow a strategy which balances between the desire for "justice", revenge, or honor on the one side, and the need to minimize costs and risks on the other, especially for the poor and less affluent claimants.

An unexpected motivation for bringing cases to the formal court system is discussed by Khan: litigants will use the courts as a means of defending or reclaiming prestige, often spending more money on the lengthy trial process than the property or claim is actually worth.[18] According to the author, this persistence in using the courts to preserve *Izzat* is a major factor in contributing to filing of frivolous cases and delays in reaching judgments. On the other hand, when a quick decision about a dispute is needed, poor rural litigants turn to traditional authority for justice; "So denigrated is the formal system that a tribal chief of Baluchistan claimed with some pride that their one person Qazi (judge) system was far superior to the formal police and court system." [19] These studies suggest that many Pakistani stakeholders use the courts for reasons unrelated to the speedy resolution of disputes or to seek 'justice'. Rather, the courts are used to delay decisions, to perpetuate a hierarchical social order, to protect vested or asserted interests, or to reinforce claims of prestige and 'face' - motivations and interests better served by lengthy, drawn out

[17] Khan**,** *Quest for Justice: Judicial System in Pakistan*, Network Publications, 2004, p17. This publication is based on field research conducted by the author in Punjab, Sindh and NWFP, using both anthropological and survey research methods. Its findings in the main support the findings of the Rule of Law Assessment.
[18] Khan, pp 14-15
[19] Khan, p 14.

processes rather than the efficient and fair resolution of disputes. It has often been said that laws in Pakistan are relevant mostly as the context within which negotiations between the state and individuals, or mostly between private citizens, take place. Other factors that come to play in these negotiations are the class, ethnicity, wealth, gender, religion/sect, social hierarchy and social networks of the parties.

These diverse and often conflicting forces have shaped the Pakistan legal structure, yet there is strong evidence that in the main, Pakistanis want a legal system that works, and given a choice, would prefer a rule of law grounded in an elected parliament and an independent judiciary. Even Pakistan's military rulers have taken pains to give their rule 'legitimacy' by amending the constitutions, as did General Zia al Haq with the Eighth Amendment to the Constitution of 1973 shifting power from a parliamentary to a strong presidential system.

As noted in the opening sections of this report, the popular support for Chief Justice Iftikar Muhammad Chaudhry is a further reflection of citizens' interest in a democratic, human-rights based rule of law. Chaudhry's popularity is largely attributed to both his defiance of an unelected ruler, and his interest in hearing and acting upon scores of human rights cases, which captured the popular imagination.

As most Pakistanis appear to want a rule of law, there is evidence as well that they are giving up hope in the possibility that substantial progress can be made. Many knowledgeable observers believe, for example, that the $350 million ADB/AJP program has not had sufficient impact in improving the quality, effectiveness and fairness of judicial performance. Others point to the accelerating demand for the use of Shari'a law or for the use of 'alternative' dispute resolution systems, including panchayats and tribal jirgas, especially in the NWFP, as a sign of frustration with the excessive delay and lack of perceived fairness of the civil justice system. A very recent incident in Karachi, whereby three young thieves in a Karachi neighborhood were beaten and set afire by an angry mob, only underscores the tenuous nature of belief in any 'rule of law', whether common or Shari'a law.

The question of "legitimacy" of the rule of law and judicial system in Pakistan is a complex one with no simple answer. In part, the answer depends on what citizens expect from the formal system. Rural Pakistanis with land disputes may have very different expectations from urban business people. The simple equation that the legitimacy of the rule of law depends on a functioning democracy would lead one to conclude that Rule of Law has not been 'legitimate' for much of Pakistan's history. However, with the exception of the very poor who tend to rely on traditional dispute resolution systems, Pakistanis show a remarkable tendency toward formal litigation, and even military rulers work hard by bending the constitution and leaning on the judiciary to secure legal authority for their regimes. This suggests that Pakistanis want a legal system that confers authority and justice as they see it in spite of the inordinate costs, lengthy and inefficient proceedings, corruption and inability to render fair and just decisions.

B. Judicial Independence and Accountability

1. The Superior Judiciary

The Pakistani judiciary has struggled to achieve its independence from executive control. The 1973 Constitution establishes the superior courts – the Supreme Court and the four provincial High Courts – as a fully independent branch of government. The superior courts have the power to review legislation, over executive action and enforcement of fundamental rights set out in the Constitution. The power of the Chief Justice to initiate "public interest litigation" under Article 184(3) of the Constitution – the so-called *suo moto* power – gives the superior courts and the Chief Justice, in particular, a great deal of latitude to challenge other branches of government.

From the outset, however, the principle of judicial independence has been strong in rhetoric but weak in implementation. Pakistan's superior courts have been reluctant to challenge the executive to enforce fundamental rights, and have not invalidated any major legislation on account of inconformity with fundamental rights provisions. As outlined above, the Supreme Court has repeatedly legitimated interventions by the military into politics, through several coups d'état and dissolutions of Parliament, highlighting its weakness vis-à-vis political forces. The dominance of the executive over the judicial branch has been apparent at all levels, with judges from the lower courts to the higher courts often succumbing to political pressure throughout Pakistan's history.

The lack of clarity and transparency in processes for the appointment and removal of judges has played a central role in enabling the executive to influence the judiciary. Article 177 of the Constitution states that the "Chief Justice of Pakistan shall be appointed by the President, and each of the other Judges [of the Supreme Court] shall be appointed by the President after consultation with the Chief Justice." Article 193 states that the judges of the High Courts "shall be appointed by the President after consultation" with the Chief Justice of Pakistan, the Governor of the province and the Chief Justice of the High Court. The Article further states that appointments of Chief Justices of the High Courts shall also be made by the President "after consultation" with the Chief Justice of Pakistan and the Governor. In the landmark *Al-Jehad Trust* case (1996), the so-called "judges' case," the Supreme Court elaborated key principles for judicial appointment. The court ruled that the words "after consultation" meant that "the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness" and that the "opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President."

In practice, these principles have rarely been applied, and the selection process has largely been a product of back-room maneuvering by various interests rather than an open process. There have been several incidents of superseding the constitutional tradition of appointing the most senior High Court Judge to the Supreme Court in order to elevate more compliant judges, including by Benazir Bhutto in 1994, and in the appointment of Chief Justice Iftikar Muhammad Chaudhry. In addition, the relatively early retirement age of judges – 65 for Supreme Court judges and 62 for High Court judges – results in short tenures for the justices, particularly for the Chief Justices who are elevated late in their careers.[20] This frequent change creates numerous opportunities for the military and executive to intervene in judicial selection and thereby maintain compliant courts. The turnover in the office of Chief Justice has been so frequent that many recent incumbents have exercised little influence on the direction of either the Court or the system.

2. The Subordinate Judiciary

The situation at the lower courts – or "subordinate courts" as they are aptly named – is even more precarious. Beneath the High Court in each province lie two levels of courts, Civil and Magistrate courts, the courts of first instance for civil and criminal matters respectively, followed by the District and Sessions courts, which serve as the appellate courts for each. Unlike High Court judges, who are usually selected from among prominent members of the High Court Bar in each province, lower court judges reach the bench through a qualifying examination administered by the Public Service Commission, and generally serve their entire careers on the bench. They are generally viewed as bureaucrats, and have historically earned relatively meager salaries. Although salaries and allowances have recently been raised relative to other civil servants, they remain less than sufficient, Judges are overworked due to the insufficient complement of subordinate judges, and work in poor conditions. They receive a brief two months of training upon joining the bench, and there are few opportunities for refresher training. Career

[20] While 65 may not seem young, it is relatively young compared to the United States, which has no mandatory retirement age for Supreme Court Justices.

incentives are limited, since lower court judges are rarely elevated to the High Court, and judges are transferred frequently.[21] These factors and conditions have made it difficult to recruit candidates to serve as judges. The team learned that in Punjab, for instance, an attempt to recruit 100 new judges yielded only 11 qualified candidates. Lacking sufficient resources and support for their independence, lower court judges are frequently subject to pressure. Lower court judges are also subservient to the High Courts, particularly the Chief Justice, who wields considerable power over the entire judiciary in each province.

In addition to controlling most management functions in the courts, the Chief Justice personally controls the transfer and selection of lower court judges, a process that is rarely transparent. In NWFP, the team was told that a former Chief Justice had sought to make the transfer process more transparent by opening the system to outside scrutiny, although it was based primarily on seniority without incorporating performance or training. More recently, the ADB supported the institution of an incentive system, which provides monetary rewards based largely on judges' efficiency in disposing cases[22], along with a Member Inspection Team (MIT) that is supposed to monitor lower court judges' performance. However the MITs are usually made up of judges rather than professional evaluators, and these systems are not linked to judges' careers. In practice, the transfer of lower court judges has often been subject to outside influence, exercised via the High Court. Since most cases are systematically appealed, lower court judges are not empowered to exercise much discretion. If the High Court Judges do not uphold sensitive or difficult decisions by lower court judges at the appeal level and instead succumb to political pressure, these lower court judges are left vulnerable and unable to resist all types of pressure. The high level of influence by the High Court also creates opportunities for intervention in individual cases. Although the ability of the judiciary to resist pressure has varied across time through the different provinces, the recent trend – since November 2007 – is generally toward less independence. The forcing out of judges at the High Court level resonated throughout the judiciary, opening lower court judges to greater pressure without a High Court that is independent enough to back them up.

The actions by the superior judiciary in 2007 signaled an important effort to overcome these historical patterns. The decision by the Chief Justice to resist General Musharraf in February 2007, and by the Supreme Court to reinstate him, was a significant assertion of judicial independence. Chief Justice Chaudhry sought to further exercise his independence through the frequent and active use of *suo moto* powers, in taking on hundreds of cases of human rights abuses and excesses by the executive based upon media reports, letters or other information. However this unprecedented activism also brought the courts more assertively into the political realm, and left them increasingly vulnerable to reaction by the other branches of government, and ultimately the decision to force over 60 judges off the bench. These unresolved issues have more recently led to the PPP drafting a set of constitutional amendments, which would reinstate the deposed judges, but likely curtail some of their powers. Whether or not the outcome of this crisis leads to a more independent judiciary in the long run, what is clear is that these actions raised fundamental issues regarding the role and independence of the judiciary that continue to seize attention at all levels of society.

3. Judicial Budget Process and Implications for Independence and Impartiality

Another common approach around the world to keeping the judiciary subservient is through executive control of the judicial budget. In Pakistan, funds are provided to all government agencies under two headings—the recurrent budget and development budget—based on a July-June budget year. Power to

[21] The team found no estimates of the 'average age' of subordinate judges-ages range across the board from new judges in their twenties to those nearing retirement age.

[22] The incentive system arises from laudable goals but its dangers are evident in Singapore, which has probably the most efficiently-operated court system in Asia, but where the incentive system has caused some to suspect that both favoritism and pressure enter into its operation.

spend money varies and is based on the status of the agency in the government administrative hierarchy. Special Institutions and Administrative Departments have full powers of expenditure within their budgetary allocations. Attached Departments (such as Subordinate Courts) and autonomous bodies have limited expenditure powers.

The budget for the Supreme Court is submitted at the national level and the High Courts with the Subordinate Courts are budgeted at the provincial level. In Fiscal Year 2005-06, the Supreme Court budget was $2.1 million (140.7 million Rp), about 0.17 % of the total federal budget.

At the provincial level, budgets for the judiciary are approved separately for the High Court and lower courts (District, Session, and Civil courts). The budget of the High Court is divided into charged and voted sectors. The charged budget does not require assembly approval and is a way of ensuring judicial independence. More than 95% of the budget provided to the Lahore High Court, for example, is charged. In 2005-06, for example, the charged budget for the High Court alone totaled about $6.3 million (423 million Rp) and the voted budget about $86,500 (5.8 million Rp). The chart below indicates, however, that the great part of the Subordinate and Special Court budgets are voted.

BUDGET ALLOCATION FOR FY 2006-2007 OF LAHORE HIGH COURT AND SUBORDINATE JUDICIARY

Detailed Functions	Budget Allocation for 2006-2007
PC21011-Admin of Justice-031101 Courts/Justice-LO4111-**High Court (Voted)**	Rp 781000 $11,693
PC24011-Admin of Justice-031101 Courts/Justice-LO4112-**High Court (Charged)**	Rp 384913000 $5,762,171
PC1011-Admin of Justice-031101 Courts/Justice-LO4114-**Sessions Courts (Voted)**	Rp 486000000 $7,275,449
PC21011-Admin of Justice-031101 Courts/Justice-LO4115-**Civil Courts (Voted)**	Rp 794434000 $11,892,725
PC21011-Admin of Justice-031101 Courts/Justice-LO4116-**Special Courts (Anti Terrorism) (Voted)**	Rp 25696000 $384,671
PC21011-Admin of Justice-031101 Courts/Justice-LO4117-**Small Causes Court (Voted)**	Rp 6357000 $95,165
(i) Grand Total:-	**Rp 1698181000 $25,421,871**

The budget process in the Punjab province as an example operates as follows:

> The Department of Finance (DOF), which is a part of the executive branch, invites budget proposals from Departments, including the High Court. These units submit their budget proposals, basing them on historical expenditures and foreseeable requirements to the DOF. The budget is required to be formulated in the MTBF format, which requires budgeting to be based on planning for three years. However, such objective based planning does not occur.
>
> The DOF consolidates budgetary proposals for the entire Government. The DOF takes into consideration the year's final receipts. This figure, plus taxation measures and donor funds, give the DOF a picture of money availability for the next year. Budgets are then allocated to various departments according to their requirements and/or priorities of the Government. The draft budget is then discussed within the Government (Secretaries, Chief Secretaries, Ministers, and finally, the Chief Minister) and presented as the Finance Bill to the Assembly. The Finance Bill

also includes approval for expenditures made over and above last year's approvals. Departmental budget proposals are sent to the DOF with the permission of the concerned Secretary.

Development budget proposals and expenditures on development schemes are made by the Planning and Development Department (P&D) located in the executive branch and sent to the DOF. Development budgets are provided subject to approval of development schemes. The respective administrative departments/attached departments do processing of development schemes. Powers to finally approve development schemes are as follows:

The Departmental development sub committee has representation from the P&D and DOF and a scheme cannot be approved without their endorsement The Provincial Development Working Party is chaired by the Chairman, Planning and Development Board, Punjab. Once the relevant forum approves a scheme, the P&D issues an advice for release of monies to the DOF.

Issues in the budget process

The Subordinate courts nationally have historically been underfunded. Even in Lahore, where a new courthouse facility is under construction, it remains unclear as to whether the physical improvements will alone permit these courts to function effectively. Issues arising as to the efficacy of the budget process play a part in this condition:

- Subordinate court budgets are processed through the High Court, which has attended first to its own perceived needs, and has also had the principal authority over use of the proceeds from the Access to Justice Development Fund (AJDF) established by the Asian Development Bank.
- MTBF budgeting—not unlike other budget "fads" worldwide such as zero-based budgeting and planning-programming-budgeting systems (PPBS)—has not succeeded in bringing true strategic planning to the budget process; at best, incremental budgets are merely fitted to an MTBF form, according to officials close to the process.
- Budget preparation does not seem to focus on responding to actual needs or to determine whether existing staff are contributing to the effectiveness of the judicial process, which becomes significant in view of the sizeable number of staff.
- Staff ostensibly serving as budget specialists have little training in budgeting, much as administrative staff generally receives little initial training and no continuing education.
- Budgets for the judiciary are closely tied to politics, exemplified by a provincial executive (chief minister) reportedly holding up approval of judicial budgets until judges of his choice could be appointed to the bench.

Not all of these issues arising from the deficiencies of the current budget system, exemplified here by detailed analysis above of the budget process in Punjab, may be resolved merely by provision of specialized training in budgeting, but certainly this training would be highly useful. Training would also enable judicial budgets to be prepared as a part of an overall planning process, as the AJP-sponsored initiation of the MTBF system was intended to encourage. As with the administrative staff of the courts as a whole, professionalization—placement of trained budget staff in leadership positions in the courts such as Additional Registrar in charge of budgeting—needs to replace short-term assignment of judges to these positions as part of their overall judicial career ladders.

The current budget process resembles that in many countries where the judiciary has little to say about what funding it receives. In essence, the judiciary is able to prepare and submit its own budget, which is more than occurs in countries where the executive Ministry of Justice performs this function. It appears, for example, that once the budget is submitted to the Ministry of Finance, there is little discussion with

the submitting agency, e.g., the judiciary; rather the MOF engages in communication directly with the legislature and involves the highest executive officials. There are officers in the judiciary who ostensibly have responsibility, e.g., the Additional Registrar of the Lahore High Court who is assigned to budgeting. Nevertheless, these officials stay in their positions for relatively brief periods and are unable to acquire the expertise required for an effective budget officer; their being posted to this task is merely an administrative way station in their judicial career—and, not surprisingly, they take far more interest and are far more involved in any of the judicial positions rather than the administrative ones they must fill for brief terms.

C. Case Delay and Access to Justice

Case delay in Pakistani courts is lengthy, closely resembling the situation in the other sub-continental (India, Bangladesh, Sri Lanka, Nepal) court systems descended from the British colonial system. The impact of this delay may be complicated. From a justice perspective, the impact is to discourage use of the courts except when court proceedings are absolutely required. On the other hand, as noted by some research, the delays may serve more powerful interests, which benefit from 'non-decisions' to maintain the status quo. Not only are courts and the inherent delay used to lengthen land and contract proceedings, but litigation itself is a tactic used to undermine the provision of justice. The public on the whole appears to lack confidence in the courts and the consequence of built-in delay is to require significant resources even to consider litigating.

In commercial and land disputes, the uncertainty created by the legal posture is highly damaging to investment prospects and ordinary commercial dealings. It is reported that contracts generally are dishonored until enforced in court. Land disputes must go to court for resolution because of the absence of any land recording and registration system—this makes it necessary for every party to prove their right to land *ab initio* every time any question arises. Estimates of the huge impact of land cases ranged from 60 to 80 percent of court caseloads. These cases clog the courts because they are not easy to resolve speedily. While the courts proceed more expeditiously in resolving criminal and family cases, the presence of the land cases, which cannot be resolved elsewhere, occupy the great portion of the civil docket, leading lawyers to seek alternative means such as arbitration to resolve commercial and other large civil matters.

As part of its introductory study of the Pakistani courts, the ADB Access to Justice Project examined the pendency figures for various courts (pendency refers to the length of time since an undecided case was originally initiated in a court). It found that the Lahore High Court, for example, disposed of approximately half the cases filed in one year in that year, but that the other half extended back in a gradually diminishing distribution over the previous thirty years. The best recent reports the assessment team heard of reduced delay in courts came from the North West Frontier Province (NWFP), where judges in the lower courts advised the team that delay reduction efforts had reduced the average case processing time from about 10-15 years to four to five years.[23] Delay appears to be greater in the lower courts as more action and investment have occurred in the High Courts. By general world standards, these processing times are lengthy. The exceedingly long times land cases have frequently taken from initiation until disposition are characteristic of sub-continental courts—if not elsewhere—but while most Asian countries have not yet achieved the speedy times within which Singapore disposes of cases in

[23] The legal and judicial culture of the NWFP appears to be one that is open to innovations in expediting cases at all levels. Just as the judicial leadership welcomed the early efforts of the AJP to speed case-flow in both the High and District Courts, the current Chief Justice and Registrar of the High Court in Peshawar have supported many projects under the AJP to improve case processing.

court, average times of three to four years remain unsatisfactory if unfortunately common in many countries. For many, if not all, this lengthy process contributes to frustration and lack of confidence in the judicial system.

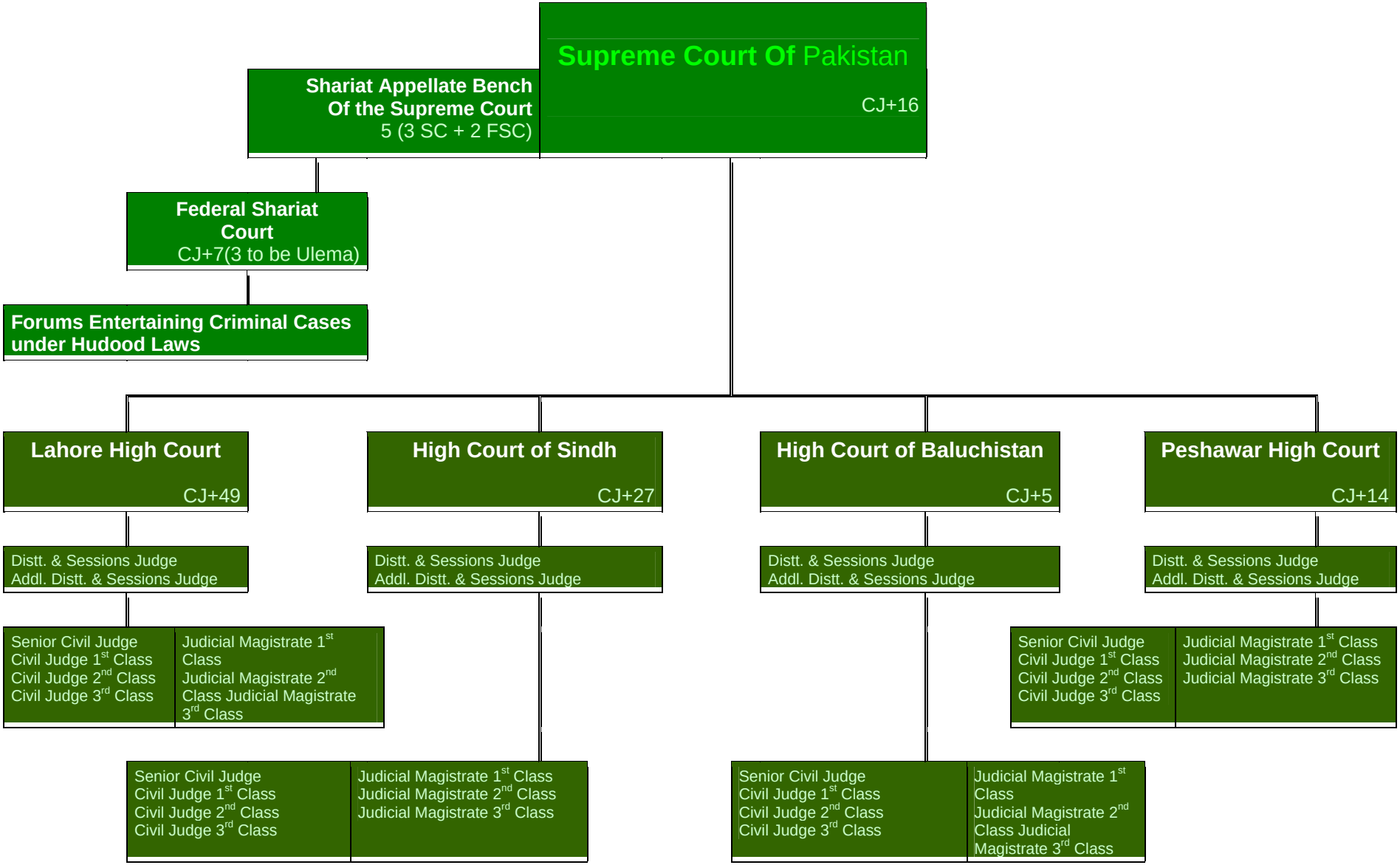
TABLE 1. NUMBER OF JUDGES, STAFF, AND CASES IN PAKISTAN'S COURTS, 2006

Judges	Supreme Court of Pakistan	Federal Shariat Court	Lahore High Court	High Court of Sindh	Peshawar High Court	Baluchistan High Court
Chief Justice & Judges	19	08	50*	28	16	08
Administrative Staff	567	216	1861	970	346	308
Pendency	10,914	3,316	75,195	27,291	13,610	2,445
Dist & Sessions Judges/ Addl Dist & Session Judge/ Senior Civil Judge/ Civil Judge	-	-	939	508	277	197
Administrative Staff	-	-	10330	3940	3317	1450
Pendency	-	-	110,546	123,663	37,000	8,377

*Actual strength of Lahore High Court is 38 of 50 authorized. Supreme Court has 17 plus two ad hoc positions.
Source: Dr Faqir Hussain, *The Judicial System of Pakistan* 23 (undated).

A number of features of the Pakistani justice system lie behind the long case delay and high pendency rates in the courts. Primary among these factors are the low number of judges and qualified staff relative to the population, the absence of case management or court administration systems, antiquated procedural laws, and the proliferation of special courts, which increase the workload on judges. Each of these factors and its contribution to fueling case delay and hindering access to justice is explored in the following sections.

The most notable efforts to speed the flow of cases have been in the NWFP courts where the leadership endorsed and the judges have begun to practice the generally-accepted principles of effective caseflow management. The NWFP High Court also secured ADB resources to hire additional judges and support staff, and succeeded in incorporating these personnel into the regular judicial budget. Nonetheless, the low number of judges continues to be a problem in NWFP and throughout the country. That problem appears to be the lack of attraction the Subordinate Court judgeships have for lawyers aspiring to the bench. Conditions are demanding, pay is still relatively low, and prestige is minimal, posing a continual challenge for recruiting qualified judges.


Supreme Court Of Pakistan
CJ+16
Shariat Appellate Bench Of the Supreme Court
5 (3 SC + 2 FSC)
Federal Shariat Court
CJ+7(3 to be Ulema)
Forums Entertaining Criminal Cases under Hudood Laws
Lahore High Court
CJ+49
High Court of Sindh
CJ+27
High Court of Baluchistan
CJ+5
Peshawar High Court
CJ+14
Distt. & Sessions Judge
Addl. Distt. & Sessions Judge
Senior Civil Judge
Civil Judge 1st Class
Civil Judge 2nd Class
Civil Judge 3rd Class
Judicial Magistrate 1st Class
Judicial Magistrate 2nd Class Judicial Magistrate 3rd Class

Court structures: judges, staff, working conditions

Superior Courts: The **Supreme Court** is the apex court of Pakistan and consists of a Chief Justice, known as the Chief Justice of Pakistan, and such other judges (now 17) as may be determined by Act of Parliament. The court has limited original and extensive appellate jurisdiction. A special bench of the Supreme Court known as the Shariat Appellate Bench hears appeals from the orders/judgments of the Federal Shariat Court. The Supreme Court has important powers with regard to enforcement of fundamental rights. Judges of the Supreme Court hold office till the age of 65 and are appointed by the President in consultation with the Chief Justice of Pakistan.

There is one **High Court** for each of the four provinces in the country. The High Courts have a principal seat and one or more benches. The Lahore High Court has three added benches at Rawalpindi, Multan and Bahawalpur. Recently a fifth High Court was established for Islamabad. High Courts have extensive appellate and substantial original jurisdiction. They have powers to issue orders in the nature of writs. High Courts are also entrusted with powers of superintendence and control over most courts.

The **Federal Shariat Court** comprises of not more than eight judges including the Chief Justice. The Court has appellate and revisionary jurisdiction in Hudood cases and jurisdiction to review laws to find out their compatibility with injunctions of Islam.

Subordinate Courts: Courts of general jurisdiction are courts which deal with the main body of civil and criminal law in Pakistan. These courts have jurisdiction over all civil and criminal matters unless provided otherwise by legislative enactment. Courts of general jurisdiction are provincial in character.

Civil courts have general civil jurisdiction and try all suits pertaining to torts, lands and declaration of rights. Procedure in these courts is regulated by the Code of Civil Procedure 1908. Section 3 of the Civil Courts Ordinance provides for the following classes of courts:

Court of District Judge
Court of Additional District Judge
Court of the Civil Judge

In each district there is one district judge and varying number of additional district judges and civil judges. Based on pecuniary jurisdiction, courts of civil judges are divided into three types- courts of civil judge class I, courts of civil judge class II, courts of civil judge class III. In every district one of the civil judges is known as the senior civil judge. The Senior Civil Judge assigns cases among his colleagues.

Criminal courts of general jurisdiction are set up under the Code of Criminal Procedure, 1898. These courts can try all cases arising out of the Pakistan Penal Code. Criminal courts are of two types:

Sessions Court
Courts of Magistrates

The Sessions Court comprises one Sessions Judge who is in charge of the administration of the court and varying number of Additional and Assistant Sessions Judges. Additional Sessions Judges have same judicial powers as the Sessions Judge. Sessions judges are invariably District Judges and are known as District and Sessions Judges.

There are three types of courts of magistrates: Magistrate of the First class, Magistrate of the second class, and Magistrate of the third class. Magistrates do not always act as courts. In addition to the above noted types of magistrates there are special judicial magistrates and section 30 magistrates. These magistrates

belong to one of the three classes mentioned above but because of special powers are known as Special Judicial Magistrates or section 30 magistrates.

Specialist Courts: Specialist courts deal with offenses relating to a particular subject and most but not all have both civil and criminal jurisdiction. Special courts are set up both by the federation and the provinces and in certain cases specialist courts are constituted by federal legislation but their finances are provided by the provincial government. Listed below are important federal and provincial specialist courts. This division is by statute of origin and not by provision of finances:

Federal specialist courts

The important specialist courts/tribunals set up by federal enactment are:

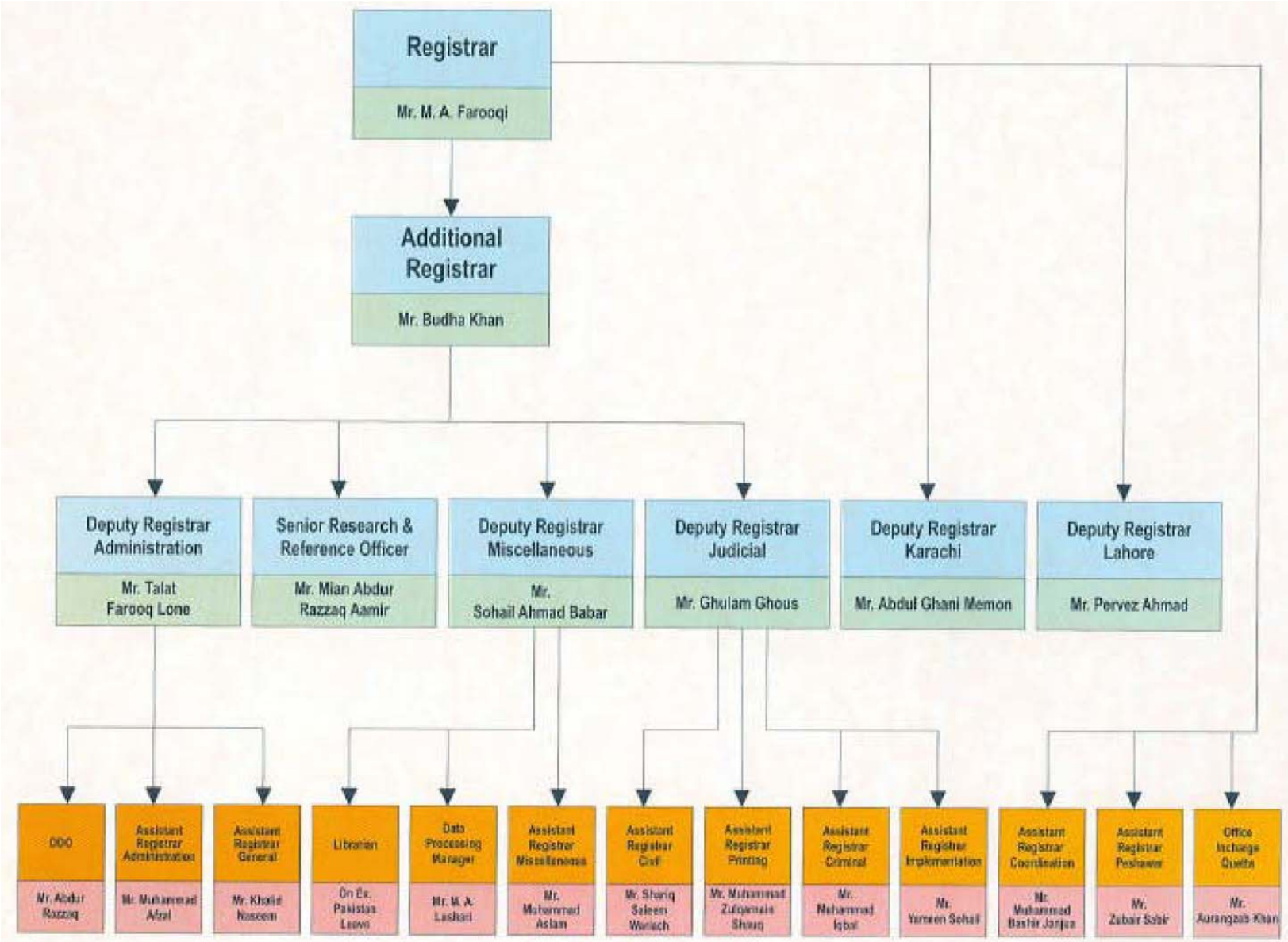
Banking Courts: Established under the Financial Institutions (Recovery of Finances) Ordinance, 2001
Special Courts for banking offences: Established under the Offences in respect of Banks (Special Court) Ordinance, 1984
Anti-terrorism Courts: Established under the Anti-terrorism Act 1997. Anti-terrorism court can be established by both the federal and provincial governments (§13)
Accountability courts: Established under the National Accountability Bureau Ordinance, 1999
Drug Courts: Established under the Drugs Act, 1976. In addition to establishing Drug Courts itself the federal government is authorized under this Act to direct a provincial Government to establish Drug Courts (s 31)
Special Courts for emigration offences: Established under the Emigration Ordinance, 1979 (s 24)
Labour Courts: Established under the Industrial Relations Ordinance, 2002(s 33). The Act however empowers the provincial government to establish Labour Courts.
Court of Special Judge (Customs): These Special Judges are established under section 185 of the Customs Act, 1969.
Income Tax Appellate Tribunal: This tribunal is established under the Income Tax Ordinance, 2001 (s 130)

Provincial Specialist courts

Revenue Courts: Established under the Punjab Tenancy Act, 1887 (s 77)
Consumer Courts: Established under the Punjab Consumer Protection Act, 2005
Rent courts: Established under the Punjab Rented premises Act, 2007
Family courts: Established under the Family Courts Act, 1964(s 3).

It has been estimated that there are now nearly 2,000 judges in Pakistan at all levels of court, for a population of roughly 160 million. Each judge is burdened with an extremely high caseload. As noted in Section B 2 above, salaries and working conditions are poor and are not regarded as sufficient to attract interest on the part of the elite bar, and some incumbents informed the team that they relied on family support to continue on the bench. Working conditions in the Subordinate Courts observed are generally inadequate, as these courts sit in small, un-cooled courtrooms with antiquated equipment and furniture. The High Courts are far better-equipped, including a plenitude of computers and staff. Subordinate courts may have one computer in a court, generally used by either the stenographic officer to record case results or by the judge. Subordinate court judges rarely are promoted to the superior courts: entering the Subordinate courts at the lowest level in effect limits their advancement to, at most, the position of District and Sessions Judge, which may require 30 years to reach.

TABLE 2. ORGANIZATION OF SUPREME COURT ADMINISTRATIVE STRUCTURE, 2004



Case Management and Court Administration Issues

The general tenor and pace of litigation in Pakistani courts reflects a system in which the lawyers determine when cases are heard and decided. In general, judges allow lawyers to adjourn cases for any or no reason. Lawyers take advantage of this lack of enforcement of any deadlines by the court. Since lawyers are generally paid by the appearance, they have an incentive to ask for adjournments whenever possible, thus significantly lengthening cases and increasing delays. Witnesses and defendants may or may not appear at scheduled hearings. Moreover, frivolous cases are filed largely as a litigation tactic to keep matters tied up in court proceedings indefinitely. It is fair to say that the general perception of the court system in Pakistan is that of a process aimed at delaying resolution of disputes instead of getting matters resolved promptly.

Persistence of delay also maintains the opportunities for corruption that have long characterized the justice system. Lawyers may pay judges or court staff to slow down or speed up the progress of a case. Lengthy pendency of cases also gives lawyers more time to approach judges to influence decisions improperly. Lack of an effective disciplinary system for either judges or lawyers diminishes the likelihood that such behavior will be curtailed or discouraged.

Nevertheless, limited progress has been made in different ways. Several courts began experimenting with modern case management techniques when the AJP pre-project began in 2001. District Courts in Sindh and the Peshawar High Court, served as pilots and demonstrated that effective case management was possible in the Pakistan court system. As noted earlier, the courts in the North West Frontier Province have continued to focus on effective case management and have reduced the average duration of cases. The deposed Chief Justice of Pakistan, whose efforts helped the Supreme Court to cut its backlog significantly, led another significant effort.[24]

The Law and Justice Commission has conducted extensive analysis and produced recommendations for addressing this issue. The Law and Justice Commission of Pakistan is a Federal Government institution, established under an Ordinance (XIV) of 1979. The Commission is headed by the Chief Justice of Pakistan and comprises 12 other members including the Chief Justices of the superior courts, Attorney General for Pakistan, Secretary, Ministry of Law, Justice and Human Rights and Chairperson, National Commission on the Status of Women and others. One member represents each province. The Law and Justice Commission produced a report[25] on expediting trials that recommends most of the changes needed to give judges the ability, aided by court managers, to address the delay problem. Yet lasting progress on making these changes has been limited by the failure of the legislature and executive to enact the Law Reforms Bill, 2005, which would have effected major changes in court procedures to facilitate speedier resolution of cases. Some High Courts have reduced their backlogs of pending cases as well, although it is not entirely clear that their efforts will endure, to the extent that cases not properly concluded are likely to reappear on the docket. In sum, although some strong efforts to reduce delay have been made, the system has persisted in its traditional form barring institutionalization of changes.

Effective case management means that judges must assert control over the movement of cases from institution to disposition in place of the current system controlled by lawyers. Basic precepts include ensuring that every time a case is called in court, a meaningful result occurs that advances the case; and

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[24] Muhammed Sher Shah, *Peshawar Solutions to Case Flow Management*, and Hon. Zafar Ahmed Khan Sherwani, *Karachi East Operational Practices and Procedures to Case and Case Flow Management*, in Asian Development Bank, Report From the ADB Symposium on Challenges in Implementing Justice Reforms, 26-28 January 2005 (2006), at pp. 80 and 82. See also Raza Ahmad, *Justice for All*, **ADB Review** (May 2005). The ADB reports are available electronically but the large ADB white book compilation is not online.

[25] Law and Justice Commission of Pakistan, **Expediting Trial Proceedings**, Report No. 60

that every case has a next scheduled date for something meaningful to occur. It is highly important to recall that despite all the procedural obstacles, capable judges and courts have made this work in Pakistan, resulting in significant reductions in case delay.

Although Table 2 indicates that the higher courts have significant administrative complements, court administration is not directly recognized as a capacity independent of the judicial strength. The Superior Court Registrars and most of the Additional Registrars are all District and Sessions Judges, or Additional District and Sessions Judges; thus, their careers are focused on their next move upward in the judicial hierarchy and not on their administrative capabilities. In the Subordinate Courts, the support staff is rarely acknowledged as administrators at all.

Leadership—such as it is—in the Pakistani judiciary comes from the National Judicial Policy Making Committee (NJPMC). The National Judicial (Policy Making) Committee is chaired by the Chief Justice of Pakistan, and includes the Chief Justice, Federal Shariat Court, and Chief Justices of 4 provincial High Courts are its members. The Secretary, Law and Justice Commission of Pakistan, is designated as the Secretary to the Committee. The NJPMC is required to coordinate and harmonize judicial policy within the court system, and in coordination with the Law & Justice Commission of Pakistan, ensure its implementation. The Committee performs the following functions: (a) Improving the capacity and performance of the administration of justice; (b) Setting performance standards for judicial officers and persons associated with performance of judicial and quasi judicial functions; (c) Improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary; and (d) Publication of the annual or periodic reports of the Supreme Court, Federal Shariat Court, High Courts and courts subordinate to High Courts and Administrative Courts and Tribunals. Judges alone—whether at the highest level of the National Judicial Policy Making Committee or at the lowest-level magistrate's court—invariably make decisions as to how the courts in Pakistan are administered. Chief Justices of High Courts personally decide which judges to assign for how long to which Subordinate Courts—a process only slightly affected by the introduction of the Member Inspection Teams, which consist of High Court justices assigned to examine performance of Subordinate Courts in their province.

Effective court management will require recognition of the roles that others besides judges should play in the operation of the Pakistani courts. This transition has occurred in many countries—including both common- and civil law jurisdictions—but it begins with acknowledgment by judges of the complementary role of administrators.

Role of Procedure

Both the civil and criminal procedure codes in Pakistan date to colonial times (Civil, 1908; Criminal, 1898) and preserve excessively complex and tortuous procedural paths for cases through the courts. When a case finally is appealed to a High Court from the District or Sessions Court, for example, it generally will be tried all over again, rather than be examined for errors by the trial court, which has become the standard North American and Western European procedure. Cases move back and forth between trial-level courts, such as the District or Sessions Courts, and the High Courts, as parties may take appeals at almost any point in a case, rather than being required to combine all their issues on appeal at the end of a case. Most critically, lawyers in Pakistan effectively have control of the courts' calendars: lawyers are able to postpone (adjourn) cases for little or no reason. Most common-law countries, including the United Kingdom, have abandoned these antiquated processes in favor of simplified procedure, which began and spread in the United States since the adoption of the Federal Rules almost 75 years ago. Since then, other countries have proceeded to introduce modern case management that features court control of the progress of cases. The complex procedure makes corrupt behavior easy to occur when lawyers desire to move their cases faster or slower or even influence the outcome. An effort to address many of these

procedural obstacles was attempted through the 2005 Law Reforms Bill, however the Bill was never passed by the Parliament.

Criminal cases also move slowly, as police investigative procedures are inefficient. Much effort goes into preparation of a FIR (First Instance Report) by a police officer, after which a suspect is usually arrested and detained until trial. Many investigations fail to move past the completion of the FIR, when police often have inadequate and often incorrect information. Courts rarely exercise their habeas corpus power to determine whether there is sufficient basis for continued detention of a defendant.

Special Courts and ADR

The judges assigned to sit in specialty courts detract from the available number of judges needed to staff the general courts, as does the practice of assigning judges to duty as registrars or other administrative positions, including assignment to executive agencies. Special courts everywhere are often able to resolve their narrow categories of cases more efficiently, but these courts also are susceptible to becoming captured by a major constituency of interest that may utilize a particular specialized court.

Alternative dispute resolution (ADR) was introduced into several courts under the AJP but the ADB noted that there was not much impact to show for the innovation. ADB sponsored a follow-up study, which concluded that ADR measures were slow to yield the desired results. Major recommendations included amending the Civil Procedure Code to give judges discretion to refer cases for ADR (if appropriate), establishing dedicated small claims and minor offenses courts (SCMOCs), training SCMOCs and family court judges – civil judges who are responsible for handling the bulk of family law cases – in ADR techniques, empowering them to refer cases to professional mediators, and providing time for ADR, to reduce unnecessary delays. A statutory autonomous national commission for ADR has also been proposed, to conduct public dialogue, research, training, registration, and regulation of private mediators, however this proposal was never implemented. The functions of the commission would include setting competency criteria and performance standards, and monitoring ADR services. The report on the study, after LJCP-led consultations, was issued to the four high courts for implementation. It is likely that implementation of ADR for commercial cases is now the most viable route.

More recently, in response to that report, the High Court of Sindh (Karachi) has sponsored a private dispute-resolution service to which the court refers cases. As a result, this service has shown some success in its use of ADR (mediation and arbitration) to resolve primarily commercial disputes. This service is interested in spreading out both geographically (next stop is Lahore, capital of Punjab province) and beyond the realm of purely commercial disputes to encompass other kinds of disputes, such as family matters.

Implementation of use of ADR in Pakistani courts is clearly within sight in commercial cases. Not only have efforts such as the one sponsored by the High Court of Sindh been undertaken but also successful lawyers have recently shown interest in both representing parties in ADR proceedings and in serving as neutral mediators, arbitrators, or facilitators in these proceedings. For example, the team was in contact with two separate groups of practitioners in Lahore who are already initiating ADR practice. This involvement, coupled with the support programs such as the IFC-sponsored Karachi Center for Dispute Resolution, have received from business groups, bodes well for the current ADR efforts in commercial cases. [26]Further success with ADR will depend on ability to effect cultural changes, especially within the bar, so that lawyers will participate in ADR proceedings, recognize the utility of ADR, and eventually serve as mediators or arbitrators. Thorough training of mediators, as recommended by the ADB report,

[26] As noted by USAID Pakistan in their comments on the first draft of this report: "attractive compensation to lawyers will also be a key issue, in order for this form of resolution to be successful.

will also be critically important. The ultimate ability of ADR to reduce case backlog significantly may depend on whether it can be employed in the huge sector of land disputes that reportedly occupy anywhere from 60 to 80 percent of court calendars. Success in commercial will establish a basis for seeking to expand ADR to this demanding sector. There clearly is not the same base of support for ADR in family cases as in commercial ones. There are some NGOs interested in this area but it likely will take a good deal more leadership and initiative to get family ADR programs underway.

Added impetus to use of special courts was given by the current Law Minister recently with his support of the concept to expedite small claims and other simple cases. This support offers an opportunity for a relatively quick improvement in services provided by the courts, however any proposal to create specialized courts should ensure that they do not increase the caseload for existing judges.

D. Order and Security: Police Responsiveness and Criminal Justice

A significant challenge to the rule of law in Pakistan is the rise in violence and crime over the last several years. The proliferation of terrorist attacks, particularly in NWFP, has captured the headlines and interest abroad. Of greater concern to Pakistani citizens, however, is the rise in various forms of petty crime that affect citizens in their daily lives. Media reports are full of accounts of the recent rise in street crime, thefts, assaults, murders, and rapes, and official statistics cite a 20% rise in crime between 2006 and 2007.[27] The police and criminal justice system have been unable to cope with this trend, fueling a general lack of confidence in the state's ability to protect its citizens. A May 2008 incident in which suspected thieves were burned alive by a crowd highlighted popular frustration with the state's inability to maintain public order.

The Pakistani police are ill equipped to provide law and order or contribute to an effective criminal justice system. Based on a military model imposed by the British in 1861 – and not altered until 2002 – the police are divided into a two-tiered system, which is primarily aimed at imposing the will of the state. The top tier consists of a cadre of well-educated officers who are trained at the national level. They are responsible for all of the management and supervision at the highest levels, including supervising at least 2-3 police stations and serving in the upper level management positions. However they lack operational experience, as they enter directly into this tier rather than rising through the ranks, and they make up less than 1% of the total force. At the bottom are the constables, who make up 87% of the force. Constables are recruited with minimal qualifications or education, and receive only basic training consisting of marching, discipline and little skills development. They have very little authority or responsibility. For example, they are not authorized to complete a First Investigative Report (FIR), which is the basis of all criminal cases. In the middle are the investigators, who sit at the top of the lower tier and make up 13% of the force, are recruited from police colleges or from the ranks of the constables, and are responsible for supervising and managing individual police stations. Only a tiny percentage of the police thus have the authority or skills to carry out even basic police functions.

Meanwhile, almost all of the police are extremely poorly paid, ranging from roughly $100 a month at the constable level to less than $1,000 at the highest levels. They are expected to work unlimited hours with few benefits and few resources at their disposal. Many crime victims find themselves being asked to cover the cost of transportation and basic supplies for police to respond to complaints. The police often rely on local political patrons for basic resources, making them responsive to only a few political interests rather than the population. Lacking adequate resources, effective oversight, or a culture of public service, the police have not been geared toward serving the public.

[27] See Pakistan Human Rights Commission, *State of Human Rights in 2007*, p. 57.

One of the fundamental weaknesses of the police is the lack of accountability to the public. Until 2002, the police were responsible to a dual command, under the Provincial and District governments. Under the 1861 Act, the Inspector General under the general superintendence of the Provincial Government headed the provincial police, while the district police was under the general direction and control of the Deputy Commissioner (or the District Magistrate), the district representative of the government who was endowed with combined executive and judicial powers. Although ostensibly part of a provincial force, the District Magistrate had such extensive operational control over the police that it was widely perceived as a tool of political actors at the local level. The Police Order of 2002 ostensibly sought to address this lack of public accountability, and transform the police into a professional, efficient and service-oriented force. The District Magistrate had been abolished by the 2001 Local Governance Ordinance, which removed the dual command over the police. The 2002 Police Order sought to further remove control over financial resources, selection, evaluation and transfer of personnel, and operational command from local politicians. The Order created a number of independent commissions that were appointed transparently from among different political and citizen groups at the national and local levels, and that were responsible for selecting personnel, approving strategic plans, and following up on complaints. It also created citizen-liaison committees, and other mechanisms to generate greater responsiveness to citizens.

Promoted and passed by the executive branch with minimal political consultation, however, the 2002 Police Order encountered strong political resistance from politicians who sought to retain their control over the police. In 2004 a PML-Q-led National Assembly succeeded in passing numerous amendments that brought the police more firmly under the control of political leadership of the provincial government, specifically the Chief Minister, which now controls the selection, transfer and budget of the police at the provincial and district levels. With so much power concentrated at the provincial government level, district governments have been unable to exert adequate oversight. With their structure and authorities significantly watered down, few of these commissions or oversight mechanisms have been implemented. Without the DCO or independent oversight committees, there has been a major gap in accountability or oversight. The result has been a decrease in performance and a rise in human rights abuses due to weakened oversight and a continued split in command.

The weakness of the police is reflected in the poor performance of the criminal justice system more broadly. The first step of a criminal case is typically the completion of a First Investigative Report (FIR). The FIR serves as the basis for the criminal case, and is often the bulk of the evidence that is presented in court. However since the FIRs must be completed by police investigators, the overworked mid-level officers who make up only 13% of the force and often lack investigation skills, the FIRs often take months or even years to complete, and are of insufficient quality when they arrive to serve as the basis for a case. In many places investigators have a disincentive to produce FIRs, since a greater number of FIRs is taken as indication that crime has increased in their jurisdiction and leads to a poor evaluation. Oral testimony is often favored over other kinds of evidence, and the police sometimes coerce testimonies out of the accused, resulting in a steady rise in alleged human rights abuses perpetrated by the police.[28]

Police frequently complain of the lack of capacity for forensic analysis, however most police also lack basic investigative or crime scene management skills, resulting in the frequent destruction of crucial evidence.[29] The 2002 Police Order sought to build in basic functional specialization by separating investigative functions from "watch and ward," through the creation of a specialized investigations wing under the authority of an Additional Inspector General in each province. In practice, however, police officers are regularly assigned back and forth between functions and no real specialization has developed.

[28] The Pakistan Human Rights Commission reports on 147 cases of torture in police custody as well as at least 65 cases of death in police custody in 2007 alone. See *State of Human Rights in 2007*, p. 59.
[29] One prominent case was the assassination of Benazir Bhutto in December 2007, after which police were instructed to hose down the crime scene to maintain public order, resulting in the loss of crucial evidence.

Nor has this change been followed up with the development of systematic investigations procedures or systems. The result is that crimes frequently go unsolved and unpunished, individuals are routinely charged without sufficient evidence against them, and criminal cases often drag on for years leaving accused to spend more time in detention prior to and during trial than would be the case if were they found guilty and sentenced to the maximum time for their crime.

While the lack of investigative capacity within the police is a critical factor in the weakness of the criminal justice system, severe weaknesses exist at all levels of the criminal justice chain. Specialized prosecution branches were created only recently, as a result of the Asian Development Bank program. In many provinces, however, the prosecution service has not yet been created and cases are either prosecuted by police officer, or victims rely on private counsel. Where the prosecution has been created, it is viewed as largely ineffective. Lawyers were not hired based on merit and no training was provided, resulting in little improvement to the system.

In practice, many criminal cases are settled through compromise by the parties, which is then recognized by the court and charges dropped. For instance a murder case may be resolved by compensation paid from the accused's family to the victim's family. While this approach may be culturally appropriate and reduces the backlog in the courts, it often fails to ensure human rights standards are adhered to, particularly for cases involving gender-based violence. The lack of specialized skills among judges also hinders effective prosecution, especially for more complex criminal cases from murder to white collar crime. Certain cases have been removed from the regular justice system altogether and placed in specialized courts, like the narcotics or terrorism courts. Particularly for higher profile cases, judges also suffer from severe insecurity, as judges have become victims of kidnapping and attacks when involved in sensitive cases. All of these factors undermine the fairness and efficiency of the system.

It is important to note some successful efforts at police reform. For instance, the Punjab Motorway Police, an experiment achieved in part through ADB funding, created a specialized unit that were specially recruited, given allowances equivalent to three times the normal level, and, unlike most other police officers, assigned to regular eight-hour shifts and a weekly day off. Perhaps most importantly, recruits were told that if they were caught accepting a bribe, they would be fired and prosecuted for a criminal offense. This experiment was replicated in the creation of the Islamabad Traffic Police. Both experiments were highly successful, with these units renowned for their professionalism and integrity. This reputation was sealed when a traffic ticket was given to a high-level official who was unable to get out of it, an incident widely reported in the media. This experiment shows that with the right mix of incentives, recruitment, training and re-organization, the professionalism, integrity and service-orientation of the police could be vastly improved.

E. The Legal Profession: Standards and Qualifications

A fundamental challenge to the rule of law in Pakistan is the weakness of the legal profession. The poor quality of legal education, the lack of professional standards and the absence of continuing legal education contribute to the deficit of qualified and ethical judges and lawyers, and undermine public confidence in the law in general. The legal profession is poorly regarded, widely seen as what one does when one is unable to pursue another higher status profession. There are a small number of highly respected and sought-after lawyers, who are usually foreign-educated and work in firms. Many Pakistani lawyers, however, maintain their own private practices, which are poorly regulated and of varying quality. The high backlog in the courts is often attributed to the constant adjournments and stalling tactics pursued by the lawyers. This approach is partly due to the small number of quality lawyers who must constantly adjourn cases in order to maintain their own caseload in the absence of a predictable scheduling system.

However, it is also a result of the professional norms within the legal system, which favor delay and intimidation tactics over enforcement of ethical conduct.

Much of the weakness in the Pakistani justice system stems from the poor state of legal education. Legal education is widely perceived to have declined over recent years, partly due to the often-cited "mushroom growth" of private law colleges, in addition to public universities with law faculties. Although official statistics are unreliable, one study cites the establishment of 49 new universities and other degree awarding institutes (most of them private) since 1999.[30] Both the Higher Education Committee (HEC) and the Pakistan Bar Council have authority over inspecting, evaluating and conducting quality control of law colleges and universities. Plagued with overlapping authority and insufficient resources, their rules and standards are rarely enforced. The result is that the quality of legal education public universities has generally declined, while dozens of these law colleges have sprung up, often with few or no permanent faculty, no systematic curriculum, little opportunity for research, and sometimes not even classroom teaching.[31] Graduates of these colleges are perceived to be grossly unprepared for the legal profession. To overcome low standards and corruption in the accreditation and examination processes, several law colleges' schools have affiliated with the University of London, which prescribes the curriculum and administers the final qualification exam. However this curriculum is based entirely on the British legal system and not the Pakistani system.

Even the more traditional law faculties in public universities do not prepare students for the profession. Although Pakistan is a common law country based on the British legal system, case law is poorly developed and rarely taught, and there are no academic law journals to develop jurisprudence. Practical skills like legal writing or advocacy are not incorporated into the curriculum. Most law courses consist of a lecturer presenting the relevant codes and students asked to memorize them. Faculty members rarely have any practical legal experience, most also lack any pedagogical training, and very few engage in any legal or academic research. The Higher Education Commission, the federal body responsible for regulating and funding public universities, has displayed little interest or understanding of legal education and has failed to provide adequate resources or support. As a result, both lawyers and judges enter their respective professions with an extremely low base of knowledge, little understanding of specialized areas of the law, and virtually no practical skills. High-level, foreign-educated lawyers frequently complain that they must educate the judges and other members of the bar on basic areas of the law.

The Bar Councils, at the national and provincial levels, are the statutory bodies responsible for maintaining standards for the legal profession, including accreditation of law schools, entry into the profession, professional ethics. Bar Councils are governmental bodies to which lawyers are appointed as members, that exercise the authority to admit lawyers to practice and disbar them from conduct. Seen as one of the more democratic institutions in Pakistan, officers are elected annually by the members. Although there is a Legal Education Committee within each Bar Council that sets rules for accreditation and guidelines for the legal curriculum, these are rarely enforced or implemented. Entry into the Bar requires a six-month apprenticeship under an experienced lawyer followed by an interview by a senior judge; however this is widely perceived as inadequate for providing the necessary training. The recently instituted Bar Exam, a list of around 30 questions that are circulated prior to the exam, is too easy to limit entry to the profession. Although the Bar Councils do adopt ethical standards, complaints are often lodged

[30] Note that this is not only for law schools. See Robert Sedgwick, "Private Universities in Pakistan," *World Education News and Reviews* Jan/Feb 2005, http://www.wes.org/ewenr/05jan/feature.htm.
[31] See Osama Siddique, "Martial Law and Lawyers: The Crisis of Legal Education in Pakistan and Key Areas of Reform," *Regent Journal of International Law* Vol 5, 2007.

but almost never enforced. Bar Councils also have legal aid committees, however these too are not always active and insufficient resources are allocated for them to function effectively.[32]

In addition to the Bar Councils, Bar Associations exist as professional associations, providing services such as libraries, transportation and inexpensive health care. Unlike the Bar Councils, Bar Associations are voluntary organizations of lawyers formed at the national, provincial and district levels to represent the lawyers in a particular jurisdiction. Members pay minimal dues to benefit from these services and officers are elected annually. Neither the Bar Councils nor the Bar Associations, however, provide systematic continuing education or training opportunities for their members.

Some efforts have been initiated to address these challenges, particularly in legal education. A recent Supreme Court case brought by the Bar Council sought to challenge the unregulated growth of private law colleges. A committee of judges was formed to look into the legal curriculum and accreditation standards, and issued a number of recommendations to make improvements. There continues to be interest within the Supreme Court and High Court Bar Councils in addressing these issues. The ADB Access to Justice Program included a program to establish "Centers of Excellence for Legal Education" in individual law schools to develop improved curricula and teaching practices based on higher standards. However this approach largely failed due to the lack follow up and poor coordination between the Higher Education Commission, Pakistani Bar Council and federal Law Ministry, which failed to agree on a common approach. More recently the ADB has provided resources for the establishment of a National Law University, based in three major cities: Lahore, Karachi, and Islamabad. A curriculum is being developed, and the ADB has begun funding scholarships for advanced study abroad, in exchange for a commitment to teach at the university with a competitive salary. One of the major challenges for all law schools has been to find faculty with the necessary skills.

Still, good legal education does exist. A bright spot in the legal education field is the establishment of a law and policy program at the Lahore University of Management Science (LUMS), a private university that has begun to provide high quality education based on an interdisciplinary law and management curriculum, in part by providing incentives for skill development and research among for its faculty. This approach seems to be paying off in producing the first graduates with an education equivalent to one that could be obtained abroad.

F. Commercial Law

The status of commercial law in Pakistan was thoroughly examined in a report on Pakistan's status as a place to do business produced earlier this year.[33] In this report, the courts were spotlighted as a major problem area for commercial transactions. Issues such as delay, corruption, and insufficiency of law were advanced as problems within the court system that hampered investment and limited both internal and external commercial dealings.

Although some bright spots in the legal framework for business were identified, such as adherence to recent international agreements and institutions regarding intellectual property, openness to cross-border trade, and recent improvement in ease of obtaining credit (except for traditionally disfavored groups such

[32] Much of the evidence for this section is based on meetings with the director and members of the faculty selection committee of the National Law University in Islamabad, as well as with faculty and administrators Lahore University of Management Science (LUMS) and review of ADB documents.

[33] Business Climate Legal and Institutional Reform (BIZCLIR), *Pakistan's Agenda for Action: Interim Report* (March 2008)

as women), major obstacles to doing business in Pakistan were also emphasized. These included the following:

- difficulty of securing clear title to real property (discussed in this report infra);
- poor mechanisms for enforcing contracts, including almost invariable need to secure court enforcement; and
- complicated and often corrupt licensing processes.

The role of employment law was depicted as more complex: many labor laws exist and are highly restrictive, but their impact is diminished because they apply to a relatively slight portion of the total Pakistani work force.

Leadership in the use of alternative dispute resolution (ADR), principally arbitration, has been centered thus far in the nation's commercial hub, Karachi, in Sindh province. In an effort to provide a strong alternative to the frequent use in commercial dealings of international arbitration structures usually located in Europe or North America, the High Court of Sindh has shown leadership in this area by sponsoring the expansion of activity by the Karachi Centre for Dispute Resolution (KCDR) to include mediation in cases referred to the centre by the court. This organization, supported in its startup phase by the International Finance Corporation of the World Bank Group, is organized on a not-for-profit basis. Owing to the presence on its board of former superior court judges, including a former Chief Justice of Pakistan, as well as important business figures, the KCDR has garnered credibility.

Many proposals were suggested during the team's meetings with retired judges of the superior judiciary and leading lawyers. Support for alternative dispute resolution was notable. In Lahore, for example, one former High Court chief justice as well as several leading members of the bar firmly supported the use of this approach, as well as another senior member of the bar and member of the national Senate. Support was also evidenced, especially among commercial legal practitioners, for effective land registration, simplification of court procedure (such as enabling parties to file written affidavits instead of going through lengthy processes to submit evidence), and for use of the fundamentals of good case flow management. Raising judicial salaries, improving judicial training in commercial law, and providing the bar with computers and better law libraries were other steps recommended to improve the ability of the courts to resolve commercial matters more speedily and effectively.

Improvement in what might be called the legal materials infrastructure was also mentioned as a major need. This includes making important commercial decisions available more broadly and quickly, development of authoritative legal journals for comment on court rulings, and establishing a reliable automated system for lawyers to use in checking on the subsequent citation by courts of major rulings. The bar appears to be aware that these improvements have been proceeding at a relatively fast pace in India; thus there is more interest and awareness of the need to effect these changes, as lawyers in Pakistan are already accustomed to looking to Indian law and cases for persuasive authority. Such changes would be useful to the legal profession and justice system more broadly, beyond commercial law.

PART III. OPPORTUNITIES FOR REFORM LEADERSHIP

A critical ingredient for progress in advancing the rule of law is the leadership of key actors, both within and outside the justice system. Throughout most of its history, the judiciary in Pakistan has been kept weak and under-resourced, enabling pressure and manipulation by a variety of actors from the local to the national levels. The resources flowing to the justice system have increased significantly since the start of the Asian Development Bank program in 2002 — overall budgets for the judiciary in the largest province,

Punjab, for example, have more than doubled since then. However, this influx does not seem to have translated into significant or change in the performance of the justice system nationally. Although certain provinces, particularly NWFP, have made some progress in such areas as delay reduction, many of the policy and legal changes advanced by the ADB, by civil society and by the judicial leadership itself, have not been fully implemented (see Part IV for an analysis of the ADB initiatives).[34] Some of this absence of progress can be attributed to low capacity to plan and implement reforms, especially since the ADB program provided limited technical assistance or training. In large part, however, this absence of follow-up is almost certainly the result of active or passive resistance on the part of political and judicial actors who prefer to maintain the status quo rather than see an empowered and independent justice system.

Our analysis nonetheless suggests that despite predictable resistance from many sides, there is considerable potential for leadership to emerge to move the justice sector reform agenda to the next phase. This potential is fueled by the considerable public demand for improved justice that has heightened during the recent judicial crisis, by the success of the ADB program in building interest within the system in trying new approaches, and by incentives among some key actors to make visible improvements in the system. While the current judicial crisis may have slowed down incipient reform efforts, it has also generated a renewed focus and interest among previously polarized actors in the need for a more independent and effective judicial system. By providing exposure to various approaches and building consensus among these stakeholders on the way forward, USG assistance may be able to nurture this emerging leadership and provide critical tools for translating latent demand into a more sustained movement for improvement.

While obstacles remain within most groups to altering the status quo and moving toward a more effective and independent justice system, significant entry points do exist. At the national-level, 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 profession more broadly. Most of the political parties have expressed strong support for a more effective and independent judiciary. There is a strong interest among many business leaders in a more effective and efficient justice system that can enforce contracts and enable the collection of debts. Addressing issues that are of primary concern to these leaders, such as reducing case delay through technical fixes, improving the state of legal education, and expanding legal aid, could build their support and strengthen their engagement on more systemic reforms. Engaging on these issues can also serve as an entry point to build consensus among these actors on key priorities cooperation and moving forward on reform.

At the provincial level, there seems to be even greater opportunities for progress. In NWFP, and to a lesser extent Sindh and Balochistan, there have already been successful attempts at using ADB resources to improve performance and reduce case backlog. The NWFP government, for example, has supported initiatives of the High Court to improve judicial performance, and has increased the number of judges and staff allocated to the judiciary. In Punjab there seems to be a growing consensus in the political leadership on the need to move forward on judicial reform. Since the justice system is largely managed at the provincial level, engaging at this level has the greatest potential to result in visible improvements on specific reform initiatives.

Finally, an entry point exists in the overwhelming demand by citizens for access to basic services, improved order and security, and protection of human rights. Achieving tangible progress in improving the responsiveness and efficiency of the judiciary and police, and strengthening oversight over both would address a key concern of citizens who have little confidence in the existing system. For example,

[34] It should be noted that ADB reports appear limited to reporting the degree of compliance with required policy actions. The ADB program was in many ways one of policy conditionality based budget support.

human rights abuses are more a function of the lack of oversight by courts over the police, and the weakness of the police, which often rely on coerced confession since they do not have the capacity to conduct meaningful investigations[35]. Supporting civil society organizations that are fighting for the protection of basic rights, in partnership with the media, can help channel this demand toward greater pressure on government authorities to invest in more effective justice and to exercise greater oversight over the police and security forces. These organizations could also provide valuable services themselves, by expanding access to legal aid and advice, taking on cases of human rights abuse, and helping citizens to navigate through the legal system. Such initiatives would both increase pressure on the justice system to function, and provide a valuable and much needed service to citizens.

PART IV. REVIEW OF JUDICIAL REFORM EFFORTS

Asian Development Bank Access to Justice Program:

Original design.

The $350 million Asian Development Bank (ADB)-funded Access to Justice Project (AJP)—the largest in the world for justice sector reform and mostly funded in the form of a loan—officially began with agreement of the Government of Pakistan in 2001 and is scheduled to end in mid-2008. To determine what kind of Rule of Law programs will most benefit Pakistan and how to design them at this critical juncture in its history—the start of return to civil government brought on by public resistance to the military's interference with judicial independence—requires careful review of the AJP.

The AJP was preceded by a Strengthening of Judicial Capacity (SJC) project, also ADB-funded through a technical assistance grant. This pre-project piloted an agenda of priority reforms in judicial training, improved court performance, an expanded coordinative role for what is now the Law and Justice Commission (LJC), court computerization, delay reduction in a small select number of both High and Subordinate Courts, improving access to justice through provision of materials, law reform, and support for legal education.

The Access to Justice Program proper—actually Phase III—began in 2003 after review of the findings and results of the SJC project. Provision of funds occurred in several installments, referred to by the banking term "tranches", as release of each installment was preceded by satisfaction on the ADB's part with Pakistan's compliance with a series of policy actions required for payment of each installment. By December 2004, $250 million had been released. By May 2008, only $30 million of the $350 million total had not yet been committed.

The largest part of the funding by far was Program Assistance, to be "used to address the chronic under-resourcing of the justice sector through infrastructure and other capital intensive needs." Most of this largest portion of the loan was indeed spent on infrastructure: court facilities improvements, purchase of equipment such as computers, vehicles, and air conditioning. $25 million of this portion, however, was used to endow an Access to Justice Development Fund (AJDF), which was intended to provide about $1 million annually in income to support improvement incentives. Lastly, there was a $20 million component of Technical Assistance to support "soft reforms" including delay reduction, legal empowerment, police and public safety, administrative justice, and fiscal reform.

[35] Information on Human Rights was drawn primarily from other human rights reporting, namely the Pakistan Human Rights Commission annual report – a credible Pakistani human rights organization, and the International Crisis Group.

When the AJP is dissected into these components, the Technical Assistance segment of $20 million over 5+ years can be seen as more closely resembling a multiyear USAID Rule of Law Program. The $330 million Program Assistance portion provided the equivalent of a capital budget for the Pakistan justice sector, which had been historically underfunded. The pre-AJP SJC project fulfilled the need for a feasibility as well as diagnostic study that lasted long enough to pilot several programs and produce some significant outcomes itself.

Diagnostic stage.

The SJC ran past its original 2002 deadline because internal disruptions in Pakistan occasioned some suspensions in work by consultants and because governmental units required added time to comply with the policy actions. By its end, the project had both diagnosed needs and begun to respond to some of them. The following needs were identified during the SJC period. We discuss the impact of the program in greater detail in subsequent sections of this report.

1. *Judicial Training*. In addition to a multitude of conferences, seminars, and workshops for judges, the first bench book for judges was produced, and study tours to common-law countries conducted. The project noted the need for strengthening of the Federal Judicial Academy to provide induction and continuing training. The FJA operates a modest program, mainly devoted to short-term training of new judges, at its building in Islamabad. It appears to be organized primarily to train judges, not other justice system components. There are curricula for some of its courses. It is not currently geared toward becoming a source of continuing judicial education in Pakistan. This is evidenced by the actions of three of the four provinces (Sindh, Punjab, and NWFP) to organize their own judicial training academies—partly so their judges need not travel all the way to Islamabad, but also because they do not feel the FJA is meeting the need.

2. *Court Performance*. Work in this component concentrated on improving statistical systems. The need for better and more transparent management information, budget allocation, and compensation and incentives systems was stressed.

3. *Law and Justice Commission*. The LJC was selected to administer the AJDF, along with the Ministry of Law, Justice, and Parliamentary Affairs.

4. *Court Inspections*. The project also organized the Member Inspection Teams of High Court judges to monitor performance in the lower courts.

5. *Computerization*. The project found a need and designed a blueprint for 1,100 computers in the superior courts and other agencies such as the LJC and FJA, along with tailored software, which was designed and piloted. Need for computers in subordinate courts was noted but put off to be "assessed and addressed…in due course…"

6. *Delay Reduction*. Using delay reduction and caseflow management techniques, pilot subordinate court judges in three provinces increased case dispositions in eight months by almost 250% and reduced backlog by more than 30%. The main pilot courts were the District Court of East Karachi in Sindh and the Peshawar High Court in NWFP. This loomed as the most promising aspect of this SJC project but despite reporting that "[t]hese initiatives have now been expanded to all courts…," true rollout was far more limited.

7. *Improving Access*. Pamphlets were produced and a law dictionary translation was completed. Some gender equality initiatives were undertaken. Plans were developed for the Citizens-Courts Liaison groups and Ombudsman Reform.

8. *Legal Education*. Seed grants were given to colleges for programs and bar libraries were augmented.

9. *Law Reform*. Statutory reforms were initiated, including the introduction of a Freedom of Information Act, expansion of the LJC's authority, and reform of contempt and defamation laws.

How It Played Out

ADB established a Project Management Unit (PMU) within the Ministry of Law, Human Rights, and Justice. The bank also retained through its Pakistan Resident Mission (PRM) a close involvement in approval of individual projects to be funded through AJP. Organizationally, this slowed release of funds to both Implementing Agencies (IAs) and ultimate users, even beyond the phased installment release of the loan tranches to Pakistan. Bank officials advised us that the government systems in Pakistan were more used to infrastructure program funding but were not set up to deal with the "soft side" of reform programming nor was there much capacity within the judiciary to conceive these requests.

The bank measured progress according to its 64 required policy actions. Many of these required announcement of policies, enactment of legislation, or establishment of certain structures, tribunals, or panels. Several performance reports carefully document the full or substantial compliance with these requirements. Because the bulk of these "actions" were process-oriented rather than outcome-focused, it is difficult to gain a clear picture from the ADB's own reports as to how the project truly performed.

The ADB and the PMU both involved themselves in several stages of review for each proposal for funding. Some major changes occurred when they recognized that the LJC had proven incapable of administering the AJDF funding: these resulted in devolution of more authority to the provincial project management units in the four High Courts. Indicative of the LJC's limited capability was its immediate conversion of the AJDF assets into Pakistan rupees during a period of steady decline in value of the local currency.

Most critically, the structure of the project ignored the need for direct involvement of the judiciary in managing the AJP. Nor were the various bar associations and official Bar Councils apparently involved. The Law and Justice Commission is part of the judiciary and did play a role but there was never a clear commitment to the project by the judicial leadership of Pakistan. Eventually, much funding authority was devolved to the High Court level, but this came late in the history of the project. Several heads of the PMU were unsuccessful in moving funds to implementers; finally, the current head assumed the position to fill expedite the program.

Exemplary of the ADB focus on policy announcements or law proposals was noting the laws passed to provide for citizen-court liaison committees and bench-bar liaison committees, along with the public safety and police-citizen units. We received reports that where many of these committees were organized, they were given few resources or political weight; local "power brokers" dominated them or did not function to any significant extent. The AJP did little to organize, monitor or assist these committees to fully fulfill their role. A more successful effort would have entailed a greater commitment by national and provincial governments to implement these committees, technical assistance to ensure their functioning, and greater outreach to key stakeholders on how to work with them.

Reviewing Results

1. Accomplishments

This review of the AJP program will be followed by an analysis of the possible opportunities for USAID engagement emerging from the AJP experience.

Reduction of delay in Peshawar High Court, some NWFP Subordinate Courts, and some Sindh Subordinate Courts: One province, the North West Frontier Province, had participated in the AJP from its earliest days and continued its commitment through several Chief Justices of its High Court. The courts here added 100 more judges and 1,300 staff, managed to transfer the cost into the regular courts budget, and reduced the time cases take from start to finish on appeal ("pendency").[36]

Member Inspection Teams (MITs) in High Courts: A team of High Court justices were responsible in each province for evaluating the performance of the Subordinate courts within the province and recommending improvements. These teams have reportedly had significant impact toward improved operations.

Organization of independent prosecution services: The project initiated a program to replace police prosecutors but although the offices have been organized, they were staffed by inexperienced counsel and do not offer sufficient compensation to attract quality lawyers.

Initiation of National Law University program: An AJP policy action was the founding of a national law university to provide a needed high-quality institution to offer an alternative to rote-teaching law schools and mushrooming private law schools. The new university is moving toward opening three campuses but is having difficulty attracting faculty as the number of excellent legal scholars and teachers in Pakistan is limited and leading members of the bar cannot be adequately compensated to induce interest.

Passage of consumer protection laws and FOIA: Through the Law Ministry, the AJP helped enact a series of useful consumer protection laws and a Freedom of Information Act.

Creation of National Judicial Policy Making Committee: This adjunct of the LJC serves as the focus of Pakistani judicial leadership with all five Chief Justices as members.

Increase in judges and women judges. The AJP sponsored increases in judgeships, especially in NWFP, from about 1,700 judges nationally to almost 2,000. The number of women judges was doubled from 85 to 171.

Infrastructure: The bulk of the AJP loan was spent on improving court facilities, viz., court buildings, as well as purchasing computers and other equipment, judicial residences, and automobiles. Although there clearly were unwise expenditures, it appears the bulk of the funding was spent for these intended purposes.

2. Shortcomings

Insufficient or delayed effort made to improve conditions of Subordinate Court judges and personnel: Many of the resources for equipment, refurbishment and renovation remained in the High Courts level. The lower courts did receive a discrete number of computers (rarely more than one per

[36] A more detailed design study would develop a case study of the NWFP experience under the AJP, which would include issues associated with budgeting and personnel recruitment policies and practices.

courtroom/chambers), but their facilities generally remain primitive, often dependent on manual typewriters. Some results of the investment in physical facilities are beginning to be observable, especially the large new Subordinate Court complex under construction in Lahore, and reportedly in many other locations.

Failure to monitor activity of civil society groups, such as public safety and police-citizen liaison committees: In many places, local powers managed to retain control of these bodies despite the intent to insure representation of different groups of citizens.

Limited action to reduce delay except for mandating commercial High Court benches and no rollout of earlier District Court caseflow management success stories except for NWFP: Early successes were not replicated except in NWFP and with some commercial cases assigned to special groups of judges in some High Courts. Many changes were proposed in a Law Reforms Bill, 2005, which was enacted by the National Assembly but not the Senate (see L&JC, Report No. 69, 2004-05).

Lack of FOIA in two largest provinces: Punjab and Sindh did not follow through on this policy action.

Review team was made up only of ADB and PMU personnel: Absence of "outside" reviewers is emphasized by focus on adoption of policy actions precedent to release of loan funds rather than looking at what actually was accomplished on the ground.

Failure to complete amendment of statutes needed to improve procedures in the Law Reforms Bill, 2005, which also would have repealed the inadequate 1940 Arbitration Act: The omnibus reform bill only managed to pass one house of the legislature, so necessary procedural reforms have been stalled. The old unwieldy colonial Arbitration statute has been replaced elsewhere in South Asia.

Inadequate provision of judicial training both at induction and continuing stages: The FJA has limited capability in its existing faculty and it plays a limited role in training new judges, with no role in continuing education. As discussed, the provinces have responded by organizing their own academies.

Failure to increase judicial resources (number of judges): Except for NWFP, needed judges were not provided by the government,

Failure to resolve problems in police investigation procedures and to eliminate use of torture: Police tend to concentrate on their First Investigation Report (FIR) and then reportedly lose interest or at least give the case lower priority, despite having arrested someone well before ostensibly completing the investigation. Judges place excessive emphasis on this FIR.

Problems of processing land cases: (need for proof, no title or registration/recording systems, fake entries, speed need, etc) and failure to enforce contracts effectively.

Mushroom growth of new lawyers nor absorbable: Bar Councils or courts have not been aided to regulate the growth of inferior educational institutions turning out excessive numbers of lawyers.

3. Opportunities for Improvements after the AJP Project

The AJP Project's major legacy may be the opportunities that exist to build on what were often limited accomplishments during the conduct of the project itself. These openings for further, and in some instances, major progress include the following:

Delay reduction. The early AJP-supported success in both NWFP and some Karachi courts showed that serious dedication to reduction in case delay is achievable in Pakistan. Interest in moving ahead in this area was clearly evidenced in NWFP, and now has been observed in the Punjab.

Budgeting and planning. The introduction of the Medium-Term Budgetary Framework (MTBF) has not resulted in any significant immediate gains but provides, along with some of the improved statistical processes introduced during the AJP, a good basis for conducting true strategic planning and directly related budgeting for the judiciary. These critical functions are much more likely to be implemented in the judiciary if the judicial leadership—national and provincial—is directly involved this time.

Subordinate court improvement. The successful implementation of the High Court Member Inspection Teams (MITs) offers some detailed findings that can be used to design targeted improvement programs in these courts, which remain under-resourced even after the pay improvements and the infrastructure investment achieved during the AJP. The infrastructure investment is starting to reach a significant level in terms of new or improved facilities. Overall reform of these courts is a long-term project, but acquiring new facilities is a step in the right direction of improving their status.

Prosecution development. While many of those whom the team interviewed commented unfavorably on the new prosecution service established under the AJP, its establishment provides a structure onto which significant improvement in staffing, quality, and effectiveness may be built.

Judicial training and legal education. The startup and growth of provincial judicial training academies during the AJP provides a basis for assisting in improved judicial training even though strong intervention by national judicial leadership will be needed to effect growth in the Federal Judicial Training Academy's role and performance. The AJP spurred the development of the National Law University as a "center of excellence" in legal education. It is not yet clear whether this highly ambitious effort to organize three, and later a total of five, campuses will prove successful. The existing concept of "centers of excellence" in academe, however, should be utilized to assist promising legal education programs.

Law reform. Many procedural improvements and other needed legal reforms were contained in the AJP-sponsored Law Reforms Bill, 2005, that only was passed by one house in the then-PML-Q-dominated legislature. The support now of the Ministry of Law, Justice, and Parliamentary Affairs and a vastly changed political climate may make it possible to enact many of the needed legal changes contained in that proposal. Fashioning a bill that has the support of the government through the Ministry is making the likelihood of passage much improved from the last attempt. The conditionality required under the ADB loan prompted many formal changes for the better; but actual implementation with impact and results is still lacking.

Donor Assistance Programs

Outside of the ADB program, there have been a few smaller-scale and targeted activities funded by bilateral and multilateral donors:

- The UK, through DFID, has provided funding within the context of the ADB program, including supplementing the Access to Justice and Development Fund, and small-scale programs like funding the Punjab Police website.
- The Canadian government, through CIDA, has provided ongoing support to the Federal Judicial Academy.

A number of donors have funded human rights and gender rights programs, working primarily with local NGOs and academic institutions:

- The UNDP Gender Support Program has focused on strengthening traditional dispute resolution mechanisms to ensure gender justice in NWFP and Punjab. This program has worked with civil society and universities to train the "Conciliation Councils" (*Masaliat Anjuman* and *Masaliat Jirga)* that were legally recognized under the 2001 Local Governance Ordinance, to sensitize their members to the legal rights of women.
- The Swiss Government has also funded a Pakistani NGO, *Shirkat Ga*, for training paralegals to provide consultations and referrals, and funding legal services for women to protect their legal rights.
- The Swiss and Norwegian governments have funded a number of other targeted human rights programs, including programs to combat child labor (with the ILO), child trafficking and prostitution (with UNICEF) and to improve juvenile justice.
- The Norwegian government has funded the Pakistan Human Rights Commission, and supported human rights training for the police.
- A project of interest to the justice sector is a pilot program funded by the World Bank focusing on land registration in targeted districts of the Punjab, which is aimed at making existing records more transparent and facilitate the adjudication of claims.

With the ADB program coming to a close, a number of bilateral donors are considering further engagement in the justice sector. The European Commission conducted an assessment in late 2007, and has set aside up to 8 million Euros for access to justice programs in the coming years. DFID, CIDA and the Dutch Government are also considering more limited support in the sector, in partnership with other donors or multilateral bank programs. Prior to engaging, however, most donors are waiting for the outcome of the judicial crisis, and looking to the ADB and its decision on whether it will continue to work in this sector. Most crucially, donors are waiting for a clear sign from the Pakistani government that it is interested in making progress in the justice sector – beyond the reinstatement of the judges to addressing more systemic issues – before making any substantial commitment to engage.

USG Programs

Although USAID has not been involved in the justice sector, a number of other programs are highly relevant, and could complement USAID and other U.S. government efforts in this area:

- USAID has funded a **Legislative Strengthening program** for several years. Currently implemented by DAI, this program has been providing orientation courses for members of the new National and Provincial Assemblies, strengthening targeted committees by supporting committee hearings and access to research, and working toward the creation of an Institute for Parliamentary Studies to provide ongoing technical support for assembly members and staff. Since one of the targeted committees will be the Law and Justice Committee, this program could have a complimentary effect on building awareness among Assembly Members regarding justice sector reform issues, and supporting the drafting, amendment and review of key laws.
- Another relevant program is the **Elections Support program**, currently implemented by IFES. In addition to strengthening the Federal Election Commission, IFES has been focusing on strengthening and monitoring the electoral complaint and adjudication process, which is largely conducted by the judiciary. IFES is producing an in depth analysis of the judicial process as it relates to electoral complaints, which will provide invaluable baseline information for any judicial strengthening efforts
- USAID is also supporting the **Districts that Work program**, a decentralization and local governance program implemented by the Urban Institute. This program is supporting a comprehensive review of national, provincial and local authorities to inform the possible revision of the 2001 Local Government Ordinance. This review may include authorities relevant to the justice system, particularly for police. The program also supports citizen participation and

capacity-building activities at the district and *thesil* levels, which could be a useful complement to any USAID justice sector activities at the district level. In the economic growth area, USAID has supported trade capacity-building activities, working with sector working groups to help make key industries more competitive for export.

- The Asia Foundation Pakistan has several projects underway that relate to Rule of Law issues, including the Consumer Rights Commission, the Hudood Impact on Women study, and the work of the Noor Education Trust which promotes advocacy on trafficking of women issues.

The State Department Bureau for International Narcotics and Law Enforcement (S/INL) has been funding a number of programs related to police and prosecution.

- A program implemented by the Department of Justice's International Criminal Investigations and Training Program (ICITAP) has provided training to hundreds of mid-level and senior-level police officers, in topics ranging from investigations, to leadership and management, to specialized topics like disorder management.
- ICITAP has also been developing and automated fingerprint system.
- Its current program will provide technical advisors to focus on training academy-development, investigations training, and management improvements.
- In addition, the Department of Justice's Overseas Prosecutorial Development Assistance and Training program (OPDAT) has maintained a Regional Legal Advisor, who has conducted trainings for prosecutors on specialized areas of the law such as counter-terrorism, narcotics and financial crimes.

PART V. STRATEGY AND RECOMMENDATIONS

The key challenge highlighted by this report is the lack of public confidence in the justice system which undermines rule of law and contributes to rising violence. As outlined above, this lack of confidence is driven by a number of factors, from the perceived foreign origin of the system relative to Islamic law and traditional dispute resolution systems, to perceptions of corruption and political manipulation at all levels of the justice system, to the rising crime and insecurity that the justice system seems unable to address, and finally high case delays which hinder access to justice and prevent citizens from using the justice system to address issues of concern. All of these challenges are underpinned by low capacity and professional standards among most actors in the system.

Not all of these challenges should or could be addressed by USAID assistance. Indeed, the recent actions by the Supreme Court have bolstered popular respect for the judiciary and its independence, and depending on the outcome of the judicial crisis at the political level, may create an opening for other systemic issues to be addressed. Some of these areas, including improving judicial capacity and professional standards, reducing case delay, and expanding access to justice, are areas where USAID has considerable experience. Developing a strategy for USAID assistance in this area requires considering several factors, including political scenarios and entry points created by political will or past assistance efforts, to determine principles of assistance that will result in a sustained impact. The following section will outline these key considerations, prior to an elaboration of a strategic approach in the final section.

A. Determinants of a USAID Strategy: Entry Points and Guiding Principles

There is a long history of reform efforts, most of which have made little impact on the actual implementation of the rule of law in Pakistan. This history is replete with study tours, conferences,

seminars, reports, recommendations, and even reform focused policies, laws and ordinances. Knowledgeable Pakistanis know very well the strengths and weaknesses of their judicial system, but seem to find it difficult to move beyond recommendations to actual institutional and behavioral change. As USAID moves into this arena, a 'demonstration based approach' offers the most sensible strategy. USAID must be, cautious, modest in its expectations, well focused on achievable results, and always, always have an exit strategy in place if things do not go well. The assessment team offers the following guiding principals for the USAID strategy.

An effective strategy for engagement should consider several factors, while building on entry points and prior experience to ensure sustained impact. Key considerations include:

- ***Judges' crisis***. The forced departure of over 60 judges from the Higher Judiciary in November 2007 has had a detrimental effect on the potential for reform leadership, created a drag on judicial efficiency, and exacerbated divisions and polarization among the bench, the bar and civil society. Until the judges are reinstated, assistance efforts are unlikely to have a sustained impact on the performance of the judiciary.

- ***Build on prior assistance efforts***. The Asian Development Program (ADB) funded substantial infrastructure upgrading, but improvements in performance were more limited. This experience has generated valuable lessons, including the need to involve all major stakeholders in assistance efforts, including the judiciary, the Bar and the government. The ADB also created openings for further assistance, in sparking widespread interest in reforms, and in preparing the ground in such key areas as delay reduction, monitoring, evaluation and budget planning in the courts, the national law university, and the new prosecution service.

- ***Coordinate with ongoing efforts.*** Assistance should complement other USG and donor efforts, including the USAID elections, local governance and legislative strengthening program, which could help move key laws toward adoption. The U.S. Department of Justice is managing police and prosecutorial training programs. UNDP is supporting a program improving the responsiveness of traditional dispute resolution mechanisms to gender concerns. Other donors, notably the EU, are formulating plans for engagement in the sector. USAID programming should seek to coordinate with these programs in specific provinces and districts.

- ***Primary focus at the Provincial Level.*** Since most cases, as well as delays, inefficiencies, corruption, and frustration to citizens occur at the provincial level, it is at this level that tangible progress is most likely. Certain provinces, notably NWFP, have already demonstrated their commitment to move forward. Secondary focus should be at the Federal level, where the Law and Justice Commission, the Judicial Policymaking Committee, the Supreme Court and the Federal Law Ministry all play a role in leading and implementing reforms. These national institutions should be engaged to ensure sustained impact.

- ***Identify and support potential reformers*** at all levels and from all functional elements of the Pakistan judicial system. There is interest and demand among civil society, legal professionals, and political leaders to address the key issues obstructing access to justice. Building on and expanding coalitions and networks of reformers and building partnership with reformers in the judicial system, the legal community, in the political parties, parliament and civil society will be crucial to translating this demand into action.

- ***Find entry points with the greatest potential for forward and backward linkages***. Not every problem can be solved, or should be by a foreign assistance program. By using assistance to build capacity and

develop solutions with Pakistani reformers focused on key structural constraints that can benefit from foreign assistance, other weaknesses will begin to be corrected as well.

B. Strategic Approach: Goal, Sequencing and Supporting Objectives

The suggested strategic goal of the USG program is:

A Pakistani Judicial System which has demonstrated measurable progress in increasing public confidence and support for the establishment of a Rule of Law according to international standards.

There are three broad causal hypotheses that will guide the identification of specific USAID tactics and activities. Tactics and activities create the causal momentum, which can realize the achievement of the overall goal of a Rule of Law in Pakistan.

Hypothesis 1: *Assisting the Government of Pakistan to make quick and measurable progress in this area will, with some allowance for inevitable skepticism and lags in any general shift in public opinion, demonstrate to the Pakistan people that Government is serious about its commitment to reform. As the Judicial System improves in providing and executing efficient, fair, and honest procedures and decisions, public confidence in the legitimacy of the system will increase.*

It is critical to the success of this strategy that the Government demonstrates immediate improvements to the Judicial System at the lowest levels of the system. It is at this level that most Pakistanis experience the weaknesses described in this report, and it is at this level that visible changes need to be made and made as quickly as possible. We propose a three phased approach for USAID assistance in the next section of this report.

Hypothesis 2: *Government's commitment to Rule of Law will be sustainable only if structural problems identified in this report are addressed.*

This report has identified a wide range of deficiencies and constraints, which have historically prevented the effective implementation of otherwise well meaning past efforts to reform the judicial system. Nearly every entry point into the system, from the training of young lawyers and judges, to the appointment of Supreme Court judges has been found to have serious defects, a conclusion reached not only by this assessment, but by 13 previous Pakistani judicial reform commissions and the ADB Access to Justice program. Unless the Pakistan government addresses these structural problems, 'quick fixes' will not be sustainable, and the Pakistani public will revert back to cynicism and distrust, damaging still further their faith in a Pakistani Rule of Law.

Building on the momentum created by both political events and the work of the ADB/AJP program, USAID's strategy will be to address carefully selected structural defects that have significant forward and backward linkages to other constraints. The concern is not to attempt to engage with all the issues, but to select those that can leverage change in other dimensions, and which have a serious commitment from government and judicial leadership.

Hypothesis 3: *A commitment to and working cooperation about the need for reform among elected federal and provincial government leaders, judicial leaders, the activists in the Pakistani Bar Associations, and principle Human Rights NGOs, will be a critical element in the successful implementation of both immediate and structural reform measures.*

This report has identified the principal stakeholders that must be engaged in supporting any reform effort. If taken seriously, reform will be controversial, contentious, and will threaten many vested interests which benefit from the present stagnant and often oppressive judicial system. The widest possible political base must be found and nurtured to advocate for reform, and to support those in positions of authority who must act to decide and implement on reform measures.

USAID cannot become an active element in the political arrangements of Pakistan for obvious reasons. It does have a responsibility to use its public resources wisely to support those Pakistanis who will advocate and take leadership in a reform effort. USAID's strategy in this regard will be to identify, support, and encourage reform elements at all levels and all parts of the judicial system and among civil society. It will assist those elements to build coalitions and networks of support, to educate and inform members of the larger Pakistani society as to their rights and obligations, but also about the reform program underway.

Strategic Sequencing

Given the uncertain conditions in Pakistan, the many failed reform efforts, the complexity of the constitutional and legislative framework, and the degree of public frustration and disaffection from the Rule of Law in Pakistan, it is essential that USAID take a measured and demonstration based approach to implementing its Rule of Law program, especially in the first phase. This means setting priorities and sequencing inputs in phases, conducting periodic evaluation reviews and making adjustments as needed. It is important to have sufficient flexibility to accelerate the strategy when there is momentum, opportunity and funding, and to contract or exit if contextual conditions deteriorate.

Phase I: Demonstrating Government Commitment to Reform

Phase I supports Hypothesis I above, which basically says that government needs to demonstrate serious commitment to reform so that the Pakistani public will begin the long process of re-establishing trust and confidence in a Pakistani Rule of Law. It also begins the Hypothesis III process of building coalitions of support for reform. The approximate time line for demonstrating commitment will be 6 to 18 months from inception of the USAID ROL strategy.

This initial phase will focus on the following components necessary to achieving progress.

1. Identify Reformers

Although much is known about the problems hindering the development of a Rule of Law, less is known about the constraints and disincentives, which have blocked reform in the past. Equally important, USAID needs to identify potential reformers who may be willing to actively support reform. In this report, we have met a few such people in the government, the judiciary, the police, and the NGO community in a few areas. More needs to be done to develop a 'data bank' of Pakistani reformers before one can proceed with more ambitious investments. This may also be an opportunity to invest in short term empirical work similar to that funded by USAID/TAF in 2004, as cited in this report. Pakistan legal scholarship is long on normative and theoretical studies, but relatively weak in social scientific research on what actually goes on in the judicial system and in the interface with Pakistani citizens. The Assessment Team encountered considerable interest among Pakistanis to improve their own capacity to gather and analyze data on the justice system, particularly with the respect to the impact of the ADB program. Working with such institutions as the Law and Justice Commission to develop their capacity to gather and analyze data as a means to measure and manage performance could provide a significant impetus for reform. Reform supporters can be found among various NGO groups such as the Consumer Rights Commission, the Noor Foundation, Journalist Associations and others, as well as academic groups such as the LUMS Department of Law and Policy, and some Bar Associations.

2. Building coalitions of support

Using a combination of small grants, study tours, networking activities, and issue oriented workshops, USAID will identify more precisely the relevant stakeholders and potential reformers. Through its support, USAID will be signaling commitment to reform efforts among various Pakistani stakeholders, and will begin to form active coalitions of support (an informed political constituency) for advocating and implementing necessary reforms. USAID will also gain a better understanding of actual constraints, disincentives, and those elements with a vested interest in maintaining the status quo.

3. Demonstrating Government commitment to reform

USAID should encourage the Ministry of Law and Justice and Provincial Judicial leaders to work together to support immediate activities to address some of the most pressing issues of judicial mal-functioning. Nearly everyone agrees that "delay reduction" is near the top of everyone's list. Another area where fairly quick demonstrations of commitment can be made is in lowering access barriers by establishing night courts, strengthening the effectiveness of ADR as part of the judicial process, and expanding legal aid and other means for citizens to access the justice system to resolve issues of concern. To the extent possible, the USAID strategy will build on the groundwork and opportunities already identified through ADB/AJP project.

4. Assisting Government to rationalize and modernize the legislative framework

The ROL Assessment did not systematically analyze the body of laws and ordinances that make up the Pakistan legal framework. However, the team's review indicates that redundancies, contradictions, complexities, and out of date procedural practices abound, and contribute to the delays, inefficiencies and failures of the judicial system. There has been much analysis of specific bodies of law by the Law and Justice Commission, and by some legal scholars, and some attempts at addressing deficiencies, most notably through the Law Reform Bill (which was not passed by the Senate), but no successful legislative reform. USAID already has in place a legislative strengthening project, which might be charged with the analysis and identification of those legislative reform opportunities where the Government and legislators might be interested in receiving USAID technical assistance to help draft, revise and/or move legislation to adoption. Because of the immensity of the problem, USAID would need to be selective if it expects to support actions that demonstrate government commitment to reform. USAID should focus on areas in which the ***successful implementation of other reforms that can contribute to greater public confidence***, such as re-energizing the process of police professionalism and accountability or reducing delay, requires legislative and/or regulatory changes as part of the reform process.

Phase II: Upgrading Judicial System Capacity and Citizen Access to Justice

Although USAID support activities for capacity building may begin in Phase I, Phase II will accelerate these efforts in several key areas. High on the priority will be to move beyond the testing phase for delay reduction, with the strategic objective of achieving significant reductions in 80 percent of the district and sessions and the appellate courts for one province, in this case NWFP. Another priority in Phase II would be to expand a small grant program to focus on key areas of human and procedural rights awareness and protection, providing support to the development of monitoring programs, counseling programs, and demonstrating means for delivering legal counsel to indigent and vulnerable litigants and/or defendants. Although the Phase II development stage would begin in Phase I, expanded program support for key interventions will begin no later than 18 months and continue through year 4. A third priority will be to work with the NWFP Registrar on developing and rationalizing administrative systems, including development of a strategic plan for sustained court administration capacity, and working with the Deputy

Registrar responsible for preparing budgets and rationalizing the financial administration system whereby budget allocations begin to be driven by what is needed to sustain a reformed system.

Phase III. Improving the Quality and Capacity of Rule of Law practitioners

In the long run, the people who take on judicial system roles, including judges, lawyers, administrators, police officers, and Registrars, must receive better preparation in law schools, judicial training institutions, and through in service training programs. More rigorous testing and certification procedures are needed to ensure that those who enter the profession are suitably qualified, and the judges, prosecutors, administrators, lawyers and police who are already in the system should be subject to review and credentials re-validation based on performance evaluations. Consistent with improving quality and capacity is improvements in processes by which ethical standards are enforced, including sanctions and potential dismissal and/or debarment.

Phase III results will not be realized in the short term. However, a serious commitment to improving legal education and in service training for members of the judicial profession will send a signal that government is looking to the long term sustainability of Rule of Law reforms, which ultimately will rest on upgrading the professional skills and ethical standards of all elements of the legal profession.

Strategic Objectives

The Strategic Objectives and specific entry points/activities proposed below each has a direct relationship to the achievement of the Strategic Goal. The presentation of each objective is followed by major categories of possible entry points and activities each with a rationale and course of action. ***Where appropriate, activities are identified as producing USAID sponsored ROL results in Phase I, II or III as discussed above***.

Each of the objectives and suggested activities below would be supported *primarily* at the provincial level. The funding and management of the judicial system is primarily a provincial subject, with the federal government having concurrent, but limited authority. The team has identified the NWFP as the most promising area for initiating the strategy. Other provinces—the apparent interest and likely support in Punjab has been noted above—could be selected depending on the location of a possible ADB follow-on program, and the availability and magnitude of USAID budget resources.

It will also be necessary to engage the federal level, which has institutions which provides the final appellate and constitutional review functions for both common and Shari'a law, as well as important leadership, analysis, training and convening authority through institutions such as the Law and Justice Commission, the Judicial Council, and the Judicial Training Institute. The Ministry of Law and Justice has begun to take a leadership role under the new government and may also be an important partner with USAID in promoting reform.

The strategy envisions five broad *objectives*, which are causally linked to the Strategic Goal. The first three would be the primary domain of USAID's rule of law program. These are

1) Improving the capacity of the judicial system to deliver more accessible and higher quality justice.
2) Strengthening citizen legal awareness and access to legal advisory and representational services, and
3) Enhancing the quality of legal education and training.

Two additional objectives would be more appropriate for other USG agencies with USAID support, or for other USAID program areas such as Economic Growth. These are:

4) Strengthen capacity of law enforcement to function according to international standards, thereby improving protection of human rights and increasing citizen confidence in rule of law.
5) Clarify and improve Land Titling and Land Registration systems, thereby helping to reduce current case load for provincial courts.

Objective 1: Improving the Capacity of the Judicial System to Deliver more Accessible and Higher Quality Justice

This objective has three major components focused mainly on judges and other functionaries in the Pakistan Judicial System. The concentration will be at the provincial level, but will include engagement of four federal institutions; the Ministry of Law and Justice, the Supreme Court, the Law and Justice Commission, and the Federal Judicial Academy. Extensive consultation should be conducted with National Judicial Policy Making Committee, along with targeted support to its technical secretariat, to ensure its leadership and capacity to sustain key initiatives. This consultative stage is especially important, and the relationships developed during its initiation should make it possible to ensure continued involvement of USAID and its implementing partners. Past improvement efforts have foundered on the apparent inability of some institutions, such as the Law and Justice Commission and the Federal Judicial Academy, to assume the burdens involved. The Supreme Court and the NJPMC need to be involved early on, because the ADB experience demonstrated that the Ministry of Law could not take the lead on its own without the judicial leadership playing a major role.

1. Improve Case Management and other Administrative processes with emphasis on delay reduction, more efficient case management and information systems

Beginning with the pilot court efforts in 2002, Pakistan's courts have demonstrated that delay reduction is indeed possible. In addition to the continuing success in NWFP since then, as well as in some Sindh district courts, the backlogs of the High Courts and the Supreme Court have been reduced. There is some disagreement among the bench and bar as to how effective the reduction in cases pending has been, in that if cases are merely dismissed or not disposed of with proper judgments, they are likely to reappear on dockets or the parties will be discouraged from further reliance on the courts.

Phase I Activities: *Refocus attention on delay reduction*. Delay reduction—having been shown to work in Pakistan—is an achievable objective. Many steps needed to be adopted in improving and simplifying procedures have been comprehensively presented in a report by the L&JC, *Expediting Trial Proceedings*, Report No. 60, 2003-04. It is likely that based on previous successes—including use of tools such as the case jacket designed by District and Sessions Judge Sherwani in East Karachi which contains places for entry of pending dates in the case—work could begin in NWFP and then readily expanded to the other provinces.

Phase I Activities: *Use fast-track courts and night courts to reduce backlog and provide greater service to citizens*. Strong interest has been expressed by the Minister of Law in introducing greater citizen access to courts through such approaches fast-track courts and night courts. Although Pakistan has many specialized courts, including small causes courts, none have tended to provide greater access: the small causes courts have apparently proven only marginally useful. It will be necessary to plan the operations of these new courts carefully to avoid the shortcomings of previous efforts but in view of the still-extensive delays in many general courts, succeeding in providing speedier justice through these forums would give the judicial system some support for further and more wide-ranging efforts. These may be true short-term

solutions, in that in many places, judges, attorneys, witnesses, and even litigants have frequently resisted continued use of night courts.

Phase II Activities: *Re-examine case management to make changes recommended in L&JC report,* ***Expediting Trial Proceedings,*** *and to integrate use of automated information systems into case management process*. The activities described here build on the work done in Phase I, but move into the much more systemic problem of case management, the solution to which will require more time and investment. Clearly, more efficient case management is the key to producing lasting reduction in the time from filing to disposition (institution to disposition in the language of Pakistani courts) it takes to dispose of a case effectively. The delay reduction program should examine the current availability and quality of case management software in use in various courts. Although much computer equipment has been acquired, it is not clear that a case management application has actually been used. Most of the computers appear to be used purely for docketing rather than management information purposes. Rather than provide more computers—presumably the AJP was used to acquire as many as could be utilized effectively at least at that time—the focus should be on making effective use of the computers now in the courts through proper software and training.

2. Improve capacity of judicial system to analyze, project, and present persuasive budget submissions sufficient to finance judicial expansion and reform, and to develop more rigorous and accountable financial management systems

Phase II Activities: *Build on new MTBF budget system to increase support for Subordinate courts*. We suggest this as a Phase II activity, the shape of which will depend on first establishing understanding of and relationship with the current budget process, as well as some greater commitment by the government to undertake improvements. Some budget staff in the High Court Registrar's offices have been trained under the AJP to use MTBF (management by objectives) budget preparation techniques to include planning in the budget process. Provincial budgets are divided between fixed and variable sectors, known as "charged" and "voted". Despite ADB project funding—exemplified by a large new complex now under construction in Lahore for these courts—many Subordinate courts function in poorly-designed, overcrowded facilities, with minimal provision of equipment needed for efficient operations: the team observed these courts in operation in Lahore, Islamabad, Rawalpindi, and Peshawar. Support given to the Registrars and their budget staffs, which usually are headed by an Additional Registrar, can be focused on training the budget staff with the aim of improving their capacity to use the MTBF system for generating increased allocations to improve operating conditions in these courts.

3. Promote the development of judicial system linked Alternative Dispute Resolution mechanisms

Pakistan has had significant experience with alternative dispute resolution (ADR) processes—both traditional and modern. The *panchayat* and *jirga* systems still in common existence and use in rural and remote areas have their adherents, although as with many such traditional processes, discrimination against women and outsiders diminishes the attractiveness of the processes. More recently, commercial ADR has been encouraged in the country's commercial center, Karachi (in Sindh province) by the High Court of Sindh supporting, through referral of cases, a newly-organized private ADR program that now seeks to expand.

Phase I Activities*: Support expansion of commercial ADR program*. The Sindh program aims to expand both in locale—a new operation in Lahore for Punjab is planned—as well as in subject area, with plans to extend its coverage to family matters underway. This program has been sponsored until now by the International Finance Corporation unit of the World Bank. It is chaired by a well-regarded former Chief Justice of Pakistan and merits examination for possible support by USAID. It appears to offer an already successful approach to expansion of largely court-annexed ADR.

Phase II Activities: *Review ADR programs sponsored by NGOs and citizens group to determine which offer most positive likelihood for success.* Attention should also be given to citizens' groups and NGOs that have organized consumer-oriented dispute resolution systems. Some of these may serve as inexpensive models for other communities and NGOs.

Phase III Activities*: Initiate dialogue with Bar Associations to encourage lawyers to use ADR and to train them to provide ADR both as counsel and as neutrals.* The Bar Associations should also be included in development of effective ADR. First, it will be highly beneficial to encourage training of lawyers in use of ADR, both through Bar Associations and law schools. Second, in addition to training lawyers to use ADR in lieu of litigation, members of the bar should be trained in ADR skills as many may serve as highly-acceptable mediators or arbitrators. We encountered some lawyers in Lahore who were organizing a private dispute resolution operation—these kinds of efforts should be identified and the most promising considered for support.

4. Skill building for Judges, Prosecutors, Administrators, Bailiffs and Process Servers/Execution Agents

Major activities would include supporting efforts to develop a multi-track judicial training institutions by strengthening the Federal Judicial Academy to provide professional training/certification for entry-, mid-, and senior-level training and re-training programs through each career stage. Efforts to establish or upgrade judicial training academies in the provinces should be carefully monitored and supported as appropriate. An academy already exists in Sindh, one is planned for Punjab and for NWFP, and probably plans for Baluchistan are less advanced.

Phase I *Activities: Initiate judicial exchange/study tour programs:* It will be as important to initiate programs in the training area with well-planned judicial exchanges and study tours to appropriate court locations in the United States. In the past, during the AJP, Pakistani jurists traveled on study tours to Singapore, mainly so they could see a good example of an Asian nation operating a far more efficient and effective judicial system. Singapore remains something of an aberration in Asia because of its small geographic size and concentration; its courts are also not entirely free from government influence. Nevertheless, it does serve the purpose of extending the definition of good working systems beyond Europe and North America. There are obvious political hurdles involved in organizing visits to India, which has been making progress in a number of aspects of judicial improvement, especially in judicial education. Despite the obvious issues arising in proposing any contacts between Pakistan and India, it should be noted that the relationships, when permitted to develop, between Indian judges and lawyers and their Pakistani counterparts have been excellent, because of the recognition of their common legal heritage. Courts in Pakistan are usually responsive, for example, to citation of Indian judicial decisions by counsel. The team became aware, for example, of the plan in NWFP to make use of an NGO-sponsored program in women's legal rights that had been developed in India. The U.K. is also a possible destination, in that the Pakistani jurists may benefit from seeing how much legal as well as judicial administrative reform has occurred at the source of much of the current Pakistani system. Court administration has been thoroughly reformed in England in the past two decades; nor have civil and criminal procedure codes there remained un-replaced for more than a century, as has occurred in Pakistan. The aim of the exchanges (such as the well-known Russian-U.S. Judges program) is to increase the awareness of Pakistani judges at all levels with the kind of judicial independence with accountability that characterizes U.S. federal and state judicial systems. Some of the features of American court systems that should be emphasized are the "good behavior" life terms of federal and some state judges, the role of Supreme Courts and judicial councils in administering court systems, the role of professional court administrators at the federal, state, and municipal levels, the increasingly common practice in U.S. trial courts of scheduling the events in a case at an early date, and the willingness of U.S. judges to take

control of the case calendars from lawyers (in civil cases) and prosecutors (in criminal cases). Many U.S. courts can also serve to demonstrate advanced budget, personnel, and statistics functions. How automated information systems can assist courts in managing caseloads will also be gained during these study tours and exchanges.

Phase II Activities: *Conduct needs assessment and initiate training programs for judges, court administrators, prosecutors and public defenders*. Training for judges, prosecutors and court administrators, as well as public defenders (lawyers who participate in Bar or NGO-sponsored legal aid programs), should proceed along different tracks, based at this time on the relative needs of each group, all of which are at early stages in their development as well-trained components of the justice system in Pakistan. Prosecutors need to improve selection processes and enforce higher standards for being appointed.

Phase III Results*: Launch court administrator training and establish professional positions for administrators*. Court administrator training should follow the judicial study tours, which themselves should follow some demonstration of acceptance of the need for reform and clear progress toward achieving some improvements, and exchanges so that the judges who now control all operations in Pakistani courts become aware of the need for professionalization of court administration as has occurred throughout the world. France, for example, operates a special training academy for court clerks and administrators. Once judicial acceptance is secured and training has followed, the system will be able to convert some ostensibly administrative positions now filled by judges on judicial career paths into truly administrative professional positions.

Phase III Results*: Support provincial judicial training academies and the Federal Judicial Academy*: As noted above, support for the provincial academies should be keyed to work with them on training judges and court administrators for delay reduction and other problems discussed below. The strategy for strengthening the FJA and expanding its role should be devised through extensive consultations with the judicial leadership (NJPMC, Supreme Court, and Chief Justice), the FJA, and the Ministry of Law. The team learned from one NGO about an excellent training program in gender justice issues implemented by the national judicial training academy in India, drawing on work done at the University of Warwick in England. Despite the traditional delicacy of relations with India, Pakistani lawyers and judges tend to react positively to professional contact with their Indian colleagues because of the awareness of their common legal traditions.

Objective 2: Strengthening Citizen Legal Awareness and Access to Legal Advisory and Representational Services

Given the social and political heritage of Pakistan it is somewhat surprising that civil society has not developed to the same extent as in other South Asian countries, even those that have experienced political turmoil and periods of authoritarian rule. In most countries, civil society is at the forefront of efforts to improve human rights, gender equality, and the conditions of poor people. As noted in the USAID Democracy and Governance Assessment conducted in 2008 just prior to this Rule of Law Assessment, "Women, the poor and minorities suffer the most from the degraded rule of law system, but few truly benefit. There are human rights and other NGOs that advocate for reform but their successes are few in number. There is some legal aid available for the needy but it is not sufficient. Some will turn to a traditional dispute resolution mechanism – a caste *panchayat* or a tribal *jirga* – instead. These mechanisms have the virtue of speed but they apply traditional norms which do not typically favor the weak." [37]

[37] USAID: Democracy and Governance Assessment Draft, Management Systems International 2008. p.14

The activities which advance this objective focus primarily on Pakistan civil society organizations which are potential or existing stakeholders in judicial reform and improving the status of the rule of law in Pakistan. While concentration would be on organizations in NWFP and other targeted provinces to complement provincial-level judicial capacity-building activities these activities could also engage NGOs at the national level and from the provinces as well.

Typically the kind of interests which have a strong interface with the justice system include human rights, especially procedural rights of those persons accused of criminal acts, gender discrimination and domestic violence, protection of children's rights from sexual and other forms of exploitation, consumer rights which are becoming increasingly salient, environmental activists and the rights of marginal populations whose tenure or ownership rights to land are either denied or taken away by more powerful persons.

In order to strengthen legal awareness and access to legal services, the USAID strategy may want to work with civil society organizations on the following possible activities:

Phase I Activities: *Identify and establish networks of existing human rights and legal reform advocacy civil society organizations (CSOs) to promote following activities*:

a. Establish standardized documentation systems for recording and reporting on abuses perpetuated by police and judicial systems; disseminate widely in local languages as well as English.
b. Support CSOs to establish legal education and awareness campaigns, using multi-media as well as direct training approaches.
c. Support development of cooperative linkages between CSOs and Bar Associations.
d. Identify and support formation of cooperative alliances in support of Rule of Law reform between business associations and other CSOs committed to ROL reform advocacy.

Phase II Activities: *broaden the base and number of civil society organizations providing services and advocacy to promote the rule of law*

e. Use small grants program to support existing CSOs to broaden membership base and form alliances with local level community based organizations (CBOs) with interests in Rule of Law Reform
f. Establish CSO operated base level legal resource and counseling centers, staffed by volunteer counselors, senior law students and Bar Association members willing to provide supervisory and consultative time to citizens.

Phase II Activities: *develop means for active engagement of NGOs and legally trained professionals to strengthen access to justice, judicial accountability and transparency.*

g. Develop a 'court watch/court monitoring" program, organized by capable CSO using law graduates trained in monitoring of court performance, especially with regard to criminal due process and rights to a legal defender. Standardized indices of court performance are developed and used to gather and aggregate court (and police/investigative) performance data. Quarterly publications and web sites are used to disseminate findings.
h. Support the training of paralegals who can serve as resources for vulnerable groups to raise awareness of their rights, monitor their interactions with the judicial system as well as traditional systems, and refer individual cases to human rights organizations or legal services if necessary. This approach has been effective for women's groups and could be expanded.
i. Develop networks of referral services to Bar Associations, Law Firms, and Lawyers willing to take on legal defense services for marginal and vulnerable citizens. Activities should be pursued in cooperation with the Bar Council legal aid committees and the Bar Associations when appropriate.

Objective 3: Enhancing the Quality of Legal Education

Helping to improve legal education in Pakistan may be one of the most fundamental opportunities to strengthen the rule of law. Quality legal education is a critical foundation of the rule of law, in preparing lawyers and judges with the necessary skills and knowledge to make the system work, and in providing the tools for the continued development of the legal system. The assessment team encountered widespread and enthusiastic support for donor engagement in this area, especially since it has been relatively neglected by previous programs. Strengthening legal education is also a crucial entry point for work with the Bar Councils and Bar Associations, which felt neglected by the ADB program, and which are clamoring for assistance to improve initial and continuing legal education.

Activities in this area would engage the Bar Councils and Bar Associations at the national level, along with selected law schools. Longer-term activities should also involve the Higher Education Commission as part of any efforts with public universities. Initial programs would work with individual universities, Bar Councils, and Bar Associations to develop model programs, using feasibly and affordable approaches, which could then be replicated by other universities, councils and associations. A key element of this component should be to build support and forge partnerships among key constituencies, including lawyers, judges, education officials, and law ministry officials. Activities would include both shorter-term impact and longer-term activities, including the following:

Phase II Activities: *Strengthen practical skills training and applied legal education.* Assistance would support efforts by provincial law schools and Bar Associations to introduce practical skills training into their curricula, and develop applied teaching approaches to provide practical experience to new law students. Specific approaches might include:

a. Develop Continuing Legal Education programs for targeted Bar Associations, including developing curricula, training instructors in substance and pedagogical techniques, and providing written and electronic teaching materials. Efforts should be made to establish requirements for continuing education for maintenance of Bar membership. Courses should respond to demand by lawyers, and include specialized legal topics, as well as management or other inter-disciplinary approaches.
b. Introduce practical skills courses. Courses could be instituted within the curricula of law faculties, with appropriate training and materials, or developed with the Bar Councils or Bar Associations as part of the requirement for entry into the Bar, as in the UK. Courses should include such practical skills as legal writing, trial advocacy, legal research, and legislative drafting;
c. Institute applied learning programs, such as legal externships and/or internships, clerkships, legal clinics, and other programs that would enable law students to gain practical experience prior to entry into the profession. These programs should be pursued through partnerships between law schools, Bar Councils, courts, and provincial law ministries.

Phase III Activities: *Strengthen the legal education curriculum and standards.* Assistance would support efforts by Pakistani legal educators and members of the Bar to upgrade and modernize legal education. Activities would target a small number of individual law schools to develop "model" programs, drawing lessons from the successful example of LUMS. Focus should be public universities, but

d. *Update the curriculum* of a small number of targeted law schools, including incorporating practical skills training, strengthening teaching skills and quality among the faculty, and introducing case law into the teaching. Examples should be drawn from both the U.S. and Indian experiences in legal education.

e. *Support the development of modern teaching materials appropriate to the Pakistani legal system*, including case books, law review journals and others materials rooted in the Pakistani legal system. Local expertise should be favored for the development of these materials.
f. *Develop long-term partnerships with U.S. Law Schools*. The common language and similar legal heritage among U.S. and Pakistani legal professionals make long-term partnerships a feasible and useful approach. A long-term partnership should be developed that included long-term exchanges, professional development opportunities, sharing of curriculum and programs, and other activities that would enable Pakistani and U.S. law schools to learn and benefit from each other. Public-private partnerships should be pursued.

Phase III Activities: *Raise professional standards in the Bar Councils.* Assistance would support efforts by the Bar Councils to build consensus around enforcing existing rules and standards, raising the standards for accreditation, entry into the Bar and professional ethics, and developing more effective enforcement mechanisms. This will likely require considerable consensus-building, working with key leaders who are interested in raising the standards of the legal profession. Technical assistance should also be provided for the development of tougher bar exams, accreditation processes, and enforcement mechanisms for ethics. In that the Ministry of Law seems open to supporting systemic reform, this may prove to be an opportune time to tackle what are major barriers to improvement in the justice system. But it is also true that there are now many models around the world for upgrading bar exams, improved accreditation processes, and increasing ethics enforcement. The biggest need will be for the Ministry and the judicial leadership to participate in these efforts, or little will be accomplished, but there are huge technical resources that may be drawn on when the time is propitious.

Objective 4: Building Law Enforcement Capacity

The police are a critical component of the justice system, responsible for the initial investigation, filing the First Investigative Report (FIR), and enforcing the law. As the most visible member of the justice system, their actions are critical to citizen confidence in the system. As described above, the weakness of the police and their inability to conduct effective investigations has contributed to significant delays in the system, the inability to prosecute criminal cases, as well as human rights abuses as the police rely on coerced confessions in the absence of other forms of evidence.

As in the rest of the justice system, there are significant needs and opportunities in the Pakistan police. Although some attempts have been made to strengthen citizen-police links, without a fundamental transformation in the service-orientation of the police and clearer accountability toward citizens, such efforts are unlikely to bring sustained improvements. There seems to be considerable support within the police leadership for reversing the 2004 amendments to the 2002 Police Order to restore public accountability and limit political influence. This would be a significant step which could create new opportunities for improvements in the responsiveness of the police force, particularly in rationalizing management, clarifying lines of accountability, and promoting responsiveness to citizens. Introducing basic accountability and professionalism into the police force would be a critical first step for working toward improved investigations and enhancing citizen confidence. Greater professionalism and accountability would also create opportunities for improving relations of the police with citizens they serve. In conjunction with a broader reform program, USAID or other USG programs could contribute to improved citizen police-relations by supporting citizen oversight over the police, working with civil society and community-based organizations to monitor and liaise with the police, and possibly strengthening the police-liaison committees started with ADB support. Without some improvement in police professionalism and avenues for citizen oversight, however, such efforts would be unlikely to remain sustainable.

In the absence of comprehensive reforms to the legislative framework and organization, there are a number of areas of police capacity that could be strengthened. Some gains could be achieved with respect to the police role in investigations – a critical lynchpin of the criminal justice system and a driver of case backlog. The USG has provided assistance through DOJ/ICITAP to train mid-level police officers in investigations skills, and has developed important tools such as an Automated Fingerprint Investigation System. DOJ/ICITAP has proposed building on these efforts by focusing on the development of more systematic investigations procedures in a pilot district, while continuing to strengthen training capacity and develop greater management capacity. Working with the prosecution, DOJ/OPDAT has provided targeted assistance to train prosecutors on a number of specialized areas of the law. Although USAID is limited by legal restrictions in the activities it can undertake with the police, efforts funded by the State Department of other USG actors could directly complement USAID activities in the justice sector, in particular by linking these efforts to judicial capacity-building work in targeted districts. Improved police investigations capacity supported by other USG actors could directly contribute to USAID efforts to strengthen the justice system and reduce delays. Specific efforts that could complement USAID programming would include:

Phase I Activities: (Not primarily USAID program)*: Strengthen Investigations Capacity in Targeted Districts.* Working in the same provinces and districts as USAID judicial capacity-building programs, as well as USAID-funded local government assistance would ensure that efforts to raise standards in the courts are followed by greater capacity among the police to prepare and present evidence. Activities might include:

a. Develop systematic investigations procedures and train police officers to increase specialization;
b. Provide limited investigations equipment, such as crime scene kits and mobile crime scene units, to improve investigations capacity and increase the use of material evidence;
c. Upgrade forensics capability through support to provincial and/or national-level forensics labs.

Phase I Activities: (possible USAID and/or DOJ program)*: Strengthen Prosecution capacity in Targeted Districts.* In complement to broader capacity-building initiatives for judges and prosecutors, technical assistance could be provided in targeted districts to ensure a more capable and effective prosecution service. Initial training efforts should be integrated into longer-term support to judicial training academies at the federal and provincial levels.

d. Provide targeted training to existing prosecutors on basic skills, such as trial advocacy, rule of evidence, etc., to improve their ability to achieve successful prosecutions;
e. Improve management capacity in the prosecution service in targeted districts, including introducing basic case management techniques, and developing merit-based systems of recruiting and promoting prosecutors.

Phase I Activities: *Support the passage of a revised Police Law*. Given considerable support within the police leadership, it may be possible to remove the amendments to the 2002 Police Law and make some improvements to address the Pakistani reality. Activities could provide technical assistance to draft a law based on other experience, or facilitate consultations with key stakeholders and the public to ensure the new law meets human rights standards and addresses the needs of citizens.

Phase II Activities: *Upgrade Qualifications and Training Capability for Police at all levels*. Moving beyond short-term, targeted trainings, this would entail a more systematic review of training needs, and working with the national and provincial police to improve police training for all levels. A review of training needs could also serve as a management tool to re-orient responsibilities at different levels of the police. Activities might include:

f. Conduct a country-wide training needs assessment for all levels of the police;

g. Support curriculum development for police training facilities at the national and provincial levels, targeting all levels of the police;
h. Upgrade the teaching capacity through an extensive train-the-trainers program.

***Phase III Activities**: Build Leadership, Management and Oversight Capacity for Police*. Until the fundamental accountability issues are overcome, some foundations can be built in developing leadership and management skills in the mid-level ranks of the police, to build a basis for ongoing reform. If the current version of the 2002 Police Order is revised or the accountability issues are resolved in other ways, fuller engagement to support oversight commissions and internal management processes would be valuable.

Objective 5: Land Titling and Recording System

Phase II Activities: (Not primarily a USAID/DG program): *Build awareness and consensus on priorities for land registration and titling reform.* A great deal of work is necessary to begin raising awareness of the issue and focusing the debate on how to reform the recording and registration system. Although there is general awareness of the problems generated by the current system, the issue has rarely been raised in policy debates. In addition, there are significant interests in maintaining the status quo due to the benefits that accrue to powerful parties, particularly at the local level. Therefore, an initial step should be to begin raising awareness of the challenges of the system and options for reform through policy dialogue, advocacy and public outreach.

Phase III Activities and beyond: (Not primarily a USAID/DG project) *Land recording and registration reform*. Since land disputes are estimated to account for between 60 to 80 percent of court caseloads in Pakistan, addressing the underlying cause of these disputes—lack of a registration system for recording land ownership and transactions—would presumably remove a large part of these matters from court dockets. A project of this magnitude must of necessity be long-term as it is time-consuming and expensive. Nonetheless, it has been demonstrated in other countries. Land registration programs have been implemented in Peru and the Inter-American Development Bank funded a land registration program in Costa Rica three years ago. Some African countries introduced land registration in the 1900s: Kenya, Uganda, Madagascar, and Malawi are among those whose programs were based on the Torrens title system. With respect to development of automated systems, the Indian province of Andhra Pradesh now operates computerized counters to help citizens to complete registration requirements within an hour instead of several days, as was necessary under the earlier system. The Teranet system in the Canadian province of Ontario automated land registration in that province and an effort to replicate it has occurred in Jamaica, W.I.[38] Land registration provides an effective means for resolving the huge number of land disputes and for relieving crowded court dockets. The World Bank is engaged in an experimental program to initiate the process of designing a land titling and registration system in Pakistan. As this kind of project—while costly and lengthy—has proven its value elsewhere, it should be considered as a longer-term prospect.

[38] C.W. Dickerman *et al.*, *Security of tenure and Land Registration in Africa: Literature Review and Synthesis*, Univ. of Wisconsin-Madison Land Tenure Center, 1989, pp. xiii*ff.*

ANNEX I

SCOPE OF WORK

The objective of the assessment is to frame the rule of law problems to be addressed and identify the programmatic options for consideration. First, the assessment will take into account the political and historic context, including current events. The second step of the assessment will be to examine the five key elements that comprise the rule of law, namely:

1. Order and security,
2. Legitimacy,
3. Checks and balances,
4. Fairness,
5. Effective application.

The third step will be to evaluate the roles and interests of the major political actors and institutions. Step four will examine program options beyond the justice sector that might have a bearing on the rule of law. Step five will assess the justice sector itself. The final step in the assessment will be the development of a strategy and programmatic options for rule of law interventions. This will be based on the findings from the preceding sections as well as additional considerations such as Mission priorities and resources. It will be designed to offer approaches that are both strategic and technically sound and upon which a rule of law initiative may be founded.

In addition, the assessment should address the following areas in assessing the priority issues and developing programmatic recommendations:

a. Review of the ADB Rule of Law program - what have been the successes? What have the weaknesses been? Where additional follow is up needed to ensure effective implementation of the policy and legal reforms adopted in the context of the ADB program? The team should review ADB program documents (to be provided by USAID) prior to the field work. In addition to ADB, the assessment team should also look at other donor programs currently focusing or planning to conduct rule of law activities in Pakistan.

b. Demand for reform - what can be done to build and strengthen constituencies for reform? What assistance is needed to support legal education, access to justice, professional associations, civil society organizations, or other constituencies that can maintain and build upon existing and potential momentum toward rule of law reform? Strengthening demand and momentum for reform should be viewed as complementary to support to the formal justice sector.

To produce the assessment the team will visit at least two provincial capitals, in NWFP and Punjab, and possibly a third in Sindh, to be determined in scheduling the field work. Please note that the MSI team will be responsible for organizing and scheduling all interviews/meetings, although the list of interviews/meetings must be approved by USAID/Pakistan and USAID/Pakistan may provide input into the list of people to be interviewed.

ANNEX 2.

PERSONS INTERVIEWED LIST – ANNEX

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ANNEX 3.

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ANNEX 4.

THE EVOLUTION OF BUREAUCRACY IN PAKISTAN

A. Bureaucracy in Colonial India

Pakistan's current bureaucratic structure owes much to its inheritance, *i.e.* the colonial governance system established by the British in India. Whereas, the East India Company had initially confined itself to the management of its trade interests in India, the subcontracting of revenue collection functions to it in 1765 by the Mughal Empire directly involved the Company in public administration. As the Company's dominion expanded to include a vast swathe of rural territories, Company administration began to evolve into colonial administration a view to achieve the maintenance of law and order and efficient revenue collection. To accomplish these primary goals, the colonial administration concentrated executive, judicial, and revenue-collecting powers in an elite cadre of bureaucrats belonging to the Indian Civil Service, which has rightly been referred to as the steel frame of the colonial governance structure.

As Robert Heussler noted: 'Colonial administrators have not been civil servants in the usual sense, that is, servants of elected or appointed governments whose higher officers hold the lion's share of whatever power there is to be exercised. They themselves were the Government.'[39] While the increasing demands for self-government led to some attempts to transfer powers from the British Crown to the government in India and from the centre to the provinces, the colonial bureaucracy nonetheless remained shielded from public opinion and political oversight until the end of colonial rule in 1947. The only means through which some indigenous input in governance was achieved was through the progressive 'Indianization' (i.e. induction of increasing number of Indians) of the civil service.

B. Post-Colonial Evolution of Bureaucracy

Upon independence, Pakistan inherited a bureaucracy designed to achieve the goals of its former colonial rulers and equally insulated from democratic control. Pakistan's early political leadership made several attempts to reform the bureaucracy by reducing its powers and increasing accountability to the public. However, the political vacuum resulting from the failure to create a constitutional structure and the instability of successive governments enabled the bureaucracy to maintain its stronghold over the administration throughout the 1950s.

Although, the bureaucracy remained the predominant player in the local government system during the subsequent four decades, its powers have been challenged by elected and military governments alike. The military governments headed by General Ayub Khan and General Zia devolved some power to the district level and below and, somewhat ironically, introduced elected officials to the fray of local government. While purportedly instated to increase public participation and political accountability, these devolution plans served a variety of aims for the military rulers. The system enabled the military regimes to groom a new set of politicians more amenable to their dictatorial rule than the elected provincial politicians they sought to displace. Devolution also enabled Ayub and Zia to pay lip service to representative government and secure enough political support to avert mass opposition. However, this was devolution in name only since the elected officials were not given real powers, which continued to remain with the bureaucracy. Nonetheless, the introduction of a new political cadre at various levels of

[39] Mavis Puthucheary, The Politics of Administration: The Malaysian Experience (Oxford University Press, 1978) at 24.

local government threatened to undermine the power of the bureaucracy. Therefore, the bureaucracy under both regimes was rendered malleable through the threat of empowerment of elected local government officials, which never materialized, and certain other measures such as the induction of military personnel in the civil service, accountability proceedings, *etc*. This was coupled with the transfer of powers from the provinces up to the center. These military regimes' aims regarding the introduction of democracy at the local level were thus essentially to gain a hold over the bureaucracy and to use it to maintain socio-political control.

In contrast, Pakistan's civil governments have always been wary of elected local government elements, perceiving them as a threat to the power and prestige of provincial politicians. Thus, since civilian regimes have not relied on elected local government officials to undermine the bureaucracy, they have sought to exercise direct control over the bureaucracy to achieve their political aims. The *modus operandi* of elected governments has been to undermine the bureaucratic structure's insularity from political influence by employing such means as removing barriers to entry into the civil service, and by giving the politicians control over appointments and transfers of civil service officials at all levels. Through such control, elected governments have been able to undermine the bureaucracy and use it to achieve their own political ends.

C. The 2001 Devolution Plan

In many ways, the Musharraf regime's Devolution Plan appears to break the mould set by its predecessor military governments: for the first time elected officials have been given command over the district bureaucracy, at least on paper. Like Ayub and Zia, Musharraf sought to curtail the powers of the bureaucracy and in fact, went much further than his predecessors in that regard. Prior to devolution, the Deputy Commissioner's (DC) office headed the district and retained a great deal of influence through a combination of executive, magistracy and revenue collection powers. Government departments concerned with health, education, public works, and all matters related to that district were under the direct command and supervision of the DC. The Musharraf government severely reduced the powers of the former DC, and by stripping his magistracy and revenue-collection powers, the Devolution plan transformed the DC into the District Coordination Officer (DCO) whose responsibilities were limited to coordinating the functions of the various line departments and dealing with other executive matters. In addition, the Devolution has made the DCO answerable to the district *nazim*, an elected official who theoretically sits atop the district administration. As a result, the line departments, previously under the command of the DC, are now also ultimately answerable to the *nazim.*

The stated goals of the devolution program are manifold. Theoretically, the program was intended to achieve the following aims: to improve the ways in which regulation of local economic activities are devised and enforced; to improve access to justice; and most importantly, to improve the development and service delivery functions of local government. The program also sought to address long-term structural weaknesses in the governance system by introducing political accountability. Thus, the appointment of an elected official at the top of the district administration was intended to incorporate local views into policymaking and allow the public to hold an individual accountable for governance decisions. Over the last few years, however, the devolution plan's effectiveness has come under substantial criticism. There has been forceful critique of the true aims of the sponsors of the devolution plan which have been identified as being identical to those of earlier military regimes: namely, the weakening of the bureaucracy and the cultivation of an alternate political cadre. It has been argued that the district government's limited budgetary powers and control over the staff render them incapable of performing a meaningful role. The mode of election of district government officials, i.e. through a complex system of indirect elections, ensures that public participation in local government and political accountability is lacking. In addition, the delays in the full implementation of the plan and establishment

of some of the institutions envisaged in it as well as the absence of any real effort at developing governance capacity at the local level lent credence to the critics of the devolution plan.

POLICE REFORMS IN PAKISTAN

In the immediate aftermath of the Devolution Plan, the Musharraf regime implemented the much-awaited police reforms in the form of Police Order 2002. The need for Police reform in Pakistan was evidenced by as many as 25 different commissions and committees that had been set up since the creation of Pakistan to recommend changes in the police laws and to bring about structural changes in the existing police set up to transform it from a police force to a police service. As noted in the Preamble, the Police Order was promulgated with the stated aim to 'redefine police role, its duties and responsibilities' and to 'reconstruct the police for efficient prevention and detection of crime and maintenance of public order.'

While this Order generated enthusiasm and support from certain quarters, in particular the Police Department itself and the National Reconstruction Bureau (NRB), it also had its detractors. Among its major opponents were the bureaucracy, particularly the district magistracy, and the political elements that later formed the national and provincial governments following the October 2002 elections. Given the political opposition to the Police Order, it was given constitutional protection by adding it to the Sixth Schedule of the Constitution of the Islamic Republic of Pakistan, to ensure that the newly constituted assemblies could not amend the Police Order without the prior approval of the President. This entrenchment of the Police Order, however, did not stop its opponents from obstructing its implementation. The Chairman of the National Reconstruction Bureau and the Interior Secretary were compelled to admit that the Police Order 2002 had not been fully implemented in its true spirit in the first four years of its existence.

A. Police Structure until 2002

Prior to the Police Order, the police forces in Pakistan largely retained the structure inherited from the colonial police established under the Police Act of 1861. The 1861 Act had established an essentially military model of policing and was introduced in the aftermath of the 'sepoy mutiny' (called the War of Independence by the indigenous population) of 1857. Its primary aim was to ensure complete subservience to the colonial government and establish control over the subjects. As observed by Dr.Muhammad Shoaib Siddique, there is a fundamental 'difference between a colonial police and a police meant for a free country. Where the former was geared at raising semi-militarized, semi-literate, underpaid bodies of men for maintaining order by overawing an often turbulent and hostile native population, the latter was aimed at creating quality professionals tasked to protect and detect crime in plural, multi ethnic and socially conscious communities, through just and impartial enforcement of laws. The former knew how to rule and the latter to serve.' This distinction makes a colonial police, designed to serve as a public-frightening, and not a public friendly agency, unsuitable for operating in a free society.[40]

Arguably, the most serious defect in the 1861 Act was that it created a duality of command in the Police Department. The provincial police was headed by the Inspector General under the general superintendence of the provincial government. Following the same principle, the district police was placed under the general direction and control of the Deputy Commissioner (or the District Magistrate). As a result, the District Magistrate was allowed to interfere in all matters of police administration including appointment, removal, deployment, discipline, as well as day to day affairs to such an extent that the Inspector General and other officers of the police became effectively subservient to the District Magistrate. The District Magistrate was not only an appointee but also a part of the government and was

[40] Dr Muhammad Shoaib Suddle: 'Reforming Pakistan Police': Resources and Materials Series no 60.

primarily there to serve the interests of the government. The government at times, through the office of the District Magistrate, interfered in police matters and used the police as a tool to achieve its own political ends. Furthermore, certain important powers of the police could only be exercised with the prior approval of, or at the behest of, the District Magistrate. For instance, the decision to use force against a procession was that of the Magistrate. This created a sense of disillusionment in the Police Department and it was felt that whereas the responsibility to maintain law and order was that of the Police Department, the authority lay elsewhere. The police also complained, rightly so, of financial dependence on the bureaucracy.

The 1861 Act also failed to adequately provide for functional specialization in the Police Department. The various functions that the police required to perform, such as watch and ward, investigation, intelligence, traffic planning and management, recruiting and training, were vested in one office and led to a concentration of power. For instance, the Station House Officer (SHO) was the main officer in the field and was responsible for patrolling, registration as well as investigation of crimes. The overworked SHO, with a very low salary, was a junior officer in the police ranks and yet was vested with vast powers. Thus, the SHO was under resourced in terms of time, men and logistic support, and was not able to perform any of his duties satisfactorily. Furthermore, since he was a lower ranking officer with very low income, there was a lot of temptation which could lead him to indulge in corrupt practices. Along with this, he was vested with immense powers and there was a very ineffective mechanism of accountability to check the exercise of his power. This led to corruption and dishonesty, where those who had money and influence could violate the law with impunity under the protection of the law. More often than not, this created a great deal of misery for the weak and the indigent.

Finally, the 1861 Act was also a defective in that it did not provide the general structure and institutions necessary for a modern police force. There appears to be a general consensus, which is also evident from the findings of the various commissions and committees set up for reviewing the police framework that the internal and external checks on the police were not very stringent and the accountability mechanisms were weak.

B. Police Order 2002

Pursuant to the Devolution Plan and the Police Order, the office of the District Magistrate was abolished and the powers relating to the police that vested with the District Magistrate under the 1861 Act, as well as various other pieces of legislation, are now vested in the officers of the police at different levels. This in effect means that the responsibility to maintain law and order now rests unambiguously with the police. Policing is no longer subject to dual control and it is now the Police Department that is solely responsible for the maintenance of law and order and all matters of policing through the bureaucracy is likely to decrease and the police can no longer shift the burden of any incompetence or malpractice on their part to any other department.

The Police Order provides for the internal reconstitution and reorganization of the Police Department. Section 8 of the Police Order requires the police establishment to be constituted as far as practicable, on a functional basis into branches, divisions, bureaus and sections. This means a separation of investigation, watch and war (patrolling) and public order functions. The reorganization of the police on a functional basis, if done, would mean that the authority is no more vested in one place but is divided in specialized wings and branches. Under the new regime, the Operations Branch, of which the SHO is a part, will be responsible for watch and ward and the registration of crime only. Once a case is registered, it is transferred to the Investigation Branch, headed by the Additional Inspector General of Police. A relevant officer is assigned to investigate the matter depending upon the importance of the case. However, it is interesting to note that the provisions of separation of watch and ward in urban areas existed under Police Rules 1934 but was never implemented mainly because of the shortage of personnel and resources,

and lack of organization within the Police Department. Whether or not the functional specialization envisaged by the Police Order now produces any fruitful results depends to some extent on the availability of financial and human resources. At present, it appears that despite some attention given by the government in this regard, the requisite resources and personnel are quite inadequate.

One of the main aims of the Police Order is to make the Police Department politically neutral and subject to strict external checks based on democratic principles. In order to achieve the stated objectives, various changes have been introduced through the Police Order. The Police Order provides for the creation of a number of public bodies at federal, provincial and district levels. The composition and role of these bodies was originally designed to encourage public participation in exercising politically non-partisan and democratic control over the police. However, in the aftermath of the amendments made to the Police Order in 2004, it remains to be seen to what extent the newly created public bodies would perform the function in the spirit envisaged by the original Police Order. Amongst the most important of these newly created public bodies are the National Provincial and District Public Safety and Complaints Commission.

In conclusion, the Police Order, despite the amendments, has introduced some creditable changes. It eliminates duality of command, which was contrary to the principles of effective organizational management, and envisages functional divisions and specializations within the Police Department. It provides a scheme whereby representative bodies may be established to improve the level of public cooperation and trust vis a vis the police. The Order tries to inculcate in the police a spirit of professionalism and social responsibility by codifying duties and responsibilities of the police. It seeks to ensure a more merit based recruitment and promotion regime in the Police Department. The establishment of structures such as the National Police Management Board is expected to bring some level of cross provincial coherence in police management. Finally, as discussed earlier, the Police Order aims to redress some of the complaints of the Police Department and providing them a degree of independence to run their affairs. This will give the Police Department an opportunity to deliver results in exchange for the trust reposed in its officers.

The major concern is that there is continued opposition from certain quarters, including the provincial governments and the bureaucracy. One of the root causes for this is that while the reforms introduced through the Police Order are quite radical, the stakeholders, in particular the political parties, were neither involved nor taken into confidence at the time of introducing the reforms. There were concerns that if the Police Order were to be implemented in its original form, the police might get out of hand and become difficult to control by the provincial governments, who have the primary responsibility for what happens in a province including law and order. It was also felt that the Police Department was not mature enough to handle such responsibility and operate on the basis of democratic principles. It might also have been advisable at the time to introduce the reforms gradually. It was primarily due to this opposition that hurdles were placed in the implementation of the Police Order and later on, Amendments were introduced. The Amendments in the Police Order and the expected amendments in the Local Government Ordinance indicate that the provincial governments are bent upon reverting to the previous system in so far as it is possible.

It is hoped that common sense and rationality prevails in this matter and that it is understood by all that an efficient, professional, service oriented and most importantly an independent, honest and politically neutral police force is in the best interests of the country. A concerted effort should be made by all quarters, in particular the political parties and their leadership, that such a police force is formed. Under the circumstances, it would be advisable to find some way of reaching a consensus on the issues regarding the police reforms so as to ensure that any reforms that are introduced have the backing of all the stakeholders and are then implemented.