



**PAKISTAN:
Human Rights
After Martial Law**

Report of a Mission

by

Judge Gustaf Petrén, Sweden
Mrs. Helen Cull, New Zealand
Mr. Jeremy McBride, United Kingdom
Mr. D. Ravindran, ICJ, Geneva

INTERNATIONAL COMMISSION OF JURISTS

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Preface

In December 1986, the International Commission of Jurists (ICJ) sent a mission to Pakistan to study the process of return to a democratic form of government after eight years of martial law rule. Among the issues the mission was particularly asked to enquire into were the constitutional position, the electoral process, the position of political prisoners convicted by military courts under martial law, the independence of judges and lawyers, the impact of Islamisation on the rights of women, trade union rights and the situation of minorities and minority religious communities.

The four members of the mission were:

Judge Gustaf Petrén	Former Supreme Court Judge and former Ombudsman of Sweden; Honorary Member of the ICJ;
Mrs. Helen Cull	Member of the Bar of New Zealand and council member of the ICJ New Zealand national section;
Mr. Jeremy McBride	Lecturer in Law at the University of Birmingham, UK;
Mr. D.J. Ravindran	Legal Officer for Asia of the ICJ.

In order to extend the coverage of the mission, on leaving Karachi they worked in two pairs. One pair went to Hyderabad and Lahore, while the other pair visited Quetta and Peshawar. They then joined up again at Islamabad where they had meetings with the Minister of the Interior, the Minister for Law and Parliamentary Affairs, and the Minister for Religious and Minority Affairs. They also met with the Governor of the North West Frontier Province, as well as the Chief Justices and other members of the Supreme Court and of the High Courts of the Provinces. In

Karachi the mission met with Cardinal Cordeiro of the Catholic Church and also the leader of the Pakistan People's Party, Miss Benazir Bhutto.

Before leaving Pakistan the members of the mission reached agreement upon their general conclusions, which are printed at the beginning of this report.

The International Commission of Jurists is very grateful to the Federal Government and Judiciary of Pakistan, as well as to the Governments and Judiciary of the provinces visited, for receiving the members of the mission and for their unfailing assistance and cooperation.

The Commission also wishes to thank the many persons who gave the mission information and provided administrative assistance. The mission is particularly indebted to Mr. A.K. Brohi, Fr. Arnold Heredia and Justice Dorab Patel. Others who helped considerably are Latif Afridi, Yahaya Bakhtiar, Iftikhar Gilani, Syad Afzal Haider, Asma Jahangir, Khalid Malik, Munir Malik, Rafiq Safi Munshey, Mujeeb-ur Rehman and Rashida Patel. The International Commission of Jurists is grateful to the following funding agencies whose grants made possible the mission: NOVIB and ICCO in the Netherlands, Danish Church Aid, and the Diakonisches Werk of the German Evangelical Church.

Niall MacDermot
Secretary-General

Geneva, April 1987

General Conclusions

**agreed by the members of the ICJ mission to Pakistan
Karachi 17 December 1986**

- 1) The lifting of martial law and the move to constitutional government is a positive development for democracy in Pakistan.**
- 2) The Constitution in force is not the 1973 Constitution in full having been substantially amended during martial law.**
- 3) There is a general lack of confidence that the Constitution in its present form can be effective in protecting human rights and in acting against a further imposition of martial law.**
- 4) The information received by the mission confirmed the widespread violations of human rights during martial law that were reported by many international human rights organisations.**
- 5) Aspects of martial law have been institutionalised. There are still some abuses of human rights and a number of freedoms are being curtailed.**

Chapter I

The Constitutional Situation

The most recent Constitution of the Islamic Republic of Pakistan was adopted on April 1973, following the secession of East Pakistan. It is generally considered to be the most democratic of Pakistan's four constitutions.

Basic Principles

The 1973 Constitution consists of 280 Articles and six Schedules. It is rather more detailed than most constitutions and can be characterized as being Islamic, federal and democratic. Islam is the state religion, as Pakistan was created to meet the demands of the Muslims in the sub-continent. Consequently, Islam is intended to be the factor that unifies the country. It features prominently in the constitution which states that existing laws should be brought into conformity with its injunctions.

Article 31 states that the state shall take steps to enable the Muslims of Pakistan to order their lives in accordance with the fundamental principles and basic concepts of Islam. Article 40 states that the state shall preserve and strengthen bonds with the Muslim world. The mission had opportunities to discuss with different persons the Islamisation of Pakistani society, especially the importance of the Shariat Court system and its impact on the country's legal system. According to Article 203D of the Constitution, the Federal Shariat Court has the right to decide which laws or provisions of a particular law are repugnant to the injunction of Islam. Any such laws or provisions cease to have effect on the day on which the decision of the court takes effect. To a large extent, the

religious influence has the possibility of creating uncertainty as to the content of the laws. As non-Muslim observers we wish, in general, to refrain from making further comments. However, we have taken note of its impact in the chapters on the rights of women and on the rights of religious and other minorities.

Pakistan consists of four provinces, the federal capital and tribal areas. The provinces are Sind, Punjab, Baluchistan and the North-West Frontier Province. The federal system was inherited from the 1935 Government of India Act, and there is a government and an elected assembly both at federal and provincial level. The constitution contains 59 federal articles, the rest dealing with the provinces.

The 4th Schedule of the Constitution contains the Federal Legislative List and the Concurrent List. The Federal Legislative List consists of 67 items and only the Federal Parliament can legislate on items in this field. The Concurrent List consists of 47 items, and both the federal and the provincial legislatures can legislate on the items in this list. However, according to Article 143 of the Constitution the federal law on an item in the Concurrent List will always prevail over a provincial law to the extent that the provincial law is inconsistent with the federal law. Items which do not fall under these two lists belong to the provincial field, but as the two lists are very comprehensive, this residual provision is of a largely academic nature.

For a long time a common grievance of the opposition parties has been that the powers of the federal parliament are so wide that the provinces have hardly any provincial autonomy. On behalf of the Federal Parliament, a Council of Common Interest deals with certain issues for which development under federal control is said to be important.

The democratic factor is institutionalised in the same way both at the centre and in the provinces. The Republic is headed by a president, the provinces by a governor. The prime minister is head of the government and in the provinces the chief-minister holds an equivalent position. The Federal Parliament elects the prime minister whose tenure depends on the confidence of the majority of the members of the National Assembly.

Prior to the amendments made to the 1973 Constitution during martial law, the executive authority of the Federation was exercised in the name of the president by the federal government, consisting of the prime minister and the federal ministers.

The governor of each province is appointed by the president. The governor appoints from among the members of the provincial assembly a chief-minister who is likely to have the confidence of a majority of the assembly members. The chief-minister subsequently appoints the other

ministers from among the members of the provincial assembly.

The right to amend the Constitution is vested in the Parliament. According to rules in Part XI of the Constitution, an amendment must be adopted in each House of the Parliament with a majority of two thirds of the total membership voting in favour, and be assented to by the president.

Fundamental Rights

In the 1973 Constitution, Part II deals with fundamental rights. Articles 15, 16, 18, 19 and 24 guarantee the basic political rights. Articles 15 and 16 protect freedom of movement and assembly, Article 17 protects the right to form associations and political parties; Article 18 protects freedom of trade, business or profession; Article 19 protects freedom of speech and freedom of the press, and Article 24 relates to protection of property rights.

The fundamental rights enshrined in these articles of the 1973 Constitution were already set aside by the proclamation of a state of emergency by the then Prime-Minister, Mr. Bhutto, before the imposition of martial law in 1977.

The part dealing with fundamental rights also contains detailed provisions for preventive detention with far-reaching consequences. There has been widespread use of preventive detention powers by the government. These provisions allow for preventive detention in situations in which ordinarily such restrictions on personal freedom would not be acceptable. With the lifting of martial law, the civilian government should either have proposed the deletion, altogether of Article 10(3) and (4) providing for preventive detention, or at least considered amending the Constitution so that no person is detained under a preventive detention law for more than seven days and that a detained person is brought before a court within 48 hours. A judicial tribunal should have the power to review the need and justification for such detention. This subject is discussed more fully in the section below on preventive detention.

The fundamental rights enshrined in the Constitution are judiciable by way of writ petitions to the High Court and the Supreme Court* Part

* The Court structure comprises the Supreme Court, four High Courts (one for each province) and a system of lower courts at the district and sub-district level. There is, in addition, one Shariat Court and a Shariat Bench in the Supreme Court to hear appeals from the shariat Court.

VII of the Constitution deals with the judiciary and provides the framework of the judicial system for the country. Details will be found in the chapter on the independence of the judiciary.

Martial Law

In Pakistan's short history, martial law has been imposed three times, from 1958 to 62, from 1969 to 71 and at the time of the military coup of 5 July 1977 when it was introduced by the Chief of the Army Staff, Gen. Zia-ul-Haq, who assumed the office of Chief Martial Law Administrator (CMLA).

The legality of the new political system was tested in the *Begum Nusrat Bhutto* case in the Supreme Court of Pakistan whose judgement was delivered in November 1977 (PLD 1977 SC 657). The court accepted the reality of what had happened and based its reasoning on the doctrine of necessity, i.e. the military intervention was looked upon as necessary in a serious political crisis for which the Constitution provided no solution.

The legal position after the coup as stated in the judgement was,

- "(i) That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts of it have been held in abeyance on account of State necessity;
- (ii) That the President of Pakistan and the superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new oath after the Proclamation of Martial Law, does not in any manner derogate from this position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the proclamation of Martial Law;
- (iii) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity, namely:
 - (a) All acts of legislative measures which are in accordance with, or could have been made under the 1973 Constitution including the power to amend it;

- (b) All acts which tend to advance or promote the good of the people;
- (c) All acts which required to be done for the ordinary orderly running of the State; and
- (d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely, restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution;
- (iv) That these acts, or any of them, may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require; and
- (v) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance."

The general condition made by the court that the CMLA should hold elections to the National Assembly within a reasonable period was not fulfilled. In fact the CMLA had announced in July 1977 that elections would be held in October, but postponed them indefinitely on 1 October. Nevertheless, the martial law system continued and was accepted by the courts. On the other hand in the opinion of many people the judgement in the *Begum Nusrat Bhutto* case led to the conclusion that martial law became automatically illegal when elections were postponed indefinitely.

It is obvious from a purely constitutional standpoint that the martial law system was not in conformity with the 1973 Constitution. The Constitution contains certain clauses* relating to emergency situations, but none of them allow for it to be set aside in the manner of the events of 5 July 1977.

For an outsider it is astonishing that the provisions in the Constitution that deal with emergency situations were completely ignored both when martial law was imposed and later when the courts tested its legal-

* Part X, Articles 232 to 237.

ity. If the provisions of Part X are inadequate to deal with a situation of emergency threatening the life of the nation, they should be revised accordingly. There can be no real guarantee for permanent constitutional rule if members of the armed forces, relying on their power, can act contrary to the emergency regulations provided in the Constitution. If the country is to develop its democratic institutions the armed forces should not interfere in the constitutional legal order whenever they think fit to do so.

Although the armed forces have established themselves in the eyes of many as indispensable by virtue of the alleged military threat from Pakistan's neighbours, they have to operate within the frame work of the democratic institutions of the country and within the Constitution. The army has to accept the position given to it by Chapter 2 Part XII of the Constitution and not dictate the terms of political and social life regardless of that Constitution as was the case following the military coup.

Further Constitutional Developments during Martial Law

According to the Supreme Court's ruling in Begum Nusrat Bhutto's case the 1973 Constitution during the imposition of martial law was in abeyance only in so far as it was justified by the doctrine of 'necessity'. In view of this the martial law decrees which the Supreme Court considered were not justified under the doctrine of necessity were declared invalid. It was not easy to ascertain which parts of the Constitution were in force and which were in abeyance. The following example concerning the position of the courts, illustrates the difficulty.

Presidential Order 21 of 1979 amended the Constitution by inserting a new Article 212A. According to this article, except for appeals pending in the Supreme Court, neither the high courts nor the Supreme Court could question any order of the martial law authorities. This was the very argument which had been rejected by the Supreme Court in Begum Nusrat Bhutto's case. The validity of Article 212A was later challenged in the high courts. The Baluchistan High Court held that Article 212A was invalid, but unfortunately the other high courts took a different view. As a result the government appealed against the Baluchistan High Court decision and individual parties dissatisfied with similar decisions by other high courts also appealed against the judgement of these courts.

The Supreme Court assembled in the middle of March 1981 to hear and decide on the appeals on the validity of Article 212A. As already

stated, the Supreme Court in Begum Nusrat Bhutto's case had rejected the contention that with the imposition of martial law the Constitution was in abeyance. Rather it took a position that except for some provisions, the rest of the Constitution was in force.

To preempt the possibilities of the Supreme Court striking down Article 212A, the martial law administration promulgated on 24 March 1981 a Provisional Constitutional Order (PCO).

The PCO stated that notwithstanding any judgement, the Proclamation of Martial Law dated 5 July 1977 setting aside the Constitution was valid. This Order also stated that no courts could question the validity of orders passed by the martial law authorities with retrospective effect from 5 July 1977, notwithstanding any judgement. Finally, according to Article 16 of the PCO the President, as well as the Chief Martial Law Administrator was to be deemed always to have held the power to amend the Constitution. This was intended to nullify the restrictions imposed by the Supreme Court on the power of the President and the Chief Martial Law Administrator to amend the Constitution. Similarly, the provision that martial law could not be questioned, notwithstanding any judgement, had reference to the judgement in Begum Nusrat Bhutto's case.

Article 17 of the PCO required that the judges of the Supreme Court and high courts take an oath to uphold this order, and declared that those who refused to do so would cease to be judges. The vast majority of the judges took the oath to uphold this order. In this way the Supreme Court was pressured to accept the reality of the power of the military in spite of the Constitution.

It is a matter for speculation whether the army would have persisted in violating the Constitution if all the judges of the Supreme Court had threatened resignation unless the Constitution which they had sworn to up-hold was respected. As it was, only a few judges resigned.

On several occasions the CMLA used his power of amendment in a way which totally changed the balance of the original Constitution. The exercise of power was concentrated in the President/CMLA. Other amendments were the 1980 Constitution Amendment Order (P.O. No. 1 of 1980) which created the Federal Shariat Court, the Second Amendment Order of 1983 (P.O. No. 7/1983) and the Third Amendment Order of 1985 (P.O. No. 29/1985).

The Second and Third Amendment Orders affected the independence of the judiciary and are dealt with in greater detail in the chapter on the independence of the judiciary.

Lifting of Martial Law

When, in 1985, the time came to lift martial law, the question of how the changes made to the Constitution should be kept in force was solved by an eighth amendment to the Constitution adopted in October 1985 by the new parliament which had been elected in February 1985. A precedent for it already existed in the 1973 Constitution, in which an article was inserted validating all orders and regulations resulting from the prior period of martial law which ended on 19 December 1971.

When the martial law period of 1977 was about to end a similar article was inserted in the 1973 Constitution by the eighth amendment which took effect on 30 December 1985. This new article 270A said that all laws and orders made during the period 5 July 1977 to 30 December 1985 were thereby "affirmed, adopted and declared, notwithstanding any judgement of any court, to have been validly made by competent authority and, notwithstanding anything contained in the Constitution, shall not be called in question in any court or on any ground whatsoever". The article continues, "all orders made, proceedings taken and acts done by any authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of July, 1977 and on the date on which this Article comes into force (i.e. 30 November 1985) in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or by-laws, or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of such shall notwithstanding any judgement of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever."

On previous occasions on removal of martial law the martial law legislation had been validated and then repealed, except for some special pieces of legislation which were given further protection. Contrary to this practice, Article 270A, after validating the martial law legislation, made it a permanent part of the law of the country.

This form of validation creates a number of problems. For example, with the reinstatement of the Constitution in January 1986, Part II of the Constitution dealing with human rights (Art. 8-28) came into force. All the guaranteed freedoms and rights became operative. Moreover, Article 8 provided that any law that is inconsistent with the fundamental rights will be void.

As far as we know Article 8 has not been used as a means of challenging in the courts the validity of martial law legislation. There are a

large number of laws that are inconsistent with the Constitutional provisions reflecting the impact of the martial law period.

The Ombudsman

The institution of an ombudsman is considered in an increasing number of states to be an important institution to check maladministration. In many countries the provisions dealing with the ombudsman are part of the constitution.

In Pakistan the ombudsman was introduced through a Presidential Order during the martial law period. Though his jurisdiction is limited to the federal administration, he received complaints from all parts of Pakistan. In practice the ombudsman receives complaints about maladministration in government undertakings such as the postal, railway, communications and electricity services. In view of the large number of communications received by the ombudsman it should be possible to develop the institution further. His jurisdiction should be extended to the provincial administration and his decisions should have an impact at the ministerial level. If the ombudsman is to become an effective protector of human rights, the institution ought to be brought within the Constitution.

General Observations

The present Constitution has been considered to be the result of events in Pakistan following the creation of Bangladesh in 1971. It is difficult for an outside group to make an exact evaluation of what is or should be the true meaning of the present Constitutional situation. We therefore, limit ourselves to a few observations from the view-point of comparative law. First some general observations.

The 1973 Constitution of the Islamic Republic of Pakistan has many detailed provisions. Looking around the world at other constitutions we find that most of them outline the basic principles which are to govern the public life of the country. On some special points related to the parliament, the government and the judiciary the constitution may present more detailed rules but never in such abundance that the general outline gets lost. The 1973 Constitution of Pakistan is totally different. It is very detailed and concerns itself with questions which are normally solved by means other than constitutional law. Further, the legislative technique used results in precise rules being given in one article which is then fol-

lowed by an article prescribing something else which is *prima facie* contradictory. This creates much uncertainty about the precise meaning of the Constitution on many points.

In the theory of constitutional law, different ideas are to be found about how far a constitution can be changed from its original construction and still be the same constitution. Every constitution is grounded on a set of basic principles. Constitutional legal theory holds that a constitution can be amended on different points as long as this basic set of principles is not seriously undermined. Applying this premise to the development of the 1973 Constitution of Pakistan, we may come to far-reaching conclusions regarding the validity of certain constitutional amendments.

An example is to be found in Art. 41 (3) which, in its original form, stated that the President should be elected by the members of the Parliament in a joint sitting. The eighth constitutional amendment added a section 7 to Art. 41 stating that, notwithstanding all other rules of the Constitution, General Zia-ul-Haq shall be the President of Pakistan. Through similar amendments several of the basic principles of the original Constitution are similarly overruled by articles which replace them with regulations and orders of the military regime which took power on 5 July 1977.

Essentially, the democratic ideas of the original Constitution were in many essential points set aside in order to preserve political power in the hands of General Zia-ul-Haq.

Furthermore, there is always the possibility that a new period of martial law could be introduced, leading to further changes in the constitutional position of the country. Since the doctrine of necessity has already been accepted in the past by the Supreme Court, there is nothing to prevent the leader of the military forces – at present General Zia-ul-Haq – reintroducing martial law when and if he thinks it necessary.

The most important changes to the 1973 Constitution have been brought about by the eighth amendment of 1985. As has been seen, its validity can be challenged. From the point of international comparative law, it is noteworthy that article 270A, subsections 1 and 2, confirm and validate even orders, regulations and acts which did not exist at the moment when the amendment was adopted, i.e. orders, regulations and acts made in the time between the adoption and the coming into force of the amendment. In international law it seems doubtful in the extreme that it is possible to give constitutional validity to things which do not exist, but may turn up in the future. A legislator should be aware of what he is doing.

The present constitutional situation cannot be interpreted as giving much security or many guarantees for a smooth development towards true

democracy, i.e. a system where the will of the people as manifested in free elections prevails. The eighth amendment of the Constitution of 1985 has basically changed the Constitution and made its foremost purpose to uphold the rule of the present President.

One of the problems of interpretation created by the eighth amendment concerns future amendments of martial law legislation still in force. This problem is partly covered in article 270A. The decrees mentioned in Schedule 7 to the Constitution have to be amended as part of the Constitution – that is, with a two-thirds majority in the Parliament. Other legislation is to be amended by the appropriate legislature. Even so there may be doubts about the method of amending parts of the regulations stemming from the martial law period.

More complicated is the general validation of all administrative decisions and court-rulings from the martial law authorities. Everyone who is still in prison serving a sentence following a conviction by a martial law authority, cannot, according to the literal wording of article 270A, get his case reviewed.

Having examined the reports of many cases where convictions by the martial law authorities seem to have been founded on little or no evidence, the members of the mission feel very concerned about the fate of some 500 persons who are serving sentences imposed by the martial law authorities, the legality of which can be very much questioned.

The blanket validation of everything that has happened in the martial law period has obviously gone much too far.

It has created difficulties for those persons convicted under martial law. For example, those whose sentences had not been confirmed when martial law was lifted. What discretion can the responsible authority exercise in these cases when bound by the constitutional presumption that the conviction is valid and was made in good faith? To this can be added the position of those whose cases were transferred on 1 January 1986 from martial law courts to civil courts. When trying these cases, how far are the civil courts bound by the decisions taken by the martial law authorities? Are the civil courts free to hear and try these cases notwithstanding other decisions which the martial law authorities may have taken and which have been validated and placed outside all review by the constitutional amendment in Art. 270A?

The practical implementation of the provisions contained in Art. 270A is of considerable importance when it comes to stating how far the rule of law has been reinstated in Pakistan after the lifting of martial law. The information we have received on this point raises serious doubts.

In view of the public statements of the President and of the govern-

ment that human rights are fully restored in Pakistan, it is recommended that the government should ratify the UN Covenants on Civil and Political Rights and on Economic Social and Cultural Rights, as well as the Optional Protocol to the Covenant on Civil and Political Rights. Once ratified the fundamental rights provided in the Constitution should be brought into conformity with the Covenants.

It is not possible to conclude without commenting on the evils caused by the widespread corruption. It also affects the Constitutional situation. The mission was repeatedly told about the corruption that exists even in the courts, particularly in the lower courts. Newspapers have even published reports alleging that public decision making is unduly influenced through bribery. It is hoped that efforts are being made on all sides to cooperate in reducing the corruption.

Chapter II

Martial Law and its Effect on Representative Government

A system of martial law, regardless of whether or not it can be justified in the light of the situation prevailing in a particular country, necessarily conflicts with the principle of democratic government. When martial law was imposed in Pakistan in July 1977, it was originally supposed to have been followed by elections within a matter of months. The fact that it actually endured until the end of 1985 has, therefore, given rise to understandable concern about whether the civilian form of government which was then introduced does actually amount to an effective restoration of democracy and is not merely a facade behind which military rule continues to operate. Factors of particular importance in assessing the nature of the change effected by the lifting of martial law are: the way in which consent was claimed to have been obtained by a referendum during the martial law period for extensive amendments to the 1973 Constitution and for the installation of General Zia ul-Haq, the Chief Martial Law Administrator, as the President of Pakistan (after that post had been given an enhanced executive role) for a period of five years beginning in March 1985; the process by which the present National Assembly and Senate were elected, by which the Prime Minister and Cabinets have been appointed since those elections and by which a party system was instituted in Parliament despite the non-party basis on which they had been held, and the continuing restrictions imposed on political parties and political activity generally. Although the lifting of martial law has undoubtedly allowed for some measure of popular participation in govern-

ment for the first time in nine years, this is on a closely circumscribed basis and it would, therefore, be premature to regard the present constitutional arrangements as truly democratic.

The imposition of martial law in 1977 came in the wake of public protests about the conduct of the elections that had been held in March. Those elections were officially recorded as a victory for the Pakistan People's Party (P.P.P.) led by the then Prime Minister, Mr. Zulfikar Ali Bhutto, but they were quickly followed by allegations that the result had been rigged. The ensuing protests were accompanied by widespread public disorder and, after the inconclusive talks between the government and the opposition parties, the Chief of Army Staff, General Zia ul-Haq arrested the Prime Minister, members of his government and leaders of the opposition parties, dissolved the National and Provincial Assemblies, declared the 1973 Constitution to be in abeyance, and stated that Pakistan was thenceforth under martial law with himself as Chief Martial Law Administrator.

In Begum Nusrat Bhutto's case referred to in the chapter on the Constitutional situation, one of the conditions laid down by the Supreme Court was that elections should be held within a reasonable time, the court accepting "the solemn pledge of the Chief Martial Law Administrator that the period of constitutional deviation shall be of as short a period of duration as possible". Before the hearing of this case before the Supreme Court, General Zia had announced on several occasions that elections would be held on 18 October 1977. However, during the proceedings, his counsel had indicated to the court that elections would be held two months after there had been a process of accountability for those holding public office prior to the imposition of martial law and that that process would probably last six months.

Despite the undertaking to, and the conditions imposed by, the Supreme Court, the Chief Martial Law Administrator, who had also become President in 1978, failed to set any date for the holding of elections until 1979. However, having announced that elections would be held in November of that year, he then cancelled them on October 16, as well as banning all political activity and dissolving all political parties. In April 1980 he announced that the question of "holding elections in the near future does not arise" and similar statements were made in the course of the succeeding years. However, in August 1983, General Zia announced his 'Political Plan' for Pakistan and set 23 March 1985 as his deadline for effecting a transfer to civilian rule. As a first step towards restoring public participation in government, elections for local government were held on a non-party basis in late September and early October, 1983 but voting was

affected by a boycott called by the Movement for the Restoration of Democracy (M.R.D.), an alliance of eight banned political parties which included the P.P.P.

Changes made to the 1973 Constitution and the Referendum

During these years, not only was the country being governed in accordance with regulations established by the martial law authorities and applied by military courts, but also the first of a series of amendments were being made to the 1973 Constitution. Thus, through the insertion of a new Chapter 3A in 1980, provision was made for the creation of the Federal Shariat Court and, under the Provisional Constitution Order of 1981, everything done by the regime since 1977 was validated so that its actions could no longer be called into question by the courts and a new oath also had to be taken by the judges in order for them to continue in office. The only allowance made during the martial law period for some public participation in discussions about the future structure of government in Pakistan (during martial law) was the inauguration in 1982 of a Federal Council (Majlis-i-Shoora) as an advisory body with respect to proposals for change, particularly those concerned with Islamisation. This Council consisted of 288 members nominated by the President.

It was to the Federal Council that President Zia announced in 1983 that elections would be held 18 months later when he gave the address setting out his 'Political Plan' for Pakistan. In this address he stated that, although the 1973 Constitution would be restored, it would have to be amended so as to bring it into "harmony with the Islamic principles" and to expand the powers of the President in order to prevent the country periodically facing "the same crisis as it did in 1977, which meant that, on the one side, we would have a despotic prime minister and, on the other, a helpless and ineffective president so that the country would be at the mercy of a dictator".

Before any such changes were made, however, a referendum was held in December 1984 which, although principally seeking approval for the official policy of Islamisation, also dealt with several other issues. The question to which an answer of 'Yes' or 'No' was sought from the electorate was as follows:

"Whether the people of Pakistan endorse the process initiated by General Mohammad Zia ul-Haq, the President of Pakistan, for bringing the laws of Pakistan in conformity with the Injunctions of Is-

lam as laid down in the Holy Quran and Sunnah of the Holy Prophet (Peace be upon him) and for the preservation of the Ideology of Pakistan, for the continuation and consolidation of that process and for the smooth and orderly transfer of power to the elected representatives of the people... and General Mohammad Zia ul-Haq shall be deemed to have been duly elected President of Pakistan for a term of five years from the day of the first meeting of the Houses of Parliament in joint sitting."

The referendum was boycotted by the opposition parties, although advocacy of a boycott was a crime, but the official returns showed that 62% of the electorate had cast votes and that there had been a 'Yes' vote by 97.79% of those voting. Considerable doubt was cast on the accuracy of these figures by many observers and indeed there were widespread allegations of ballot-rigging.

Apart from the uncertainty about the level of support actually obtained in the referendum, the specific question put to the electorate has also given rise to justifiable concern. This is because it was hardly one that was capable of being answered by a simple 'Yes' or 'No', even though that is really the only way in which popular opinion on an issue can be accurately gauged in a referendum and that was the very criterion to be used when the 1973 Constitution was amended in 1985 so as to give the President the power to hold a referendum (Art. 48(6)). Thus, someone supporting the transfer of power to the elected representatives of the people might not have approved of the Islamisation process and someone in favour of both of those developments would not necessarily have agreed that President Zia should remain as President of Pakistan, whether for five years or any other period. The confusion in this way of at least three distinct issues was calculated to deprive the electorate, regardless of the level of participation in the referendum, of any real choice and was not, therefore, a satisfactory basis for purporting to restore constitutional government or for confirming President Zia in office.

A further criticism of any reliance on whatever support was given in the referendum is that the question put to the electorate did not deal explicitly with the sort of proposals for constitutional change that were being made at that time by General Zia. Indeed, given the continued suppression of political activity, there was hardly any opportunity to debate the merits of the proposals, insofar as the details were known, and the prior discussions in the Federal Council were meant to advise President Zia rather than focus the issues to be considered by the electorate. Even if it could be argued that there was at least an implied acceptance of the

changes that had already been made to the 1973 Constitution, it is highly questionable whether there could be any justification for thinking that there was a popular mandate for the further amendments that were to be made.

Revival of Constitution 1973 Order

Nonetheless substantial changes to the 1973 Constitution were effected by the Revival of the Constitution of 1973 Order which was adopted by President Zia at the beginning of March, 1985. As this was made only a matter of days after elections had been held for the National Assembly and Senate but before their first sessions were due to take place, this timing effectively denied those bodies any opportunity to consider the amendments that were being introduced by the Order.

The principal amendments involved a significant increase in the power of the President, so that the post became much more than the sort of figurehead found in many countries that base their constitutional arrangements on the Westminster model of parliamentary government, amongst which Pakistan had been numbered. Indeed they were to lay the foundations for the extensive involvement of President Zia in the government of Pakistan after the lifting of martial law. Thus, the executive authority of Pakistan was vested in him instead of just being exercised in his name (Art. 90); the Prime Minister was henceforth to be selected not by the National Assembly but by the President, choosing the person who he thought commanded the confidence of the majority of its members (although this was subsequently restricted to appointments made before March 20, 1990), and the role of Prime Minister was downgraded from that of chief executive to someone who, together with the Cabinet, is supposed "to aid and advise the President in the exercise of his functions" (Art. 91); the Prime Minister was thereafter required to communicate to the President all Cabinet decisions, and could also be required by the President to submit to the Cabinet decisions taken by himself or any other Minister which have not first been considered by the Cabinet (Art. 46); the President, although generally obliged to act on the advice of the Cabinet, was empowered to require that that advice be reconsidered before he does so; he can also act in his discretion in relation to certain matters, including the making of certain key appointments (such as the governors of the provinces, the Chairman of the Public Service Commission and the Chief Election Commissioner) and the dissolution of the National Assembly (however, the extent of his discretion in relation to dissolutions was sub-

sequently subjected to some qualifications) (Arts. 58, 101, 213 and 242); the President was empowered to send messages to the National Assembly or Senate on any matter including any Bills that are being considered (Art. 56(2)); he can now also withhold his assent to Bills that have been passed by Parliament and can require them to be reconsidered and approved in a joint sitting of the National Assembly and the Senate before becoming law (Art. 75); the supreme command of the armed forces was vested in the President and the appointment of the Chairman of the Joint Chiefs of Staff Committee and the Chiefs of the Army, Naval and Air Staffs was thereafter at his discretion (Art. 243). Furthermore, the electoral college for the President has been extended to include the members of the Provincial Assemblies as well as the members of the National Assembly and the Senate, although the tenure of General Zia as President was specifically guaranteed in accordance with the terms of the referendum (Art. 41).

In addition to amending the 1973 Constitution so that the power of the President was enhanced at the expense of the role to be played by the Prime Minister, President Zia's Order also introduced many other important constitutional changes. Amongst these was the creation of a system of entirely separate electorates for the election of members to the National and Provincial Assemblies by Muslims and the various religious minorities (Arts. 51, 62, 106 and 113); an increase in the size of the Senate to include five members to be elected by each Provincial Assembly representing "ulema, technocrats and other professionals" (Art. 59); the undermining of the pre-eminence of the National Assembly by a provision which allows Bills to be originated in the Senate as well as the National Assembly and which, instead of deeming that a Bill adopted by the Assembly and not passed by the Senate within 90 days has been so passed, requires that any Bill not to be passed by the second House to consider it must be considered in a joint sitting of the two Houses (Art. 70); an increase in the age at which a citizen becomes eligible to vote in elections to the National and Provincial Assemblies from 18 to 21 years (Arts. 51 and 106); the conferment on the Governor of a Province of the power to require a Provincial Assembly to reconsider a Bill and any amendment specified by him before his assent is given (Art. 116); the introduction of comparable changes in the relationship of the Governor and Chief Minister in a Province to those made with respect to the President and Prime Minister (Arts. 129-132); the amendment of the rules governing the seniority of judges of the Supreme Court and the High Courts and the appointment of the Chief Justices of those courts (Arts. 179, 180, 195, and 197); the conferment on the Supreme Court of the power to transfer cases pending before one High Court to another High Court (Art. 186A); an increase in the period for

which the Judge of one High Court can be transferred to another High Court without his consent from one to two years (Art. 200); the vesting in the President of the power to modify the term of appointment of judges of the Federal Shariat Court or to assign them to any other office or require that they perform such other functions as the President deems fit (Art. 203C(4B)); the restoration of the original power given by the 1973 Constitution to the Supreme Court and the High Courts to punish persons in contempt of court with the notable exception of the 'explanation' clause, which had provided that "fair comment made in good faith and in the public interest in the working of the Court or any of its final decisions after the expiry of the period of limitation for appeal, if any, shall not constitute contempt of the Court" (Art. 204); the extension, when a Proclamation of Emergency has been issued by the President, of the executive authority of the Federation to the Provinces (Art. 232); a provision deeming the 1983 local elections and the 1985 General Election to have been held under the Constitution (Art. 270B); and the deletion of the word 'freely' from the terms of the "Objectives Resolution" of the Constitution with respect to the profession and practice by minorities of their religions.

All these amendments amounted to a substantial transformation in the character of the 1973 Constitution but still further changes were made to it within a matter of days, and again without any opportunity for consideration by the National Assembly and Senate. These changes were effected by the Constitution (Second Amendment) Order 1985 (P.O. 20 of 1985) which was adopted by President Zia on March 18 and the Constitution (Third Amendment) Order 1985 (P.O. 24 of 1985) which was adopted the following day. The first of these primarily involved a limited modification of the provisions governing the amendment of the Constitution that had been introduced by the Revival of the Constitution of 1973 Order. Thus, although it confirmed the enhanced role that had been given to the Senate by the earlier order, in that amendments can now be originated there as well as in the National Assembly and require the support of two-thirds of its members instead of a simple majority, it dropped the need for amendments to be supported by a majority of the members voting in each Provincial Assembly which had been introduced by the Revival of the Constitution of 1973 Order (Art. 239). It also confirmed two clauses introduced by the earlier order which sought to preclude any judicial challenge to the constitutionality of any purported amendment by providing that "no amendment of the Constitution shall be called in question in any court on any ground whatsoever" and that "there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution". The Third Amendment Order extended the

power of the President to transfer judges from one High Court to another so as to cover acting Chief Justices and deemed any judge not accepting a transfer to have retired (Art. 200).

Some of these amendments, particularly those relating to the courts and the judiciary, are discussed further in other sections of this report but it is clear that their overall effect has been to create a substantially new constitution for Pakistan without any prior expression of approval by the electorate; neither the referendum nor the General Election, the only occasions when popular opinion could be voiced, were specifically held for that purpose. In so establishing a new framework for government, President Zia thus ensured that he would still be in a position to exercise significant control over the country after the lifting of martial law – a control underlined by his continuing to be Chief of Army Staff as well as President (even though the amendment vesting in the latter post the Supreme Command of the Armed Forces (Art. 243) does not seem to be sufficient to override the prohibition on the President holding “any office of profit in the service of Pakistan (Art. 43)”. While an executive presidency is clearly not inconsistent with a system of democratic government, the way in which this position was introduced by and entrusted to him while he was still the Chief Martial Law Administrator undoubtedly calls into question the extent to which this constitutional re-arrangement and his tenure of the Presidency until 1990 can genuinely be regarded as a reflection of the electorate's choice. As important as this, however, is the way in which the operation of the new constitutional structure still obstructs or inhibits the free exercise of political choice. This is apparent from the basis on which the 1985 elections were conducted and the manner in which the party system was restored and is still being regulated.

The General Election of February 1985

The General Election held on February 25, 1985 took place while martial law was still in force and was subject to the prohibition on party political activity that had been a feature of most of that period. Although the opposition parties had called for a boycott of the elections, which was an offence that could lead to disqualification from being a candidate for seven years, it was clear that their participation would not have been permitted in any event. Thus, it was often not possible for their members to circumvent the non-party basis of the elections through candidates standing as individuals, since many people who had been associated with political parties had actually been barred from standing for elec-

tion, either because of the fact that they had been office bearers or members of dissolved political parties, which meant that they were thereby disqualified under the Political Parties Act from becoming members of Parliament for up to twelve years (see below), or because their past activities were held by the Chief Election Commissioner to disqualify them on account of their being persons who had violated Islamic injunctions. The ban on any participation in the elections by the former office-bearers of dissolved parties was not, however, applied in an even-handed fashion as the Act was specially amended by President Zia in January 1985 to allow such persons to stand if they had been a member of the Federal Council or a government minister or adviser during the martial law period. He was thus in a position to determine whether many politicians could be candidates.

Although these elections were, therefore, clearly not intended to allow all political interests to take part, there have not been many suggestions that the actual conduct of them was vitiated by any of the improprieties that have been alleged with respect to the referendum. Indeed, in some constituencies at least, the voters felt under no compulsion to vote for those involved in the administration of martial law as several Ministers were defeated. Apart from some allegations that the rules governing the registration of voters had not been adhered to in all areas, so that some people were able to vote twice, the principal grievances about the elections that were brought to the attention of the mission concerned the restriction on participation in them and the way in which, despite the non-party basis of the elections, Parliament has subsequently been permitted to take on a party political complexion. These complaints are particularly important in view of the major constitutional and legislative changes that are now being considered and adopted. The non-party basis of the election meant that the issues before the electorate were much more oriented to local concerns than the future direction of Pakistan and that the only national issue for which support could be inferred was the lifting of martial law. In view of this, the mandate of those elected seems to be at most limited to making the transition back to civilian rule rather than introducing further constitutional change or governing on a party political basis.

The Constitution Eighth Amendment Act

Adherence to this limited mandate was only partly evident in the final set of amendments that were made by Parliament to the Constitution

before the end of martial law. The changes were made through the Constitution (Eighth Amendment) Act, 1985 which was adopted unanimously by the National Assembly and the Senate in accordance with the procedure established by the amendments previously discussed. Although this was to be the only occasion during the martial law period on which anything like a representative body had some control over constitutional reform, the fact that the amendment was adopted as part of the process securing its formal termination undoubtedly meant that the freedom to undo or modify the structure which had previously been erected was necessarily limited. The Constitution (Eighth Amendment) Act, 1985 was, therefore, apart from some minor clarifications of previous amendments, a compromise under which some reforms, holding forth the prospect of a democratically run government, were permitted in exchange for immunising from legal challenge anything done during the martial law period.

Thus, by way of reform, it provided that the three members of the Senate coming from the federal capital should be elected rather than appointed (Art. 59); that the term of office of the Chairman and Deputy Chairman of the Senate should be three rather than two years (Art. 60); that the time within which the President must either assent to a Bill or return it to Parliament for reconsideration be reduced from 45 to 30 days, and that the majority required to dispense with the President's assent is a majority of the members of both Houses present and voting rather than of their total membership as provided in the Revival of the Constitution of 1973 Order (Art. 75); that after March 20, 1990 the President shall invite to become Prime Minister the member of the National Assembly who commands the confidence of the majority of its members, to be ascertained in a session summoned for that purpose (Art. 91(2A)); that the discretion of the President to dissolve the National Assembly should not be exercised simply because he considers an appeal to the electorate is necessary but only where he considers either that, following a vote of no-confidence in the Prime Minister, there is no one likely to command the confidence of a majority of its members or that a situation has arisen in which the government "cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary" (Art. 58); that the Prime Minister should be consulted before the President appoints a Governor for a Province although the appointment remains in his discretion (Art. 101); and that after March 20, 1988 the Governor of a Province shall invite to become Chief Minister the member of the Provincial Assembly who commands the confidence of the majority of its members, to be ascertained at a session summoned for that purpose, but this would be without prejudice to anyone holding office on

that date (Art. 130(2A)).

Although these measures should ultimately return control over the choice of the Prime Minister and Chief Ministers to the National and Provincial Assemblies, this will not occur until 1990 and 1988 respectively. Even if fresh elections open to all parties were to be held before 1990, there could, therefore, be no guarantee that the person chosen as Prime Minister would be someone commanding the confidence of a majority in the National Assembly. Furthermore, the limitations imposed on the other powers of the President are only a matter of degree and, in particular, his power to dissolve the National Assembly remains extremely wide since he can still impose an election even though the Prime Minister still enjoys its confidence. The constitutional position thus remains one in which the powers vested in the former Chief Martial Law Administrator as President are extensive and he does not flinch from exercising them, whether it is a matter of making key appointments, directing Parliament how to deal with legislative proposals such as the bill to enforce Sharia or removing the disqualification imposed on members changing parties (see below) or making the final review of sentences imposed by the military courts during martial law. The first opportunity for any democratic influence over the choice of President, albeit indirectly, will only come after the general election due to be held in 1990.

The price exacted for these fairly modest reforms was substantial. Thus the Constitution (Eighth Amendment) Act, 1985 re-enacted and slightly extended the validation measure introduced as Article 270A by the Revival of the Constitution of 1973 Order in the following terms:

- "(1) The Proclamation of the fifth day of July, 1977, all President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, including the Referendum Order, 1984... under which... General Mohammad Zia-ul-Haq became the President of Pakistan... the Revival of the Constitution of 1973 Order, 1985... the Constitution (Second Amendment) Order 1985... and all other laws made between the fifth day of July, 1977, and the date on which this Article comes into force are hereby affirmed, adopted and declared, notwithstanding any judgement of any court, to have been validly made by competent authority and, notwithstanding anything contained in the Constitution, shall not be called in question in any court on any ground whatsoever:

Provided that a President's Order, Martial Law Regulation or Martial Law Order made after the thirtieth day of September,

1985, shall be confined only to making such provisions as facilitate, or are incidental to, the revocation of the Proclamation of the fifth day of July, 1977.

- (2) All orders made, proceedings taken and acts done by any authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of July, 1977, and the date on which this Article comes into force, in exercise of the powers derived from any Proclamation, President's Order, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or by-laws, or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgement of any court, be deemed to be and always to have been validly made, taken or done and shall not be called into question in any court on any ground whatsoever.
- (3) All President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or by-laws in force immediately before the date on which this Article comes into force shall continue in force until altered, repealed or amended by competent authority. ...
- (4) No suit, prosecution or other legal proceedings shall lie in any court against any authority or any person, for or on account of or in respect of any order made, proceedings taken or act done whether in the exercise or purported exercise of the powers referred to in clause (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.
- (5) For the purpose of clause (1), (2) and (4), all orders made, proceedings taken, acts done or purporting to be made, taken or done by any authority or person shall be deemed to have been made, taken or done in good faith and for the purpose intended to be served thereby.
- (6) Such of the President's orders and Ordinances referred to in clause (1) as are specified in the Seventh Schedule may be amended in the manner provided for amendment of the Constitution, and all other laws referred to in the said clause may be amended by the appropriate Legislature in the manner provided for amendment of such laws."

The final revisions to the validation clause, originally introduced by the Revival of the Constitution of 1973 Order, have enabled Parliament to amend and repeal most of the orders, ordinances and regulations made during martial law. The exceptions, listed in a new Seventh Schedule, can only be changed by a constitutional amendment and include the order establishing the office of Ombudsman. However, the validation clause was also extended to include the referendum in 1984 and the constitutional amendments made by President Zia during 1985. The effect of the extensive immunity conferred by this Article is considered in subsequent sections.

The National Assembly

After the election and the adoption of the Revival of the Constitution of 1973 Order, President Zia exercised his discretion under the Constitution to appoint as Prime Minister the person most likely to command the confidence of the majority of the members of the National Assembly (Art. 91(2)). His choice of Mr. Muhammad Khan Junejo was subsequently confirmed by the unanimous vote of the National Assembly and a government was formed. Although the government and parliament were supposed to operate on a non-party basis, two main groupings of National Assembly and Senate members did in fact emerge in the remaining months of martial law. The Official Parliamentary Group was comprised of members committed to supporting the government and many of the remainder, although not strictly an opposition grouping, made up the Independent Parliamentary Group. It was through a compromise between these two groupings that the Constitution (Eighth Amendment) Act could be adopted prior to the lifting of martial law; the provisions seeking to reduce some of the President's powers, particularly with respect to the appointment of the Prime Minister after 1990, being extracted in exchange for supporting the validation of acts done, or purported to have been done, under the authority of martial law. After the lifting of martial law the members of the Assembly and the Senate, who had been elected on a non-party basis, were allowed to take on party affiliations and the majority group led by the Prime Minister became members of the Pakistan Muslim League.

While the reintroduction of a party system to Parliament is undoubtedly an important step towards the full restoration of civilian rule in Pakistan, the basis on which this was done at the end of martial law means that it cannot be accorded an unqualified welcome. In particular, it

is questionable whether candidates elected without any party affiliations or the mandate to implement the policies of a particular party should be able to constitute themselves into the ruling party and as such retain power until 1990. The partial basis on which the party system was introduced is further underlined by the opposition mounted by President Zia and the Pakistan Muslim League to proposals to amend the defection provision in the Political Parties Act 1962 which disqualified from membership of the Senate or National and Provincial Assemblies anyone who had been elected as a candidate of a political party and had become a member of another political party afterwards (s. 8-B). This particular provision had been introduced just before the lifting of martial law and the restoration of the party system occurred. Towards the end of 1986, moves were made by members of the National Assembly not belonging to the Pakistan Muslim League to have this amendment revoked but they could not defeat the united front of the League. Although such a provision against defection might be an important safeguard of the electorate's wishes where a party system is fully operative by retaining it, the dominance of the Pakistan Muslim League, the existing majority party, is thus entrenched even though it had not actually attained power on a party basis and this undoubtedly amounts to an abuse of position.

Its determination to retain this dominance in the face of any challenge is also apparent in the way the Pakistan Muslim League's majority was used in May 1986 to remove Mr. Fakhir Imam as Speaker of the National Assembly after he had referred to the Chief Election Commissioner the question of whether those members of the Assembly belonging to the League had become disqualified by joining it prior to it having been registered in accordance with the Political Parties Act 1962. Subsequently President Zia exercised his power under the Act to remove the disqualification, if any, affecting the League's members.

Political Parties Act and the changes made to it during martial law

A further reservation about the restoration of the party system is the fact that the lifting of the restriction on those who had been elected to Parliament in 1985 from joining or forming political parties was subject to the various amendments that had been made during the martial law period to the Political Parties Act 1962. These had made some significant changes in the way in which political parties, now defined to include any

group or combination of persons "operating for the purpose of propagating any political opinion or indulging in any other political activity", would thereafter be allowed to operate. Not only has the formation of a political party been subjected to increased regulation, but these amendments have also had the effect of creating uncertainty as to what policies will be regarded as 'legitimate' and, therefore, as to whether all parties are free to engage in political activity and will be able to take part in future elections. This uncertainty particularly affects those political groupings which did not acquire any representatives in Parliament once party affiliations had become permissible.

The 1962 Act had originally prohibited the formation of those political parties which had objects prejudicial to the sovereignty or integrity of Pakistan or which were foreign-aided and it had also established a procedure for the dissolution of any such party (s. 3). During martial law the restrictions on a party's objectives had been extended so as to include a prohibition on those parties which have been formed to propagate any opinion or act in a manner prejudicial to Islamic ideology, morality, the maintenance of public order and the security of Pakistan. In addition, the ban on anyone forming or convening a "foreign-aided" party or being in any way associated with such a party was furnished with the explanation that such a party was one that was formed or organised at the instance of, or is affiliated to, associates with or is in receipt of aid from any government or political party of a foreign country or has received any of its funds from foreign nationals. Also dating from martial law are the requirements that political parties must account to the Federal Government for the source of their funds, must submit their finances and accounts for auditing by the Election Commission (which is appointed by the President) and must also apply to be registered with that body (S. 3-A and B).

The registration requirement involves the extensive disclosure of information, particularly concerning membership, and is by no means a formality. Thus, within a month of being formed, a party must submit an application for registration, together with a copy of the manifesto, constitution or foundation document which establishes its composition, aims and objectives and which provides for the periodic election of its office bearers; a list of its office bearers at the national level; and a statement of its total membership. Under the notification issued by the Election Commission (No. F.11(1)/86 of January 20, 1986), an applicant party must also undertake to provide a copy of any amendments to its manifesto, etc., a list of any new office bearers and, if required, an up to date list of its membership and any other documents the Commission

considers necessary. In addition it must make a declaration that it believes in the ideology of Pakistan, its integrity and sovereignty and that it has not received any funds from any foreign source whatsoever. A party will only be registered if the Commission is satisfied that the party has published a formal manifesto providing for periodic election of office bearers, has undertaken to publish any amendment to the manifesto, believes in the ideology of Pakistan, its integrity and sovereignty and has submitted its accounts for audit. The Election Commission can cancel a party's registration where it fails to submit its accounts or hold elections for its office bearers, receives aid from foreign nationals or the government or political party of a foreign country, "propagates any opinion or acts in any manner prejudicial to the ideology of Pakistan or the sovereignty, integrity and security of Pakistan or morality or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan" or does anything which would have resulted in registration being refused.

The significance of the registration requirement is that a party which has not been registered or whose registration has been cancelled is not eligible to participate in elections to the Senate and the National and Provincial Assemblies and cannot nominate or put up a candidate at any such election. Despite these serious consequences not all opposition parties have sought registration by the Election Commission; although they are willing to provide copies of their accounts, and indeed some have actually done this, they do not wish to supply the Commission with detailed information about their office bearers and membership and are concerned about the extent of the discretion to refuse registration which is conferred by the loose framing of the prohibited objectives for political parties. This reluctance is entirely understandable in view of the way in which many office bearers in the opposition parties were detained prior to the demonstration that the Movement for the Restoration of Democracy (M.R.D.) had planned to hold on August 14, 1986 (see below) and the way in which charges have been made by President Zia and government ministers that some political organisations either have impermissible objectives or are in receipt of foreign aid; a party is hardly likely to have much confidence in a process which only seems to be increasing the risk of detention for its members and office bearers and which could result in its unequivocal exclusion from future elections.

Certainly it would seem that the allegation that the P.P.P. is in receipt of foreign funds, which is often made by members of the government, is designed primarily to intimidate and discourage since, although

it is never formally pursued in, for example, proceedings for dissolution (see below), the charge is sufficient to create doubts as to whether it would be allowed to register. The broad phrasing of the prohibited objectives also makes it very easy to cast doubt on the legitimacy of a party's manifesto and activities. This is particularly true of the charge that a party is propagating or acting "in a manner prejudicial to Islamic ideology" or has objectives prejudicial to the "integrity of Pakistan". Similarly campaigning for a confederation which would increase the rights of the Provinces while maintaining the present state of Pakistan seems to be impossible, regardless of whether it is intended to act through Parliament, as its principal proponents, the Sindhi Baluch-Pashtoon Front, are frequently accused of threatening the integrity of Pakistan and sedition charges have been framed against leaders of the Front such as Mumtaz Ali Bhutto and Hafiz Pirzada. Only in a few instances is it absolutely clear that the objectives of an unregistered organisation are impermissible; for example, those who advocate the creation of new states, such as Sindhu-desh, out of the existing Pakistan.

Although the activities of political organisations since the lifting of martial law do not appear to have been directly affected by their failure to register and no effort has been made to compel them to do so, the basis on which registration is allowed and the obligations currently involved for a party, other than the disclosure of accounts, are undoubtedly inhibiting the full restoration of party politics. Moreover, it is questionable whether the approval of a party's objectives is actually needed to protect the state's interests since any unlawful activities could be dealt with by specific criminal charges against those concerned or, in extreme cases, by dissolution. Furthermore, the requirement that details be provided of the party's membership and office bearers does not really seem necessary unless it is intended to keep political parties under close scrutiny, which would hardly be consistent with freedom of political activity. It is doubtful, therefore, whether a system of party politics can be truly re-established without substantial changes to the Political Parties Act 1962. In any event the local elections due to be held in 1987, if they are to be held on a party basis despite President Zia's hints on a number of occasions that they may not, will provide the government with an opportunity to establish that all political parties will be allowed to participate in the return to civilian rule.

Prior to martial law a party operating or formed with prohibited objects or receiving foreign aid could be dissolved by the Supreme Court upon the application of the Federal Government, but now the government is empowered to make and publish the initial decision on dissolution and

a reference must then be made to the Supreme Court for a final determination (s. 6). Following its dissolution a party's assets vest in the government and anyone holding himself out as a member or office bearer of the party is liable to three years imprisonment and, since martial law, an office bearer of the party is liable to the same penalty if he "indulges or takes part in any political activity within seven years of its dissolution" (s. 7). A member and office bearer of a dissolved party may also be disqualified from election to the Senate and National and Provincial Assemblies for up to seven and twelve years respectively (s. 8). The disqualification provisions for office bearers are, however, not applicable to any person appointed by President Zia to serve on the Federal Council or a Provincial Council or as a Federal or Provincial Minister and may also be removed by him at any time. It was under this power that President Zia was able to defeat the claim that the National Assembly members who had joined the Pakistan Muslim League had done so precipitously and had thereby disqualified themselves from continuing to sit. The constitutionality of the amendments made to the Political Parties Act was challenged in the Peshawar High Court in March 1986 but the petition was not even heard once.

Separate Electorates for minorities

Although the mission did not receive any specific complaints about the conduct of the 1985 elections other than those already mentioned, it did encounter some concern about their fairness as part of a more general complaint about the constitutional provisions governing the representation in the National and Provincial Assemblies of those belonging to the religious minorities. Under the Constitution a number of seats in these Assemblies are exclusively allocated to members drawn from the religious minorities. The making of special arrangements for the representation of the religious minorities was originally done only with respect to seats in the provincial Assemblies, but was extended to the National Assembly in 1975. At first these special representatives were chosen by the directly elected members of the Assembly concerned and there was no bar on someone from a religious minority taking part in the direct elections, whether as a candidate or voter; the special members simply ensured that the views of the religious minorities could be heard in the particular Assembly. However, in 1978 the minorities were constituted into entirely separate electorates from those citizens who were Muslim; henceforth they were to vote directly for their representatives in the Assemblies and were

no longer entitled to vote or stand for election other than in their special constituencies. This change was effected by the President's Orders 16 and 17 of 1978, the Delimitation of Constituencies (Amendment) Ordinance, 1978 and the Electoral Rolls (Amendment) Ordinance, 1978 and was given constitutional status in the Revival of the Constitution of 1973 Order, 1985 (Arts. 51(4A), 62(b), 106(5) and 113).

In the National Assembly there are 237 seats, 207 for Muslims, 20 for women and 10 for members of the religious minorities, the last of which are divided up as follows: 4 each for Christians and Hindus, 1 for Ahmadis and 1 for Sikhs, Buddhists, Parsis and other non-Muslims. There are 40 seats for Muslims in the Baluchistan Assembly, 80 in the North West Frontier, 240 in the Punjab and 100 in Sind. A number of seats amounting to 5 per cent of those for Muslims are reserved for women in each Province and the religious minorities are represented in the following way: the Ahmadis have been allocated 1 seat in each Assembly except Baluchistan; the Christians have 1 in Baluchistan and North West Frontier, 5 in the Punjab and 2 in Sind; the Hindus have 1 in Baluchistan and the Punjab and 5 in Sind; and the Sikhs, Buddhist, Parsis and other non-Muslims have 1 in every Assembly. Although the representation provided for the religious minorities is, in proportional terms, slightly greater than their overall share of the population, the members of the religious minorities who spoke with the mission felt that the existence of these separate electorates not only set them apart as communities but also made the representation of their interests much less effective, particularly at the national level.

The difficulties arise out of the fact that, whereas the Muslim members are elected from defined constituencies forming only part of a Province, a constituency for a minority religious community will stretch over the whole Province or, in the case of National Assembly elections, the whole country. This necessarily makes electioneering much more difficult for candidates from the religious minorities as they now have to campaign over a considerably larger area than the candidates for the Muslim seats and the electorate from which they are seeking support may be twice the size of that in a Muslim constituency; indeed in national elections their task is virtually impossible to do satisfactorily. The nature of the constituencies also makes it much harder for the voters to get to know, and distinguish between, the candidates than it is for those voting in a Muslim constituency. Furthermore the members for the religious minorities are necessarily much more remote than the Muslim members from their constituents, perhaps living in another Province, and so cannot always be readily approached about problems in a particular locality. Certainly the person

best placed to know about their problems, the Muslim member elected for the district in which religious minorities live, is less likely, if at all, to concern himself with their interests because they now belong to a separate electorate. A further problem arising out of the introduction of this system of separate electorates concerns the members of the Ahmadi community. The seats which have been allocated to them are not being used because that would require the Ahmadis to accept the official designation of themselves as non-Muslims and that would be contrary to their religious beliefs; they are, therefore, effectively precluded from participation in the National and Provincial Assemblies.

Proceedings to challenge the constitutionality of the introduction of separate electorates were started in Sind in 1978 but they were not pursued. The principal allegation in the petition, that such electorates are discriminatory and violate the constitutional guarantee of the equal protection of the law (Art. 25), could not now be argued in the courts of Pakistan as their introduction was given constitutional status by the Revival of the Constitution of 1973 Order in 1985. That Order removed a further ground of complaint against the system of separate electorates, namely, that only the Muslim members of the Assemblies would constitute the electoral college for the seats reserved for women, but it is evident that this system still creates serious problems for candidates and voters belonging to the religious minorities. In effect a system of special representation to ensure that the voice of the minorities is heard has been transformed into one which makes the task of representing their interests much more difficult than that of the Muslim community.

Conclusions

Although there have, therefore, been some steps to restore civilian rule in Pakistan, it is evident that this remains on a very restricted basis. Not only have the electorate been denied any real choice as to the President (now an important executive role) but the government formed from the elected members of Parliament is being run on a party basis without any mandate to do so. There cannot, therefore, be any full restoration of democracy until there are elections in which all parties are able to take part. In order for this to occur the restrictive effect of the registration requirement under the Political Parties Act 1962 will have to be removed and all parties assured that there is no obstacle to their seeking election. It is undoubtedly important that this be established as soon as possible and the forthcoming local elections provide the government with a

suitable opportunity in which to make their intentions clear. Apart from taking these steps, serious consideration ought also to be given to the desirability of retaining the arrangements for the separate representation of the religious minorities which are both unfair and divisive in their present form. It might be more appropriate, insofar as they need a specific voice in Parliament, to afford such representation through the Senate in a similar fashion to groups such as those living in the Tribal Areas and have a member of the National Assembly representing everyone who lives in his or her constituency.

Chapter III

The Independence of the Judiciary and the Bar after Martial Law

Against a background of three separate martial law periods,¹ three Constitutions in less than 25 years² and an existing Constitution which the mission was told has been amended 25 times since its introduction in 1973, an assessment of the independence of the judiciary and the Bar in Pakistan must be viewed in the context of constant political, legal and constitutional change since the inception of Pakistan as an independent State in 1947.

The focus of this part of the report is to assess the impact of the last martial law period, from 5 July 1977 to 30 December 1985, on the independence of the judiciary and the Bar, with particular reference to the constitutional changes made during martial law and the provisions which have continued since the lifting of martial law in December 1985.

No assessment of the independence of a judiciary is complete, however, without reference to the basic international principles accepted for the independence of justice,³ particularly with regard to security of tenure for judges. The Mission therefore, also considered the method of appointment of judges, their security of tenure once appointed with particular reference to the power of transfer vested in the President and the conditions of their service, including remuneration and the facilities within which they must work.

Judicial independence prior to 1977: Transfer of Judges under Prime Minister Bhutto

It is appropriate to observe that prior to the imposition of martial law in 1977, amendments made to the 1973 Constitution under the Government of Mr. Bhutto had made inroads into the independence of the judiciary. For example, the Constitution Fifth Amendment Act of 1976 passed in September 1976 amended Article 200 of the Constitution which had contained the guarantee that a Judge could not be transferred from the High Court to another without his consent. The effect of this amendment was that a judge of the High Court could be transferred to another High Court against his wishes "for a period not exceeding one year at a time". Mr. Bhutto did not exercise this power, but it remained the sword of Damocles over the heads of the judges, and after the imposition of martial law, the Martial Law Administrator General Zia-ul-Haq exercised it several times. As discussed later a further amendment of Article 200 was made under martial law enabling a judge of the High Court to be transferred against his wishes to another High Court for two years.

Article 179 of the 1973 Constitution dealt with the tenure of the Chief Justice of the Supreme Court. On being appointed Chief Justice of the Supreme Court, the Chief Justice was entitled to continue as Chief Justice until he reached the age of retirement which is 65 years. But Article 5 of the Constitution (Fifth Amendment) Act 1976, reduced the term of the Chief Justice to five years. At the end of five years, he had the option to continue as a judge of the court over which he had presided or to retire on full pension. The Chief Justice at that time was Mr. Yacoob Ali and he was due to retire within two years. Within three months of the Constitution (Fifth Amendment) Act 1976, Mr. Bhutto again amended Article 179, with the effect that once a judge of the Supreme Court was appointed its Chief Justice, he could continue in this office for a period of five years regardless of whether he had passed the retirement age. Both these amendments to Article 179 damaged the image of the judiciary, and were later repealed by the Martial Law Administrator.

The Constitution (Fifth Amendment) Act of September 1976 also curtailed the tenure of the Chief Justices of the High Courts. Until then, once a judge was appointed as Chief Justice of the High Court he was entitled to continue in his office until he reached the retirement age of 62 years or until elevated to the Supreme Court. This guarantee was curtailed with retrospective effect by Article 9 of the Constitution (Fifth Amendment) Act, with the result that a Chief Justice could hold office as such only "for

a term of four years". At the end of four years, he had the option of retiring on full pension or of serving as a judge of the court of which he had been a Chief Justice.

This amendment gave the Government extensive opportunities to interfere in the judiciary. The fact that the Chief Justice had to retire in four years increased the opportunities which the President had of appointing Chief Justices. At the same time, the fact that a Chief Justice had to retire in four years could not but rouse the ambitions of the other judges of the Court and increase their willingness to please the Government. Consequently, this amendment was generally resented by the Bench and the Bar.

The Chief Justice of the Lahore High Court retired in 1976 in view of this amendment. Instead of appointing the next senior judge, in accordance with the usual practice, Mr. Bhutto appointed as Chief Justice a judge who was junior to several other judges of the Court.

This decision shocked the legal profession and the public at large, and this had as traumatic an effect on the judiciary as the later removal of judges under martial law (see below) in March 1981.

Legislative enactments during martial law

Effect of "The Laws (Continuance in Force) Order 1977"

Following the proclamation of martial law on 5 July 1977 which put the 1973 Constitution "in abeyance", Chief Martial Law Administrator Zia-ul-Haq issued "The Laws (Continuance in Force) Order 1977"⁴ (CMLA 1977 Order). This order stated that:

"notwithstanding the abeyance of the provisions of the ... Constitution of Pakistan subject to this Order and any order made by the President and any [regulation] made by the Chief Martial Law Administrator",

Pakistan shall be governed as nearly as may be, in accordance with the Constitution. However, by Clause 3 of the Order, fundamental rights under the Constitution were suspended. Also by Clause 3, all judges of the Supreme Court and High Courts were to continue in service on the same terms and conditions and all Courts in existence were enjoined to continue to function and exercise their respective powers and jurisdictions⁵. However

limits were placed on the jurisdiction of the Supreme Court and the High Courts. The jurisdiction under Article 199 of the Constitution was curtailed in that no Judgment, Writ, Order or Process could be issued by the Supreme Court or the High Court against any Martial Law Authority⁶. Further, Clause 4 of the Order stated that "no Court, Tribunal or other authority shall call or permit to be called in question" the Proclamation of Martial Law or any Martial Law Order or Regulation⁷.

Despite these restrictions, in Begum Nusrat Bhutto's case referred to in the chapter on the Constitutional situation, the Supreme Court struck down clause 4 of the CMLA 1977 Order and affirmed that "the Superior courts (namely the Supreme Court and the High Court) continued to have the powers of judicial review, to judge the validity of any act or action of the Martial Law Authorities if challenged in light of the principles underlying the law of necessity ...", and that the Supreme Courts could exercise their full jurisdiction under Article 199 of the Constitution. In the view of Justice Dorab Patel, a retired Supreme Court judge, and one of the judges who heard the *Nusrat Bhutto* case "the judgement was the law of Pakistan until March 25, 1981. In this period of more than 3 years, hundreds of Writ Petitions were filed against Martial Law Orders, some of which were admitted, while many others were dismissed on the ground that there was no case for interference with the impugned orders."⁸

The *Nusrat Bhutto* judgement has been severely criticised for giving the CMLA permission to "perform all such acts and promulgate legislative measures, which fell within the scope of the law of necessity, including the power to amend the Constitution"⁹.

Unfortunately, the Constitution was amended many times (see for details Chapters I and II) by the CMLA in the following years and the promise to hold elections was not fulfilled. In October 1979, the CMLA postponed elections indefinitely and amended the Constitution by inserting Article 212A.

Article 212A

This Article provided for the establishment of one or more Military Courts or Tribunals for the trial of offences punishable under any Martial Law Regulation or Order and purported to oust the jurisdiction of the Superior Courts by removing the power of judicial review over acts done or orders made by the martial law authorities. The validity of Article 212A was challenged in all the High Courts throughout Pakistan and although there was a divergence of judicial opinion as to its validity,¹⁰ the stay

orders and directions granted by the Supreme Court were complied with by the Martial Law Authorities,¹¹ despite the curb on the Superior Courts' powers. Possibly because of the exercise of the Superior Courts jurisdiction, the President made the Constitution Amendment Order, 1980.

Constitution (Amendment) Order 1980

a) Jurisdiction of the High Court and Supreme Court Amended

On 27 May 1980, the Constitution (Amendment) Order 1980 came into effect. Clause 3A of that Order amended the jurisdiction of the High Court, contained in Article 199 of the Constitution, by preventing the exercise of judicial review of any Martial Law Action or Order, precluding the High Court from making any order affecting the jurisdiction and any judgement or sentence of a Military Court or Tribunal, and disallowing any proceeding to be taken against any martial law authority. All orders made by the High Courts and the Supreme Court affecting the validity of any Martial Law Action or Order were declared null and void¹² and any such proceedings pending decision in any Court were declared to have abated.

In addition, the Order declared that all the Orders made by the CMLA and the President, including Martial Law Regulations and Martial Law Orders, "notwithstanding any judgement of any Court" were validly made¹³. Clearly the gradual inroads on the jurisdiction of the Superior Courts, in particular, were in evidence in this Order, but it was not until the introduction of a further amendment, the PCO 1981, that the independence of the judiciary was severely curtailed. Before considering the PCO 1981, one other aspect of the 1980 Constitution Amendment Order has an important bearing on the jurisdiction of the Courts, that is the introduction of the Federal Shariat Court.

b) The Federal Shariat Court

As part of the process to implement Islamisation of laws in Pakistan, President Zia-ul-Haq made an Order¹⁴ in 1978 which provided for the establishment of a Shariat Bench in each of the High Courts in the four provinces of Pakistan and a Shariat Appellate Bench in the Supreme court of Pakistan. These benches were authorised to rule on the *Shari'a*, the Law of Islam, namely, to examine and decide whether any law was repugnant to the injunctions of Islam as laid down in the Quran and Sun-

nah, (referred to as "the Shariat jurisdiction"), and any citizen of Pakistan or the Federal or Provincial Government could seek the Courts' ruling by way of petition. The President, by way of the Constitution (Amendment) Order 1979, with effect from 7 February 1979, gave constitutional standing to the Shariat benches, by adding to the 1973 Constitution Chapter 3A, "Shariat Benches of Superior Courts", which confers Shariat jurisdiction on the High Courts and the Supreme Court.

One year later, the Constitution (Amendment) Order 1980 again amended the 1973 Constitution, inserting a new Chapter 3A in the Constitution called "Federal Shariat Court". By this amendment, the Shariat Benches of the High Courts were abolished, and the Federal Shariat Court was established, which was initially to consist of five Muslim members who had to be qualified to be (or were already) High Court judges, including a Chairman who had to be or was qualified to be a judge of the Supreme Court. Provision was made for judges of the High Court to be appointed to the Federal Shariat Court for not more than one year without their consent but if a judge of the High Court did not accept appointment as a member of the Court he was deemed to have retired from office.

The initial jurisdiction of this Court was as a Civil Court with Shariat jurisdiction, namely to examine and determine whether any law was repugnant to the injunctions of Islam, and if it were held by the Court that a law was repugnant it would cease to have effect on the day of the Court's decision and the President would have to take steps to amend the law to bring it into conformity with the injunctions of Islam. Provision was made for an appeal from the Federal Shariat Court but such an appeal would be to the specially constituted Shariat Appellate Bench, consisting of three Muslim judges of the Supreme Court.

Since the introduction of the Federal Shariat Court, Chapter 3A of the Constitution has undergone constant amendment¹⁵ with provisions being introduced which greatly affect the appointment of judges and religious members to the Courts, their security of tenure and the jurisdiction of the Court. Although these aspects are commented on in greater detail in the latter section of this chapter, it is pertinent to observe that a separate and distinct court structure was established to operate in a parallel way to the existing judicial system, with judges (initially) from the existing High Courts and the Supreme Court to preside over the Federal Shariat Court, in matters which had previously been dealt with in the existing judicial system. The reason for the creation of a separate Shariat Court structure may well have been born of a genuine desire to implement the Islamisation of laws in Pakistan, but the practical effect of its establish-

ment, jurisdiction and structure has been to weaken the jurisdiction of the Superior Courts, create insecurity amongst superior judiciary and make unnecessary inroads in a judicial system which could have dealt with the Shariat jurisdiction in its existing structure.

The Provisional Constitutional Order 1981

The most significant constitutional amendment made during the martial law period, which seriously impaired the independence of the judiciary and had a lasting impact on its functioning was the Provisional Constitutional Order 1981 (PCO 1981).

It has been observed that the PCO 1981 was made before an appeal could be heard in the Supreme Court from a decision by the Full Bench of the Quetta High Court which "unanimously declared that both the insertion of Article 212A and addition of Clauses (3A), (3B) and (3C) in Article 199 failed to come up to the test of necessity laid down in Begum Nusrat Bhutto's case and were *ultra vires* of the power of CMLA even though he acted as President while promulgating these amendments".¹⁶

Although leave to appeal to the Supreme Court had been granted, one legal commentator¹⁷ notes that "the regime was not prepared to take any chances before the Supreme Court" and the PCO 1981 was promulgated on 24 March 1981.

The most invidious of its provisions was Article 17, which required the judges of the Supreme Court and the High Courts to take an oath to act faithfully in accordance with the PCO 1981 and to abide by it. The article provided that if a judge failed to take the oath or if the President did not call upon a judge to take such an oath, he would cease to be a judge. Several judges including the then Chief Justice of Pakistan and two Supreme Court judges, refused to take the oath, and several High Court judges were simply not invited to do so. As a result, the President effectively dismissed approximately 16 High Court and Supreme Court judges.

This was a severe blow to the security of tenure of judges, which is a cardinal principle for the independence of the judiciary. Under article 128 of the 1962 Constitution and Article 209 of the 1973 Constitution the Government could dismiss a judge only by referring the matter to the Supreme Judicial Council consisting of the five most senior judges of the country, and receiving its recommendation for dismissal. This could be given only on the ground that the judge 'is incapable of performing the duties of his office or has been guilty of misconduct'.

Since 1962 the Government had referred only three cases to the Supreme Judicial Council. According to Justice Patel, the procedure under Article 209 'is a very fair way of ensuring the independence of the judiciary and of protecting the judiciary against the misconduct of judges'. We note that under the present government it is once again in force.

The other provisions of the PCO 1981 were equally undesirable. Article 15 retrospectively validated everything done by the military regime since 1977, "notwithstanding any judgement of any Court"; it prohibited any challenge in any court to anything done or any action taken by a military authority or to any sentence passed by a Military Court, which effectively precluded all judicial reviews, it nullified any orders or injunctions made by the courts in respect of decisions of the Military Courts and declared that all constitutional proceedings pending hearing by the courts had abated.

Of significance to the tenure of judges were the provisions which empowered the President to a) appoint *ad hoc* judges from the High Court to the Supreme Court for such period as may be necessary¹⁸; b) request one of the judges of the Supreme Court, irrespective of his seniority, to act as Chief Justice of a High Court¹⁹; and c) transfer a High Court judge from one High Court to another without the judge's consent and without consultation with the Chief Justice of Pakistan or the Chief Justices of both High Courts, for a period of not more than two years.²⁰ This latter power of transfer altered the previous 1976 constitutional requirement that consultation with the Chief Justice was not required if the transfer was only for a year. Other provisions established benches of the High Court in different places in each Province,²¹ removed the constitutional bar to a judge holding public office until two years after he ceased to be a judge by allowing a judge to take a diplomatic assignment or an advisory post to the Government while in office,²² and curbed the power of the High Court to grant interim bail or interim relief with regard to a detention order on a Habeas Corpus Petition.²³

Finally, the President in his capacity as President and Martial Law Administrator reserved for himself the power both retrospectively and for the future to amend the Constitution.

It is clear that the constitutional and legislative changes during the martial law period, culminating in the PCO 1981, had a cumulative and repressive effect on the independent functioning of the judiciary. The seriousness of these changes and their effects on the judiciary was highlighted in a recent address of welcome to the Prime Minister at the 5th Pakistan Jurists Conference by the Vice-Chairman of the Pakistan Bar Council, when he stated:

"After the promulgation of martial law in Pakistan in July 1977, the judiciary, under the law of necessity conferred legality on the martial law regime in *Begum Nusrat Bhutto's* case. Thereafter a treatment was meted out to the judiciary in which no society can take pride. The addition of Article 212A to the 1973 Constitution, the promulgation of the Provisional Constitution Order in the year 1981, and the enforcement of various Presidential Orders, Martial Law Regulations and Martial Law Orders relating to the jurisdiction of the Superior Courts seriously undermined the powers and dignity of the judiciary. On the enforcement of the Provisional Constitution Order 1981, a large number of judges of the Superior Courts did not take oath or were retired leaving an adverse impression in the mind of the public. Subsequently, instead of making permanent appointments to the Superior judicial offices, the Chief Justice and judges were kept on the acting list for a long time to weaken the rank and file of the judiciary. Transfers of some of the judges or shifting of their headquarters adversely affected the independence of the judiciary."²⁴

With the introduction of the PCO 1981, the power of the executive to influence the judiciary was more than apparent. Rewarding a judicial officer regardless of seniority, was made possible by an appointment to the office of Chief Justice or to an advisory or diplomatic post, and conversely the Presidential powers to transfer a High Court Judge, without his consent, either from one district to another for a period of two years, or to the Federal Shariat Court could be used as a means of punishment.

As one commentator notes:

"It was not surprising that in the PCO years, which ended with its repeal on December 30, 1985, the progressive development of constitutional law through judicial review almost came to a halt."²⁵

As will be evident from the legislative development from 1981 to the present day, and as a resolution of the All Pakistan Lawyers Convention states:

"The introduction of [PCO 1981] has done incalculable harm to the independence of the judiciary and of rights of the citizens of Pakistan."²⁶

The period prior to the lifting of martial law – The Judiciary and the Bar

In the period from 1981 to 30 December 1985, further enactments were made which affected both the legal profession and the judiciary alike. On 10 March 1985, the President promulgated the "Revival of the Constitution of 1973 Order 1985", although fundamental rights and the Writ Jurisdiction of the High Courts were not brought into force. More importantly, the PCO 1981 continued as part of the revived constitution until 30 December when it was repealed and martial law was lifted. The following enactments survived the martial law period and are still in force today.

In July 1982, amendments were made to the Legal Practitioners and Bar Councils Act of 1973, firstly prohibiting Bar Councils and Bar Associations from engaging in political activity, and secondly allowing the right of an advocate to practise at the bar without being a member of a bar association.²⁷ As the Vice-Chairman of the Pakistan Bar Council noted:

"By the first provisions the activities of the advocates were intended to be controlled and by the latter provision a gross indiscipline was introduced into the legal profession."²⁸

In March 1985, a further amendment was made to the Legal Practitioners and Bar Councils Act 1973, removing the power to enrol and discipline members of the legal profession from the bar councils to the judiciary.²⁹ These amendments were seen by the legal profession as highly discriminatory and seriously affecting the freedom of the legal profession.

In addition, many changes were made affecting the appointments and tenure of the superior judiciary. The principal ones included an amendment to Article 179 of the Constitution with the abolition of the seniority ranking for appointment to the office of the Chief Justice of the Supreme Court,³⁰ and Article 196 which abolished the appointment of the most senior judge of the High Court to the office of the Chief Justice of the High Court,³¹ thus allowing a junior judge to be appointed over more senior judges. A further enactment amending Article 200 provided that any High Court judge who did not accept a transfer to another High Court would be deemed to have retired from his office,³² and in relation to an appointment of a judge to the Federal Shariat Court, a new provision (inserting Article 203C(4B) to the Constitution) allowed the President "at any time" to modify the term of appointment of that judge, or assign him to any

other office or require him to perform such other functions as the President "may deem fit; and pass such order as he may consider appropriate".³³

The effect of such an enactment is amply demonstrated by the experience of Mr Justice Aftab Hussain, who was Chief Justice of the Federal Shariat Court. In 1984 he was out of the country on a tour of Saudi Arabia. In his absence, another judge was appointed to his position and on his return to the country he was asked to take up a position as Advisor to the Ministry of Religious Affairs. He declined to accept the new office and was therefore deemed to have resigned.³⁴

The jurisdiction of the Federal Shariat Court was also the subject of change. In 1982, the jurisdiction was extended to allow the Court of its *own* motion to examine laws to determine their compatibility with the injunctions of Islam. The Federal Shariat Court was also given the power to review any finding, sentence or order passed by a criminal court in respect of any law relating to the enforcement of Hudood (which are the penalties ordained by the Quran or Sunnah and are contained in statutes described as the Enforcement of Hudood Ordinances)³⁵ including the power to "enhance the sentence".³⁶

Even in its civil Shariat jurisdiction, if the Federal Shariat Court considers that a law is repugnant to the injunctions of Islam, an enactment passed in 1984 required the Court to notify the appropriate Government authority and afford it "adequate opportunity to have its point of view placed before the Court".³⁷ Under Article 203G, no Court including the Supreme Court and a High Court can exercise any jurisdiction over matters within the jurisdiction of the Federal Shariat Court and Article 203GG provides that a decision of the Federal Shariat Court shall be binding on all High Courts and subordinate courts.

Finally, the structure of the Federal Shariat Court was also amended in this period. Originally constituted to consist of eight Muslim judges who were or were qualified to be High Court judges, the Federal Shariat Court, by an amendment in May 1981, was to consist of a Chief Justice (who was, or has been, or is qualified to be a judge of the Supreme Court or who was or has been a permanent judge of the High Court), not more than four judges who were or were qualified to be judges of the High Court and not more than three shall be *ulema* who are well versed in Islamic law.³⁸ *Ulema* are religious leaders, who give decisions on questions of religious importance, and thereby regulate the life of the Muslim community. The *ulema* now sit as judges of the Federal Shariat Court along with High Court judges, or persons so qualified. Similarly the Shariat Appellate Bench of the Supreme Court consisted originally of three Muslim judges of the Supreme Court, but by an amendment in 1982,³⁹

it was to consist of three Muslim Supreme Court judges and not more than two *ulema* "to be appointed by the President to attend sittings of the Bench as *ad hoc* members thereof from amongst the judges of the Federal Shariat Court or from out of a panel of *ulema* to be drawn up by the President in consultation with the Chief Justice".⁴⁰

The legislative changes in this period illustrate the continuing meddling of the Executive with the jurisdiction and judicial officers of the superior judiciary. One further enactment that came into force on the day that martial law was lifted has compromised the superior judiciary in its present functioning. That enactment is clause 19 of the Constitution (Eighth Amendment) Act 1985.

The lifting of martial law and the Constitution (Eighth Amendment) Act 1985

After eight and a half years of military rule, President Zia-ul-Haq issued a Proclamation which ended martial law, repealed the Laws (Continuance in Force) Order 1981 and the PCO 1981, but which stated that the Constitution (Eighth Amendment) Act 1985 had been passed by Parliament (Majlis-e-Shoora). Clause 19 of the Eighth Amendment substitutes Article 270A in the Constitution and this Article validates and affirms all orders made, proceedings taken and acts done by any martial law authority during the martial law period, and provides that no law passed may be called into question in any court whatsoever, "notwithstanding anything contained in the Constitution".⁴¹ Further, it precludes any court from reviewing any acts done by the martial law authorities or entertaining any legal proceedings against any authority and declares that *all* orders made and action done or taken by the martial law authorities "shall be deemed to have been made, taken or done in good faith".⁴²

Although the Writ Jurisdiction was restored to the High Court on the lifting of martial law,⁴³ Article 270A effectively curbed any judicial review of martial law actions or laws in respect of which many hundred petitions challenging Martial Law Orders as well as actions taken, are still pending hearing. The crucial issue which has yet to be determined, is whether the superior courts have the jurisdiction to review *mala fide* actions, abuses of power or *ultra vires* actions on the part of any martial law authority, and order appropriate remedies. Thus, petitions seeking the return of confiscated property, the re-opening of sealed newspaper presses and the review of the continued detention of martial law pri-

soners, whose cases had not been heard, were still awaiting hearing at the time of this Mission's visit to Pakistan. The allegations of serious and gross delays in the hearing of cases was widespread but more particularly there seemed to be a marked reluctance on the part of the judiciary to set down for hearing those petitions involving sensitive political issues.

One such case involved the closing down and sealing of an Ahmid-dyan newspaper *Al Fazal* in December 1984. A petition was filed in the Lahore High Court on 29 December 1984 challenging the authority of the Punjab Provincial Government to take such action.

From the date of filing to mid-1986 more than 21 adjournments were granted by the Court, principally at the request of the Attorney General, until the matter was set down for hearing in October 1986. On the day fixed for hearing the petition was placed towards the end of the fixture list and simply "was not reached". At the time of our visit in mid-December 1986, the matter had not been given another hearing date and neither the judge nor the court had marked the matter for a priority hearing. We were told by the Acting Chief Justice of the Lahore High Court that the petitioner's counsel should seek an urgent fixture by seeing him and making such request personally, although he also acknowledged that he had the power to set an urgent fixture of his own motion.

The reluctance of the judiciary to determine such matters and grapple with the vexed question of the extent of their powers of judicial review can perhaps be explained by the further requirement made of them, after martial law was lifted, and the PCO 1981 was repealed, to take a fresh oath of office. The judicial oath that was administered was the oath contained in the Third Schedule of the 1973 Constitution. Although it purported to be the oath under the "revived Constitution" it was administered after the Eighth Amendment was passed and Article 270A was incorporated in the Constitution. Since the PCO 1981 had been repealed and its terms incorporated into the Constitution and the 1973 Constitution had allegedly been revived, why was it necessary for judges who had already taken the oath under the 1973 Constitution to take the same oath again?

Since the oath required judges to discharge their duties and perform their functions honestly and "faithfully in accordance with the Constitution" and to swear that they will "preserve, protect and defend the Constitution", was it not a grim but timely reminder that the Constitution they must now uphold is a Constitution substantially amended and different to the 1973 Constitution to which they originally pledged allegiance, and that it now contained a provision validating all martial law action and legislation?

The requirement for the judiciary to swear to uphold the Constitution in its amended form must also be seen in the context of the martial law changes and the executive powers which have endured the transition to civilian rule, and which continue to affect the functioning of the judiciary.

Post martial law – the surviving enactments

The historical tracing of the successive martial law enactments and constitutional amendments evinces a gradual but steady weakening of the judiciary by the martial law administration, so that with the lifting of martial law it is pertinent to examine those enactments which continue to exist and to assess how they affect the present independence of the judiciary.

Despite the repeal of the PCO 1981 and Article 212A, constitutional enactments were passed prior to the lifting of martial law, which ensured the continuation of many of the changes made during martial law.

The most notable of these were the amendments made to Articles 196, 200 and 203C of the Constitution. Article 196 allows the appointment of High Court judges to the position of Chief Justice regardless of their seniority. Article 200 allows the President to transfer High Court judges to other High Courts for two years and if any judge does not accept transfer he is deemed to have retired. Article 203C permits the President to appoint a High Court judge to the Federal Shariat Court and if any judge does not accept such an appointment he is also deemed to have retired.

As discussed earlier, these amendments were made in the period prior to the lifting of martial law with all the above amendments being made in March 1985. The changes to Articles 196 and 200 were not new, however. They simply echoed the provisions of Articles 8 and 10 of the PCO 1981 but were inserted in the Constitution in 1985 prior to the repeal of the PCO 1981, to ensure their continuation. Thus the executive still retains the ability to punish or reward members of the judiciary. The prospect of promotion for a junior High Court judge to the position of Chief Justice would seem to offer an incentive for a judge to seek the favour of the executive while simultaneously creating an unnecessary competitive element among the members of the judiciary. Conversely, the prospect of being transferred from a High Court bench in one district to a completely different district for two years, or face retirement, creates for any judge an atmosphere of apprehension and uncertainty. Even more undesirable, are the provisions of Article 203C, which allow the President to appoint a High Court judge to the Federal Shariat Court and if the judge does not

accept appointment he shall be deemed to have retired. If he does accept appointment, the President can at any time modify the term of his appointment or assign him to any other office or require him to perform any other function the President deems fit.

All these powers of transfer and appointment which are still retained by the President from martial law times, mitigate against any notion of security of tenure of judicial officers and continue to threaten and damage the independent functioning of the judiciary.

The repeal of Article 212A of the Constitution, which established the Military Courts, proscribed their jurisdiction and precluded any other form of judicial review, is another example of a positive advance made when martial law was lifted.

However, when balanced against the provisions of the Eighth Amendment, the overall result is somewhat nugatory. The Eighth Amendment validates all actions taken and sentences passed by the Military Courts, and as already discussed, precludes any other Court from reviewing any of their decisions, sentences or orders. Again, the repeal of one martial law enactment is replaced by another which ensures continuing immunity for everything done during the martial law period, particularly by the Military Courts. The jurisdiction of the superior courts was again affected on the return to civil rule. Not only is their jurisdiction curtailed by the Eighth Amendment but a further constitutional amendment has impaired their ability to review any future amendments to the Constitution. With effect from 2 March 1985, Article 239 allows parliament by a two-thirds majority to amend the Constitution, but such an amendment is not to be "called in question in any Court on any ground whatsoever".⁴⁴

Without the jurisdiction to examine the validity of an amendment to the Constitution, the courts are deprived of an essential part of their function, to give redress to a citizen who is aggrieved by any enactment passed and to prevent violation to the Constitution. The prohibition to review constitutional amendments breaches Article 8 of the Universal Declaration of Human Rights which provides:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".⁴⁵

Restricting the jurisdiction of the courts by the Eighth Amendment and Article 239 erodes the public perception of and confidence in the judiciary. This is further exacerbated by the actions of the executive in certain cases, in providing the relief sought in proceedings before the court, after

the hearing has started and before the decision is given. One such example occurred during the Mission's visit. A petition challenging the continued detention of Jan Saqi was set down for hearing on 7 December 1986 in the Sind High Court. Jan Saqi, a prominent leader of the Sind Hari Committee, was convicted before a military court and sentenced to ten years rigorous imprisonment. His sentence expired on 5 July 1986 but the authorities continued to detain him. The hearing of his petition commenced on 7 December and on 9 December before the hearing was completed, the Central Prison of Karachi authorities ordered his release.⁴⁶ Clearly, such executive action obviates any need for a judicial determination, but has the effect of rendering the court's function redundant. It also prevents any court from setting a precedent which may in turn encourage other petitioners to have their detention reviewed and offends against an internationally accepted standard for the independence of justice that: "the executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision".⁴⁷

Other impediments to judicial independence

In addition to the above mentioned impediments to the proper functioning of the judiciary are a number of other factors which affect its independence and the adequate administration of justice. These factors do not necessarily arise from any specific martial law enactments, but continue a pattern of practice which existed during the martial law period:

Vacancies in the Judiciary

Inordinate delays in the hearing and disposal of cases was a constant and universal complaint made to the Mission by the Bar Associations, Bar Councils and practising advocates throughout Pakistan. The principal cause is attributable to the inadequate number of judicial officers available to clear the large backlog of cases pending hearing and to ensure an efficient flow of cases in the future. We were told that in the High Courts in each district there are vacancies in the judiciary which has largely been operating for many years without a full complement of judges. The Bar Councils have also observed that the number of judicial officers has not been increased commensurate with the increase in the number of cases and have stated that "the inadequacy of the number of judges is a major cause for justice delayed".⁴⁸

The Appointment of Ad Hoc and Acting Judges

As stated in the Universal Declaration on the Independence of Justice, "the appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence". Although the constitutional provisions allowing for the appointment of acting additional and *ad hoc* judges were passed prior to the martial law period,⁴⁹ we were informed that the practice during martial law was to consistently appoint *ad hoc* additional or acting judges in the High Courts and the Supreme Court without confirming the appointments as permanent. By Article 182 a High Court judge can be appointed as an *ad hoc* judge of the Supreme Court "for such period as may be necessary" and similarly by Article 197 a person qualified for appointment as a judge of the High Court can be appointed an additional judge "for such period as the President may determine". As with the powers of transfer, the ability of the President to cancel an appointment of a temporary judge when he chooses creates uncertainty and insecurity and can be meted out as a punishment to an independent and courageous judge. In addition to encouraging the appointee to favour the executive, such a power can and does destroy judicial independence.

Retirement Age of the Superior Judiciary

In 1976 amendments were made to the Constitution stipulating that the retirement age for judges of the Supreme Court be sixty-five years and for judges of the High Court, sixty-two years.⁵⁰ Those judges who face compulsory retirement from the High Court, but who wish to continue a judicial office, may well wish for an appointment to the Supreme Court. Again, the opportunity for the executive to "reward" certain judges presents itself and to promote true judicial independence it is recommended that the retiring age for all superior judges should be sixty-five.

Facilities and Funding

The premises in which the judiciary must function, particularly the subordinate judiciary, are generally inadequate, overcrowded and lack adequate equipment for recording evidence, storing files and typing judgments. It has been urged upon the Government to impress on Provincial Governments the need to make adequate financial allocations in their budgets to alleviate the situation and clearly greater funding is necessary to improve the conditions both for the judiciary and the public alike.

The Mission also received widespread allegations of corruption, particularly in the subordinate ranks of the judiciary. A contributing factor to the acceptance of bribes in particular was the inadequate remuneration received by the subordinate judiciary. The Pakistan Bar Council has urged the Government⁵¹ to improve the conditions for the judiciary, including an increase in remuneration and we endorse that recommendation.

Separation of the Judiciary from the Executive

Article 175 (3) of the Constitution provides that the judiciary shall be separated progressively from the executive within fourteen⁵² years.

Under the Code of Criminal Procedure 1898 (referred to as the Criminal Code) four classes of criminal courts are established: Courts of Session, Magistrates of the First Class, Second Class and Third Class.⁵³ In every district the Provincial Government has the power to establish the session courts;⁵⁴ to appoint all session judges,⁵⁶ district magistrates⁵⁵ and magistrates of each class,⁵⁶ including any "Special Magistrates";⁵⁷ to direct any "two or more magistrates to sit together as a Bench" and invest the Bench with such powers conferrable on magistrates of the first, second or third class;⁵⁸ to confer additional powers on magistrates;⁵⁹ and to withdraw all or any of the powers conferred by the Criminal Code on any person.⁶⁰

The civil "district courts" and the Courts of Small Cases established by the Code of Civil Procedure 1908 are however, subject to the control of the High Courts,⁶¹ although the application of the Civil Code to Revenue Courts is within the power of the Provincial Governments, which may declare which portions of the Code may apply.⁶²

It has long been the request of several Bar Councils and the public⁶³ that article 175 (3) of the Constitution should be honoured and the judiciary should be completely separated from the executive. We were told by the Minister of Justice that the Government was committed to the separation of the inferior judiciary from the executive by August 1987 and we urge the Government to secure the complete independence of the inferior courts and judiciary as expeditiously as possible.

The effect of the Shariat Courts

As described earlier⁶⁴ the Federal Shariat Court was established during the martial law period as a separate and distinct court outside the existing court system. It retains the same powers and functions as were con-

ferred on it during martial law. Thus, apart from the present restriction on any question regarding fiscal law, tax law, court procedures, or banking and insurance practice, it retains jurisdiction to examine any laws and declare them repugnant to the injunctions of Islam, and to review any sentence or order passed by any criminal court in respect of Hudood laws. (Islamic criminal laws). The findings of the Federal Shariat court still bind all High Courts and subordinate courts and the only right of appeal from the Federal Shariat Court is to the Shariat Bench of the Supreme Court. The members of the Federal Shariat Court and the Shariat Bench of the Supreme Court include *ulema* who do not have formal legal qualifications and whose only qualification must be that they are well-versed in Islamic law. In addition, a panel of jurisconsults or *qalim*, who in the opinion of the Federal Shariat Court are "well-versed in Shariat", are to be maintained by the court to represent any party to the proceedings before the court, although a party may also be represented by an advocate of the High Court, with five years experience, who is a Muslim.

Thus, a court structure has been created during martial law times, with far reaching jurisdiction, by a President who has retained the power to appoint or modify the term of all its members who must be Muslim; who has introduced legally-unqualified religious leaders to sit as judges; has placed restrictions on legal practitioners who may appear before the court; has permitted legally unqualified persons to represent parties; and who has imbued the decisions of the court with a status greater than that of the High Courts and all subordinate courts, which in turn are bound by those decisions. It is not surprising that the legal profession perceived the establishment of the Shariat Court as a threat because "jurisdiction has been taken away from the Shariat Benches of the Supreme Court and placed into another separate court outside the Civil Court system and beyond the reach and influence of the legal profession. In addition such a development enhances the power of the Executive by giving it the choice of another forum of law in which to prosecute complaints and consequently vests it with the added power to bargain as to penalties".⁶⁵

In addition to reserving for itself "adequate opportunity to have its point of view placed before the Court" when the Shariat Court specifies that a law is repugnant to Islam,⁶⁶ the Government or executive exercises its control over the court by modifying the appointment of judges or amending the court's jurisdiction, as demonstrated in the following two cases:

In *Hazoor Bakhsh v. Federation of Pakistan*⁶⁷, a full bench of the Federal Shariat Court ruled that the imposition of a sentence of death by stoning ("rajm") was against the injunctions of Islam and the infliction of 100 strikes alone constitute Hadd (the punishment proscribed in the

Quran). The Government lodged an appeal with the Shariat Bench of the Supreme Court. Before the appeal was heard, an amendment was passed to the Constitution allowing the Federal Shariat Court to review its own decision.⁶⁸ The bench of the Federal Shariat Court was reconstituted; the chairman of the Federal Shariat Court a former judge was removed, a new Chief Justice was appointed and two *ulema* sat on the bench. On review the sentence of death by stoning was upheld.⁶⁹ However, the mission understands that no sentence of death by stoning has been carried out.

In *Mujeeb-ur-Rehman v. Federation of Pakistan*⁷⁰, Ordinance XX (which prohibits Ahmadis from calling themselves Muslims) was challenged before the Federal Shariat Court as being repugnant to the Quran and Sunnah. The case was heard by five judges and a "short order" announcing the determination by the *five* Judges was made in August 1984,⁷¹ with reasons to be given at a later date. The Chief Justice who presided at the hearing was Mr Aftab Hussain. By the amendment to Article 203C(4B) with effect from 2 March 1985, the President was empowered to assign a judge to any other office or perform such other functions as the President deems fit. As described earlier, Mr Aftab Hussain was asked to accept appointment as Advisor to the Ministry of Religious Affairs. He declined, and was deemed to have retired. The full judgement of *Rehman's* case was later delivered and reported,⁷² by four judges only. There is no reference to the fact that five judges heard the case and made a preliminary determination.

The problem with the establishment of separate religious-based courts, which have jurisdiction over civil laws and enactments and are able to be controlled by the executive, is that they can be easily manipulated to approve and endorse Government policy, while discriminating against sections of the populace who do not belong to the majority religious sect. The introduction therefore of *ulema*, the religious leaders of the majority sect in Pakistan, who are perceived by the community to be very powerful and influential as judges in both the Federal Shariat Court and the Supreme Court Shariat bench, is a dangerous innovation, particularly as they are not required to have any formal legal qualifications and the judgements of both the Shariat courts are not justiciable by any of the civil courts.

For the restoration of confidence in the judiciary and for the preservation of fundamental human rights, it is desirable that the jurisdiction of the Shariat courts, if still required, is returned to the civil court structure.

With the return to civilian rule, and the re-establishment of Parliament, the need for Shariat Courts, with the power to strike down legisla-

tion, may no longer be necessary. If legislation is passed by the elected representatives of the people, then as in any democracy, the laws should be justiciable, particularly with reference to the provisions of the Constitution. As the title suggests, the Constitution of the Islamic Republic of Pakistan contains in its preamble and in the "Objectives Resolution" which is a substantive part of the Constitution,⁷³ that "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah". If the full jurisdiction of the courts were restored, and constitutional amendments were justiciable, then the need for Shariat courts would seem to be superfluous. However, if the prerequisite for legal training in Pakistan were to include more courses on Islamic law, lawyers and judges would be well equipped respectively to present argument and adjudicate on laws repugnant to the tenets of Islam. If the need to seek specialist religious opinion arose in a difficult matter, the *ulema* could be called before any court as independent expert to give evidence. Since the civil judges were able to decide "Shariat" cases, prior to the establishment of the Federal Shariat Court, and are still appointed to the present Shariat court structure as judges, there seems little reason to doubt their capability to interpret and apply Shari'a to the laws of Pakistan.

The need for judicial independence

It is axiomatic to the rule of law that a judiciary must be able to function independently. In formulating international standards for the independence of justice, fundamental principles have been enunciated. The most pertinent are that the judiciary must be independent of the executive; the judiciary must have jurisdiction, directly or by way of review over all issues of a judicial nature; the executive must not have control over judicial functions and nor should any power be exercised as to interfere with the judicial process; assignments or transfers of judges within the courts to which they are appointed is an internal administrative function to be carried out by the judiciary; the appointment of temporary judges is inconsistent with judicial independence, and it should "be a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence ..."⁷⁴

For the sake of an independent judiciary in Pakistan, it is time that these principles were followed. We would urge the Government of Pakis-

tan to restore full jurisdiction to the Courts by the repeal of Article 270 and 239; to leave the powers of transfer of judges to the judiciary, including the transfer of any judge to a Shariat Court; to review the need for separate Shariat Courts and to ensure that legally qualified persons only are appointed as judges of these Courts; to repeal the provisions allowing for the appointment of ad hoc or temporary judges; to separate the subordinate judiciary from the executive; to provide the same retirement age for Supreme and High Court judges, and to allocate adequate resources to the superior and inferior judiciary, including adequate remuneration for the inferior judiciary.

The Bar

The amendments made to the Legal Practitioners and Bar Councils Act 1973, during martial law, as already described, still persist today. Thus the ban on Bar Councils and Bar Associations from engaging in political activity continues. Nevertheless, many of the Bar Associations, Bar Councils and Lawyers Conventions before and after martial law have issued press statements, made public addresses and published resolutions urging the Government *inter alia* to uphold the rule of law, to allow the judiciary and the bar to operate independently, to repeal repressive laws and enactments and to restore fundamental human rights.

Both during and after martial law, many lawyers were arrested and detained for their political activity, for holding meetings with political leaders, for appearing at political gatherings and for delivering speeches at such gatherings. The detention of lawyers during 1986, after martial law, has lasted in some cases for several days, in other cases for one month. At the time of their arrest, no reason has been given and no charges have been laid. Although none of the lawyers interviewed could say that they were arrested because of their professional activity or because of the clients they represented, the type of work which they received from Government corporations or commercial organisations was affected, as the Government would "blacklist" certain lawyers and thus prevent them receiving more lucrative work.

The other amendments made during martial law allow lawyers to practise without belonging to a Bar Association, and all enrolments of and disciplinary actions against lawyers were moved from the Bar Councils jurisdiction to the judiciary. These amendments, which are still in force, weaken the ability of the Bar Councils and Associations to check the quality of lawyers being admitted to the Bar and, more importantly, de-

prive the profession of the ability to discipline its members and make them accountable for their actions.

A constitutional amendment made just prior to the lifting of martial law, has also caused concern to the legal profession. Article 204 of the Constitution contains the powers for a High Court or Supreme Court to punish anyone for contempt of court. Prior to March 1985 it contained an explanation which read:

"Fair comment made in good faith and in the public interest on the working of the Court or any of its final decisions after the expiry of the period of limitation for appeal, if any, shall not constitute contempt of the Court."

By an amendment to the article,⁷⁵ the explanation was omitted. The concern of the legal profession is aptly expressed as follows:

"The Pakistan Bar Council is unable to find wisdom behind the omission of the "Explanation". Does this mean that a judgement of a Court in no circumstances can be commented upon even in good faith? Such a provision is not recognised in Islam and shall impede the development of the law".⁷⁶

If this fear has foundation and effectively silences comment on judicial decisions, then it can be seen as an unnecessary fetter on the freedom of speech and another restraint on the legal profession in particular.

Legal aid

There is no state funded legal aid system in Pakistan, although the Government, both Federal and Provincial, do have a statutory obligation to make "grants in aid" to Bar Councils under the Legal Practitioners and Bar Councils Act 1973. We understand that no grant in aid payments have been made to any Bar Council for several years. At the present time, lawyers provide their services free of charge to those who cannot afford legal representation. A scheme was proposed by the Pakistan Bar Council, whereby a proportion of the court fees paid on every court document would be given to the Bar Council to establish a legal aid fund, which would also require, initially at least, an adequate donation by the Government to instigate the scheme. These proposals have not been implemented and there appear to be no plans by the Government to provide the much needed

resources for the large numbers of the needy and poor who cannot afford legal services.

Legal education

To complete a law degree in Pakistan, a candidate must complete a Bachelors Degree, and complete a two year part-time law course. These courses are taught by practising advocates in the evenings. There was widespread dissatisfaction among the legal community about the minimal requirements to obtain a law degree and the inadequate nature of the courses. Many lawyers who can afford the cost, study and obtain law degrees from overseas universities.

However there is a need to establish adequate full-time law courses in the Pakistan Universities, which will ensure a well educated legal profession. Again, the Pakistan Bar Council has framed rules for legal education, which have not been implemented by the Government. In addition, funding is required to provide adequate facilities and full-time lecturers.

The Ombudsman

The office of Ombudsman or Wafaqi Mohtasib was established in 1983. His powers allow him to undertake "any investigation into any allegation of mal-administration" on the part of any Agency, which includes any department of the Federal Government or any institute controlled by the Federal Government. He does not, however, have any jurisdiction to investigate any matter which relates to the defence of Pakistan, or anything to do with the military, naval or air forces of Pakistan.

As noted in his annual report, the complaints received mostly contain "allegations of delay, neglect and inattention, inefficiency and ineptitude, indifference and carelessness, discrimination and favouritism, corruption, departure from the law, rules or regulations, unjust and biased decisions or administrative excesses and abuses."⁷⁷

From his report, it is clear that administrative inefficiencies of the Government are often rectified by an intervention by the Ombudsman, such as the failure to connect electricity to a village, the failure to provide telephone services, excess charges or the delay in paying family pensions.

However, the flagrant abuses perpetrated by the law enforcement

agencies, which we were told were under the control of the military, are not able to be investigated by the Ombudsman.

If Government accountability is to be a reality in Pakistan, then there is a need for the actions of the military to be reviewed and/or investigated, particularly where court action is not possible because the identity of the perpetrators is unknown or uncertain. There is a clear need, therefore, for the jurisdiction of the Ombudsman to be extended to include all areas of law enforcement, regardless of whether agencies thus investigated are under civilian or military control.

Notes

1. The first martial law period was under General Ayub Khan on 8 October 1958; the second occurred in March 1969 under General Yahya Khan and the third on 5 July 1977 under General M. Zia-ul-Haq till 30 December 1985.
2. The first Constitution, the Constitution of the Islamic Republic of Pakistan came into force on 23 March 1956 and was abrogated on the promulgation of martial law in 1958; the second Constitution, the Constitution of the Republic of Pakistan 1962, was subsequently amended in 1963 and 1964, and was suspended on the proclamation of the Defence of Pakistan Emergency in 1964; the third Constitution, the Constitution of the Islamic Republic of Pakistan in 1973, which came into force on 1973, was in abeyance from 5 July 1973 to 26 December 1985.
3. Universal Declaration on the Independence of Justice, from the World Conference on the Independence of Justice, 1983 No 12 CIJL Bulletin, Geneva, pp. 27-55.
4. Chief Martial Law Administrators Order 1 of 5 July 1977.
5. Clause 3 *ibid*.
6. Proviso to Clause 2 *ibid*.
7. Clause 4 *ibid*.
8. "Justice Patel on 1973 Constitution" MAG January 31-February 6 1985 pp. 8-9 at p. 9.
9. Introduction to "The Constitution of the Islamic Republic of Pakistan" by Makhdoom Ali Khan p. xxxvi.
10. One such decision was made by the Division Bench of the Karachi High Court in *Aizaz Nazir v. Chairman Summary Military Court* PLD 1980 Karachi 444, in which it held that the petition before it had not abated and the Court had the power of judicial review.
11. *Judicial Review of Martial Law Actions* M. Farani, 1986, Lahore Law Times Publications, contains a collection of cases decided by former High Court Judge Mian D. Mahmood, in which many martial law actions and proceedings were set aside as illegal and without lawful authority.
12. Clause 3B Constitution (Amendment) Order 1980.
13. Clause 3C *ibid*.
14. Shariat Benches of Superior Court Order 1978, President's Order 1978, President's Order No. 22.
15. As at 6 February 1986, Chapter 3A had been amended 16 times. R. Patel *Islamisation of Laws in Pakistan*, 1986, Faiza Publishers, p. 88.
16. Introduction to "The Constitution of the Islamic Republic of Pakistan" (*supra*) at p. xi.
17. *ibid*.

18. Article 5 of PCO 1981.
19. Article 8 of PCO 1981.
20. Article 10 of PCO 1981.
21. Article 7.
22. Article 12.
23. Article 9.
24. "Address of Welcome to the Prime Minister of Pakistan". Fifth Pakistan Jurists Conference, Karachi, March 28-30 1986 by the Pakistan Bar Council reprinted April 1986, No. 17 CIJL Bulletin, Geneva, p. 29.
25. Introduction to the 1973 Constitution (*supra*) p. xii.
26. Resolution of the All Pakistan Lawyers Convention "Independence of the Judiciary".
27. Sections 59A & 59B of the Legal Practitioners and Bar Councils Act 1973, inserted by Legal Practitioners & Bar Councils Amendments Act 1982.
28. See note 24.
29. Legal Practitioners and Bar Councils Amendment Act 1985.
30. P.O. No 14 1985 Art. 2 and Sch. item 34 repealed Art. 179 Clauses 2-6 of the 1973 Constitution.
31. P.O. No 14 1985 Art. 2 and Sch. item 37 repealed Art. 195 Clauses 2-6 of the 1973 Constitution.
32. P.O. No 24 of 1985 section 3 inserted Article 200 Clause 4 in the 1973 Constitution.
33. P.O. No 4 of 1984 subsection 4.
34. R. Patel, *Islamisation of Laws in Pakistan* (*supra*) at p. 97.
35. For a further discussion on the Islamic Laws of Hudood see Chapter 5 (*infra*) on "The Impact of Islamisation on the Rights of Women".
36. Constitution (Second Amendment) Order 1982 (P.O. No. 5 of 1982) ss 4 inserted. Article 203-DD (a) in 1973 Constitution.
37. Constitution Amendment Order 1984, P.O. No. 1 of 1984 p. 2(a) inserted ss 1-A to Article 203D of the 1973 Constitution.
38. Constitution (Second Amendment) Orders 1981 (P.O. No. 7 of 1981).
39. Constitution (Third Amendment) Order 1982 (P.O. No. 12 of 1982) section 2.
40. Article 203 F (3) of the 1973 Constitution.
41. article 270 A subsection 1.
42. Article 270 A subsection 5.
43. "Notifications" *Dawn*, December 30 1985.
44. Article 239 subsection 5.
45. Universal Declaration of Human Rights, Article 8.
46. *Pakistan Times*, 10 December 1986.
47. "Universal Declaration on the Independence of Justice" (*supra*) p. 34 para. 2.07 (d).
48. eg. Pakistan Bar Council, (*supra*).
49. Articles 181, 182 and 197 of the Constitution.
50. Articles 179 and 195.
51. Pakistan Bar Council (*supra*).
52. The word "fourteen" was substituted for the word "five" by P.O. No. 14 of 1985 Article 2 and Schedule item 33 with effect from 2 March 1985.
53. Clause 6 Code of Criminal Proceedings 1898.
54. Clause 9 *ibid*.
55. Clause 10 *ibid*.
56. Clause 12 *ibid*.
57. Clause 14 *ibid*.
58. Clause 15 *ibid*.
59. Clause 37 *ibid*.
60. Clause 41 *ibid*.
61. Clause 3 Code of Civil Procedure 1908.
62. Clause 5 *ibid*.

63. eg. Pakistan Bar Council (*supra*), and the Lahore High Court Bar Association contains an object in its Constitution seeking the separation of the judiciary from the executive.
64. See *ante* under headings "Constitution (Amdt) Order 1980-B "The Federal Shariat Court" and "The Period prior to the lifting of Martial Law".
65. "The Independence and Freedom of Lawyers in Pakistan", Report to Lawasia Council, March 1983 p. 57.
66. S.1(a) Article 203D of the 1973 Constitution.
67. PLD 1981: Federal Shariat Court p. 145.
68. Article 203 E (9), added by Constitution (Amendment) Order 1981 (P.O. No. 5 of 1981).
69. *Fed of Pakistan v. Hazoor Bux* PLD 1983 Federal Shariat Court p. 255.
70. PLD 1984: FSC p. 136.
71. PLD 1984: FSC p. 136.
72. PLD 1986: FSC p. 1051.
73. By Article 2 A.
74. Articles 2.04, 2.05, 2.07 (a) and (b), 2.16, 2.20 and 2.41 of the Universal Declaration on the Independence of Justice (*supra*).
75. P.O. No. 14 of 1985 Art. 2 and Sch. item 44.
76. "Address of Welcome" (*supra*).
77. Wafaqi Mohtasib (Ombudsman)'s Annual Report 1985 p. 65.

Chapter IV

Military Courts

The most criticised aspect of the military rule was the use of special and summary military courts to try political opponents and even those charged with ordinary crimes. In the Province of Punjab alone, 12,078 persons were arrested and 10,524 were convicted and sentenced by military courts. This gives an indication of the number of persons who would have been tried by military courts in the whole country.

The special and summary military courts were established under Martial Law Order no. 4 which was promulgated following the imposition of martial law on 5 July 1977. Summary military courts which consisted of only one member of the armed forces, generally in the rank of a major, had powers to impose sentences extending to three years. Defendants before summary military courts were not permitted legal representation. The special military courts had powers to pass sentences of death, life imprisonment and rigorous imprisonment for more than three years. Special military courts consisted of three members of which two, including the President, were military officers and the third member was a First-Class Magistrate or a sessions judge.

The mission met with persons who were tried and convicted by the military courts and who were subsequently released after the lifting of martial law. According to these persons, the military officers who sat in these courts very often lacked legal training and procedures were not followed strictly. This was also confirmed by lawyers who had appeared before special military courts. There were instances where lawyers resorted to walking out of these courts in order to register their protest against procedural irregularities. According to these lawyers, when the military courts initially came into operation petitions challenging the military

courts' verdicts were taken to the High Courts and some judges did deal with the petitions. The High Courts had dealt with these petitions on the basis of the Supreme Court's decision in Nusrat Bhutto's case which gave qualified validation to the imposition of martial law. In this judgment, the Supreme Court had held that "the superior courts continue to have the power of judicial review to judge the validity of any act or action of the martial law authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore notwithstanding anything to the contrary contained in any martial law Regulation or Order, Presidential Order or Ordinance."

The judicial review of military court trials by High Courts on the basis of Nusrat Bhutto's decision helped rectify blatant mistakes carried out by the military courts. The following case is a good illustration:¹

"The crime of poor Ghulam Hussain was that he was allegedly found in possession of an unlicensed 12-bore gun. He was armed with this weapon at 8.05 p.m. It was recovered from him at the time of his arrest. A formal case was registered against him *vide* first information report No. 244 of 1978 at Police Station Mianwali Saddar on 12th August. He was tried by a Summary Military Court and convicted and sentenced to six months' rigorous imprisonment plus a fine of Rs. 2,000. The gun was also confiscated to the State.

"The petitioner assailed his conviction and sentence in the High Court. His case was that he had been falsely implicated and that the gun was planted upon him.

"Strangely enough the examination of the record of the case revealed that on the same day another first information report No. 241 of 1978, at this very police station, was registered against the petitioner in respect of the occurrence which took place earlier in the day at Degerwela (about 4.00 p.m.). It was alleged in this first information report that Amir Abdullah, Hamid Ullah and Ghulam Hussain, petitioner, were exchanging fire from their respective weapons with the complainant party and that in the meanwhile an Assistant Superintendent of Police along with a police party including the Sta-

(1) This case is taken from a compilation of such cases dealt with by the then Lahore High Court Judge, Justice M. dilwar Mahmood. The compilation is entitled: "Judicial Review of Martial Law Actions", M. Farani.

tion House Officer came there and arrested all of them at the spot, i.e. at 4.00 p.m. Thus the petitioner, along with his accomplice, was in jail after 4.00 p.m. He could not, therefore, be carrying a gun at 8.30 p.m. as was being alleged in the instant case. The learned judge concluded that this was clearly a concocted case. The conviction and sentence of the petitioner was declared to be unlawful. He was set at liberty."

However, in 1979, the Martial Law Administration, contrary to the Nusrat Bhutto judgment, passed the Constitution Second Amendment Order which specifically excluded the military courts from any judicial review. According to this order:

"Notwithstanding anything hereinbefore contained, where any Military Court or Tribunal is established, no other court, including a High Court, shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of the military court or tribunal extends and of which cognisance has been taken by, or which has been transferred to, the Military Court or Tribunal and all proceedings in respect of any such matter which may be pending before such other court, other than appeal pending before the Supreme Court, shall abate."

Nevertheless, petitions were filed before the High Courts challenging the martial law courts decisions. One such petition was filed by Abdul Hameed Baloch who had been tried and sentenced to death by a Special Military Court for an alleged offence of murder. His constitutional petition before the Baluchistan High Court was heard by a bench of the Court presided over by its Chief Justice and the court stayed the execution of the death sentence holding that the trial by a military court of an accused who was a civilian for an offence under the ordinary law was not covered by the principle of 'state necessity' as enunciated by the Supreme Court while sustaining the imposition of martial law. The High Court also held that all legal measures by which their constitutional jurisdiction to review executive actions was restricted were *ultra vires*. (Reported in NLR 1980 Civil Quettar 873.)

Regrettably the Martial Law Administration promulgated on 24 March 1981 the Provisional Constitution Order 1981. This validated all actions of the military government since 1977 and prohibited any legal challenge to the actions of the martial law government or to any sentence passed by a military court or tribunal. Supreme Court and High Court

judges were required to take an oath under the PCO, some refused and resigned. At least five High Court judges were not invited to take the oath and were thus removed from office. Incidentally, the Chief Justice of the Baluchistan High Court who had given the judgment of Abdul Ahmeed Baloch's case was one of the judges who was not asked to take the oath. As a result, the Baluchistan High Court was reconstituted and the new judges vacated the stay order against the death punishment given to Abdul Hameed Baloch who was subsequently executed.

The prohibition on judicial review was followed by President's Order No. 4 on the Criminal Law Amendment Order 1982. Under this order the burden of proof was placed on the accused and confessions made to a police officer were admissible contrary to the Evidence Act of Pakistan.

The unfair nature of the trials that were conducted by the military courts after the promulgation of the PCO and the Criminal Law Amendment Order has been well documented by Amnesty International,² Lawasia³ and the Lawyers' Committee for Human Rights.⁴

The conclusions of these reports concerning the trials were confirmed by the reports received the present mission.

Unfortunately, there are still persons in prison who are undergoing sentences or even awaiting death sentences imposed by the military courts. The mission was informed about a case known as the 'Sahiwal case' in which two persons have been sentenced to death by military court and may be executed any time. The background to this case is as follows:

In October 1984 a group of men are reported to have attacked a Ahmadiyya Community's place of worship in Sahiwal. The caretaker, in order to protect the property and inmates, is alleged to have resorted to firing with a shotgun and killing two non-Ahmadis. The caretaker admitted responsibility for firing and killing the two men. The police arrested him and also six others and charged them with murder and rioting. They were tried by the military court no. 62 of Multan. The court found six of them guilty and passed sentences of death for two of them and seven years' imprisonment for the rest. Military Court no. 62's order was sent to the Provincial Martial Law Administrator for confirmation as required under the Martial Law Order that established the military courts. The Provincial Martial Law Administrator (PMLA), in an order dated 8 October 1985, stated that Military Court no. 62 should reconsider the convic-

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- (2) The trial and treatment of political prisoners convicted by Special Military Courts in Pakistan - November 1985.
 - (3) The Independence and freedom of lawyers in Pakistan - March 1983.
 - (4) Zia's Law: Human Rights under Military Rule in Pakistan.

tions on all charges which were based on doubtful evidence and as such were not legally sustainable.

Military Court no. 62 reconvened and in spite of the PMLA's order not only reconfirmed the earlier sentencing but increased it by adding a fine to those who were sentenced to death and changing the seven years' imprisonment to life imprisonment. This order with the increased sentences was confirmed by the President and that too was after the lifting of martial law.

This case shows the urgent need for review of cases of persons who are awaiting death sentences or who are undergoing long prison sentences.

The only procedure available to these persons is given under Martial Law Order no. 107 passed on 29 December 1985. Under this Order, a petition for review can be submitted to the President in the case of a death sentence and in all other cases to the Provincial Governor. The mission was told that even nearly eleven months after the lifting of martial law only a few persons have benefited from this procedure. This procedure implicitly acknowledges the need for review but still keeps it out of the ordinary courts.

Total indemnification of all actions taken during the martial law period and the continued exclusion of the courts from reviewing the military courts' decisions is seen by many as indicating the control of the army over the present civilian government.

Article 270A of the Constitution inserted in the Constitution by the Eighth Amendment that came into effect as from 30 December 1965 states:

"Any order made or sentence passed by any authority ... shall, notwithstanding any judgment of any court, be *deemed to be and always to have been validly made, taken or done* and shall not be called in question in any court on any ground whatsoever."

According to lawyers and retired judges of High Courts and the Supreme Court, this blanket ban on judicial review of actions taken by military authorities and verdicts given by military courts is unprecedented. In the two previous martial law periods, the courts always had at least the power to look into mala fide and illegal actions carried out by the martial law authorities.

Concern was expressed to the mission that the wording of Article 270A of the Constitution by stating that 'martial law regulations, orders ... any sentence passed ... *be deemed to be and always to have been validly made* ...' has preempted the possibility of challenging them in the courts as being mala fide or illegal.

In spite of Article 270 many petitions have been filed in different High Courts challenging the actions taken by the martial law authorities and sentences passed by the military courts. One such petition was being heard by the Lahore High Court at the time of our mission. It was that of Mr. Malik Ghulam Mustafa Khar, former Governor and Chief Minister of Punjab. Mr. Khar, while in England during the martial law period, was tried *in absentia* by a military court and sentenced to 14 years' rigorous imprisonment. He was arrested upon returning to the country after the lifting of martial law. Mr. Khar has challenged the sentence passed on him on the grounds that the military court that sentenced him was not properly constituted and also that the summons was served in his village when the authorities knew well that he was in England. His petition also challenges the competency of the parliament to 'validate incompetent and void orders and actions of martial law authorities or military courts'. Furthermore, he alleges that the validation of an illegal conviction and sentence offends against the principles enunciated by the Supreme Court in Nusrat Bhutto's case.

It is not clear whether the courts will give a clear ruling on this and other similar petitions or whether the government will find a way to modify Article 270A in order to give the courts the power to review the cases decided by military courts.

While the mission was in Pakistan there were reports that the government was contemplating another amendment to the Constitution to settle the question of the courts' powers to deal with cases decided by the military courts. This was confirmed to the mission by the Minister for Justice and Parliamentary Affairs. The Minister expressed the opinion that it is a complex issue and that the government is giving serious consideration with regard to making an amendment to the Constitution to deal with this question.

The mission welcomes the assurance given by the Minister and recommends that the jurisdiction be completely restored. Such a step would enable those aggrieved by the martial law courts or by other actions taken by the martial law authorities to vindicate themselves. This is important because many persons who were convicted by the military courts and who were subsequently released face problems in rejoining their posts from which they were dismissed or finding employment or joining professional bodies such as the Bar Council.

The case of Dr. Hasan Zafar Arif is a good example of an individual living with the consequences of arbitrary detention during the martial law period. Dr. Arif who was Associate Professor at the Philosophy Department of the University of Karachi and President of the Karachi Uni-

versity Teachers' Society was issued with a show cause notice in September 1984, by the Governor and Martial Law Administrator of Sind Province. According to the show cause notice, Dr. Arif was accused of 'involvement in political activities, of guiding, training, and inciting students to abjure and oppose ways of thinking and life approved in Islamic society'. The show cause notice circumvented the normal university procedure for disciplinary action which requires the appointment of an enquiry officer to investigate the charges, issuing a charge-sheet, having a hearing before an enquiry committee and finally a show cause notice. Dr. Arif chose to reply by a defiant response by stating that, "under certain other circumstances I would have termed your communication as meddling into academia. But against the backdrop of suppression of all classes and sections of population, labour, students, lawyers, teachers, doctors, journalists, and women and generally unscrupulous treatment of all dissent, I feel truly disarmed". Following this reply, he was arrested in October 1984, under a three months detention order. The detention order was repeatedly extended and Dr. Arif was in detention even after the lifting of martial law. He was finally released in April 1986. During his detention he was dismissed from his University post and his family were evicted from their university quarters. At the time of the Mission's visit, the University had not given back his job and his quarters. Dr. Arif has no possibilities of challenging his dismissal nor of taking any action for damages for the hardship caused to him and his family.

Some of the individuals who face similar problems and who met with the mission expressed the opinion that the government should grant an amnesty to all those who were tried and convicted by military courts. They also argue that since the military have been granted immunity for their actions under martial law, then correspondingly, amnesty should be granted to its political opponents as well. According to these persons, those who are undergoing sentences were not only denied amnesties but were also made to serve the full sentence without the benefit of ordinary rules of remission.

During the martial law period, those sentenced by the military courts were not allowed the benefit of remissions in sentences permissible to ordinary criminals. These remissions, which are given for good conduct, etc., usually substantially reduce the term of imprisonment. The mission was told that this rule is still applied even though martial law has been lifted. When this matter was raised with the Minister for Law, he denied the continuation of the applicaiton of this rule and stated that all prisoners are given remission as per the prison regulations. However, the mission has obtained a copy of an order dated July 1986 by the Additional

Chief Secretary Government of Sind which amends the Persons Act 1984, to insert a new section as follows:

"No person who is convicted for espionage or anti-state activities shall be entitled to ordinary or special remission unless otherwise directed by the Provincial Government."

The mission hopes that the government will revoke this order and apply remission rules to all persons irrespective of the charges under which they were convicted.

The mission was also informed that persons who went into hiding during martial law are still underground since the cases against them are still pending. Many were of the opinion that the government should withdraw the cases against such persons so that they could emerge from hiding and lead a normal life. This was emphasised particularly for political leaders who are still in hiding. For example, the well-known Pakistani newspaper, *Muslim*, in its editorial on 13 December, urged the government to withdraw the case against Mr. Mahmood Khan Achakzai, leader of the Pakhtoonkhwa National Awami Party, to ease the political climate in Baluchistan.

The mission is also of the view that the government should consider withdrawing cases instituted against political leaders during the martial law period.

Postscript

At the time the report was being printed, we were informed about the full bench decision of the Sind High Court on the admissibility of petitions challenging convictions by the military courts (CPNO.D. NO./28 of 1986). The unanimous order passed by the court was that 'the petitions under Article 199 of the Constitution are not under the present dispensation completely barred in respect of convictions by Military Courts or actions by military authorities. However, the scope of challenge is now restricted to Acts or Orders which are without jurisdiction or to proceedings which are *coram non judice*'. According to the opinion expressed by the Court, the words 'deemed to have been made taken or done in good faith' contained in Clause 5 of Article 270A is completely distinct and different from the provisions which have so far been in the so called indemnity clause. The court further stated that 'the effect of this clause appears to be that although an action may not appear to have been taken

in good faith and for the purpose to be served thereby, yet this clause shall oblige us to treat it as done in good faith. Again even though the action may not appear to have been for the purpose for which it was intended to be under the Statute. Yet this deeming clause, which is part of the Constitution itself, will not leave it open to the courts or to anyone else to declare that the action was not taken for the purpose provided in the statute, but on the other hand to treat it as the action taken for that purpose... Clause 5 of Article 270A is part of the Constitution itself and since the jurisdiction of the court under Article 199 is subject to the Constitution, the High Court has to give effect to clause 5 of Article 270 and cannot brush it aside as the High Court is itself the creature of the Constitution and cannot act in contravention of the Constitution.

As for the remedy provided under Martial Law Order No 107 for military court convictions by way of petition to the President, the Court stated that, 'it is hardly possible to treat a petition under para 7 of MLO 107 as an adequate or alternate remedy to writ petition under Article 199 of the Constitution. It appears to be merely a different form of a mercy petition as provided under the criminal Procedure Code and the Constitution'. In concluding, the Court stated that 'we cannot, however, refrain ourselves from pointing out that in view of the scores of challenges made by aggrieved persons on innumerable grounds against convictions by martial law events, it may have been more conducive to public confidence, particularly after the revival of the Constitution and restoration of fundamental rights, if some sort of opportunity of hearing had been provided to the aggrieved parties to ventilate their grievances before an appropriate tribunal ... the same would have cleared the air a great deal and would not have burdened the High Court with scores of petitions. The tribunals could consist of retired judges of the High Court or even senior retired army officers or retired senior civil servants'.

It is not clear what effect this judgment will have on the petitions before other High Courts and what position the Supreme Court would take on this question. The judgment, however, reiterates the mission's conclusion that there is a need for proper review of sentences passed by the military courts.

Chapter V

Preventive Detention

The martial law period was renowned for detention without trial. It was common for political opponents, including students, lawyers, women activists and trade unionists, to be detained without trial for many months. The mission was told that detention was so routine that the police had cyclostyled detention orders with the signature of the detaining authority and that they just filled in the names of the persons to be detained.

There was no possibility of challenging the detention orders in a court. The detainees were most often ill-treated or tortured and kept in prisons among convicted prisoners.

After the lifting of martial law, preventive detention was not used except in August 1986 when several thousand Pakistan People's Party workers were detained and later released. However, the laws authorising preventive detention continue to exist and even the Constitution provides for the use of preventive detention.

Article 10(1) and (2) deal with safeguards with regard to arrest and detention of persons such as production before a magistrate and providing grounds for arrest. Article 10(3) makes these safeguards inapplicable to 'any person who is arrested or detained under any law providing for preventive detention'. Article 10(4) states that laws providing for preventive detention are to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or external affairs of Pakistan or public order, or the maintenance of supplies or services. The grounds of detention are to be communicated within fifteen days. The detention is not to exceed three months without an opinion of the Review Board that there is sufficient cause for continued detention. A person detained for acting in a

manner prejudicial to public order is to be detained for not more than a period of eight months and in all other cases for not more than twelve months. When a person is detained under a Federal law, the Review Board will consist of three persons who are or who have been judges of the Supreme Court or the High Court. In the case of a detention made under a provincial law, the Review Board is to consist of three persons who are or who have been judges of the High Court.

Two laws, the Defence of Pakistan Ordinance 1971 and the Maintenance of Public Order Ordinance 1960, which provides for preventive detention, were brought to the attention of the mission. Under the Defence of Pakistan Ordinance 1971, the central government may authorise any authority to make orders for the apprehension and detention of any person for the purpose of preventing him from acting in a manner prejudicial to Pakistan's relations with foreign powers, or to the security, public safety or defence of Pakistan, or the maintenance of supplies and services essential to the life of the community, and the maintenance of peaceful conditions in any part of Pakistan. The explanation for this section states that the sufficiency of the grounds on which the opinion of the detaining authority is based for detention of a person is to be determined by the authority forming such opinion.

Under the Maintenance of Public Order Ordinance 1960, the government, if satisfied that it acts with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order, may by an order direct his arrest and detention and, subject to other provisions, extend from time to time the period of such detention.

The mission was given a copy of a detention order issued after the lifting of martial law. The order, which speaks for itself, is reproduced here. Dated 12 October 1986 and issued by the Home Secretary to the government of Baluchistan, it states:

"NO.H.POL. 10(150)/86 WHEREAS the Government of Baluchistan is satisfied that with a view to preventing him from acting in a manner prejudicial to Public Safety and Maintenance of Public Order in Baluchistan, it is necessary to detain Kala Khan s/o Aqal Muhammad Kamrani Marri, r/o Sibri;

NOW, therefore, in exercise of powers conferred under sub-section (1) of Section 3 of the Maintenance of Public Order Ordinance 1960, the Government of Baluchistan are please to direct that the said Kala Khan s/o Aqal Muhammad, Kamrani Marri r/o Sibi, who is already under detention, be detained in District Jail, Quetta, for a further pe-

riod of TWO months with effect from 13.10.1986, and committed to the custody of the Superintendent District Jail, Quetta, as a class-II detenu.

GROUND OF ARREST

The above-named Pakistan national has been detained in the interest of security and territorial integrity of Pakistan.

(signed)

(AGHA AMAN SHAH)

Home Secretary

NO.H.POL. 10(150)/86. Dated Quetta the 12th October 1986."

This Order shows that the grounds for arrest are too general and vague.

In view of the misuse of preventive detention during martial law, the present government should make necessary rules that safeguard the interests of detainees and prevent the misuse of detention powers. Among other things, the amendments made to Article 10(4) and (5) of the Constitution by the Third Amendment Act of 1975 should be repealed so that the original article providing that the grounds of arrest be communicated as soon as may be and not later than one week is restored.

Also, the repeal of that amendment will bring back the original article by which no-one is to be detained for more than one month without a review by a Review Board. In addition to making these changes in the Constitution, the government should ensure that the power to challenge detentions by way of habeas corpus petitions should be available at all times, including in a state of emergency. In addition there should be safeguards against continuing arbitrary confinement by requiring a prompt administrative hearing and decision upon the need and justification for detention, with a right to judicial review and with the right to representation by counsel at all stages.

Chapter VI

Torture or Cruel, Inhuman and Degrading Treatment or Punishment

The mission met some of the persons who said they had undergone torture at the hands of the law enforcement authorities during martial law. The mission was told of the existence of special prisons where torture was routinely practised. It was common for detainees or arrested persons to be taken to 'torture dens' to be tortured. It was alleged that most of the convictions under the military courts were often based on confessions extracted after torture. Some torture victims and lawyers expressed their indignation at the fact that the 8th Amendment has indemnified illegal acts such as torture and the present government has not made any enquiries with respect to identifying those police and army personnel who practised torture. However, these persons also agreed that torture is no longer a common feature and that the restoration of the habeas corpus remedy is a safeguard against torture. The Peshawar High Court Bar Association members gave the mission a copy of an affidavit filed before the Peshawar High Court in a habeas corpus petition. One of the petitioners, Abdul Karim, has affirmed that:

"I was arrested on 15 August 1986 and was detained in Rahim Abad police station at Swat. I was tortured in the said police station and then I was shifted to Sardar Sharif police station. I was absolutely naked; my left hand was burnt by the police... The police inspector at the station presented me a document which I refused to sign for which I was threatened. I was warned that in case I do not make a confession before the magistrate, I shall be again put to torture and shall be involved in many other cases."

In the same case, another detainee, Pazal Wahid, has made a similar allegation in an affidavit filed before the court. The filing of the habeas corpus petition and the issuance of a notice by the court helped these two detainees and prevented further torture. The mission is convinced that the restoration of habeas corpus is a positive step but the government should conduct a thorough enquiry into the allegations of torture during the martial law period and also take effective action whenever allegations of torture are made by arrested persons. Such allegations should be the subject of judicial investigations.

Degrading Punishment or Treatment

In 1979 the martial law regime introduced in the criminal code new types of punishments such as the amputation of a hand, stoning to death and flogging. This was done in order to bring the punishments for certain offences into conformity with the punishments laid down in the Quran and Sunnah, the Islamic punishment of 'hadd'. The offences for which the new punishments were introduced are:

- Possession and consumption of intoxicants.
Possession is punishable by imprisonment for up to two years and flogging not exceeding 30 stripes.
Consumption is punishable by 80 stripes.
- Adultery and fornication.
If the offence is committed by a 'Muhsan' or a sane Muslim adult, the punishment formerly was death by stoning in a public place. A person who is not a 'Muhsan' is to be punished with 100 stripes, also to be carried out in public. The requirement under Islamic law that the adultery shall be proved by the evidence of two persons testifying to having witnessed penetration is not applied.
- Kidnapping and abduction.
This is punished by life imprisonment and whipping not exceeding 30 stripes.
- Offences of theft.
Punishment is amputation of the right hand from the wrist if theft is committed for the first time, for the second offence it is amputation of the left foot up to the ankle, and for the third offence the penalty is imprisonment for life.
- Theft with the use of force.

Punishment is by amputation of the right hand from the wrist and the left foot from the ankle.

In addition to these new punishments, in 1979 the martial law regime promulgated the 'Execution of the Punishment of Whipping Ordinance'. The preamble to the ordinance states:

"Whereas it is expedient to make provision relating to the execution of the punishment of whipping and whereas the President is satisfied that circumstances exist which render it necessary to take immediate action..."

The ordinance specifies the type of whip to be used, according to which it is to be of one piece and 1.22 metres in length. The person to be whipped as to be medically examined so as to ensure that whipping will not cause death. Whipping is to be postponed for reasons of health, pregnancy or weather. The whip is to be applied with moderate force so as to avoid lacerating the skin; and not to be applied to the head, the face, the stomach or chest. The person to be whipped should be fully clothed and the whipping should take place in a public place.

The punishments of amputation and stoning to death have not yet been carried out. However, flogging or whipping was widely employed during the martial law period. The regime used it as a way of punishing its political opponents. A large number of them were given this punishment by military courts for simple offences like taking part in demonstrations or processions. Most often, whipping was carried out in public with loudspeakers relaying the cry of the person being whipped. Additionally, none of the specifications in the ordinance were followed and as a result whipping became a very cruel and degrading treatment.

The introduction of whipping and other punishments such as the amputation of hands and feet were criticised strongly by all the lawyers and others who met with the mission. The official explanation given for the introduction of these punishments was that they are part of the process of change from the Anglo-Saxon jurisprudence to that of Islamic jurisprudence and that these punishments, apart from whipping, have not been carried out.

The mission strongly believes that the punishments of whipping and amputation are contrary to the provisions of the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights, Articles 5 and 7 respectively.

The Use of Bar Fetters, Shackles and Chains

Related to the question of degrading and cruel punishment is that concerning the use of bar and fetters, shackles and chains on prisoners. The mission had the opportunity to meet with ex-prisoners who had been fettered during their imprisonment. According to them, bar and fetters and shackles were used on the prisoners routinely. When this matter was raised with the Minister for the Interior, the mission was told that it was/is used on convicts who are dangerous or who have attempted to escape from prison. However, the members of the mission saw for themselves many persons in bar and fetters in the Karachi District Court.

The mission strongly recommends that the government abolish the use of bar fetters, shackles and chains, either as instruments of restraint or for the purpose of punishment.

Prison Conditions

One other major concern that was expressed by many was over the extremely bad prison conditions. The mission did not have visit any prisons and was not able to confirm the allegations that were made regarding prison conditions. Some of the common problems that were referred to were the overcrowding of prisons, the lack of hygiene and medical facilities. There were allegations that prisoners in some jails in the province of Sind were ill-treated by the prison authorities. During the mission's stay in Pakistan the newspaper, *Dawn*, reported that nine opposition members of the Sind Assembly sought permission to inspect four prisons in the province to see conditions for themselves. They had also asked the Home Secretary to verify the allegations of the treatment meted out to the prisoners in these four jails.

The mission understands that a Jail Reforms Commission that was constituted in 1984 is still finalising its report. The mission hopes that the views of the Bar Associations and other non-governmental organisations will be actively sought by the commission before finalising its report.

Chapter VII

Freedom of Expression, Public Assembly and Movement

During martial law not only was representative government abandoned but other civil and political rights were also severely curtailed. Most notably there were substantial restrictions on freedom of expression, public assembly and movement which limited the organisation and articulation of any opposition to the regime. Although it would be fair to say that the scope for enjoyment of these freedoms is now somewhat greater than during martial law, nonetheless the restrictions to which they are subject, both as a matter of law and practice, are still considerable. Some of these restrictions have survived the martial law era during which they were first introduced but others originated prior to that period, although they were also used throughout it with great effect. It is probable that many of these restrictions are not compatible with the constitutional guarantees now in force, which are in exactly the same terms employed by the Constitution of 1973*, but challenges to them in the courts either have not been mounted or have made little headway on account of the difficulties discussed in relation to the judiciary elsewhere in this report. It ought also to be noted that some of the restrictions on these rights and freedoms are applied with particular severity to the Ahmadi community and this will be discussed specifically in the section dealing with freedom of religion.

* Articles of the constitution 15, 16, 17 and 19.

Press Freedom

Pakistan has had a long tradition of publishing newspapers, both in English and Urdu, in its major centres of population and they have generally reflected a wide range of opinions. Although the majority of newspapers are in private ownership, several of them, together with one of the two press agencies, are owned and controlled by the government through the Press Trust of Pakistan. The freedom of the press has been curtailed on many occasions during Pakistan's history and this was particularly true during the latter years of the administration led by Zulfikar Ali Bhutto. Indeed the press was subject to so many restrictions then that the initial effect of the imposition of martial law was generally regarded as liberating. For most of the time, however, there was no freedom of the press during martial law; not only was there a formal system of censorship but a number of other measures were successfully employed to curtail or suppress the publication of information and the expression of views considered unacceptable by the martial law authorities. The censorship system relied on officials from the Press Information Department determining what was and was not to be published. Their decisions were not always consistent but the system was only in force for part of the martial law period and the many other measures used during most or all of that period were probably even more effective in controlling the press. Many of them were directed at ensuring self-censorship by the press itself. Thus a system of 'press advice' would indicate the official view on whether or how a particular matter ought to be covered and it would be up to the editor, proprietor or publisher to draw his own conclusions.

This approach was backed by an array of sanctions, both formal and informal. Not only was there power to ban the publication of particular issues of newspapers but those seen to be acting out of line could be formally warned and/or required to furnish a financial security of up to 30,000 rupees. In addition there was the power to shut down a newspaper for a specified period by suspending or cancelling the declaration or licence which all newspapers are required to obtain by the Press and Publications Ordinance of 1963. The owner of the press on which a newspaper was printed could also be required to furnish a security and was equally liable to be shut down under the terms of the Ordinance. In addition, a newspaper's financial viability could be undermined by the partial or total withdrawal of government advertising (which is the main source of advertising revenue open to the press), by restrictions on the newsprint it was able to purchase at the advantageous official price and by the can-

cellation of government subscriptions as these can make a significant contribution to sales.

In 1979 a further inhibition on adverse comment was effected by an amendment to sections 499 and 500 of the Pakistan Penal Code which withdrew from the press most of the defences normally available in an action for defamation, notably, where the statement complained about involved an imputation of truth which the public good required to be made or amounted to the expression in good faith of any opinion concerning either the public conduct of public servants or the conduct of any person touching any public question or the merits of a case decided by a court or the conduct of witnesses or others concerned. The publication of information relating to the conduct of public affairs as well as any criticism of it was thereafter at risk of being subjected to five years' rigorous imprisonment or a fine or both.

There were also restrictions on the importation of foreign newspapers and periodicals which contained material unacceptable to the martial law authorities and difficulties were created for Pakistani journalists seeking to travel overseas. The independence of the press was further undermined by the government's support for the rival trade unions of journalists that were formed in 1978 when the existing unions decided to continue protesting against the banning of newspapers and the detention of newsmen.

Since the lifting of martial law there has been a considerable easing of the controls to which the press had been subjected and a number of new newspapers have been granted declarations (licences) and been able to commence publication. We were able to read news reports, published during and prior to the mission, which did not show public authorities in a favourable light, including accounts of events, such as the riots in Karachi in December 1986, that did not always confirm the anodyne versions in the 'press notes' prepared by the government and which newspapers are obliged to carry. In some newspapers there was also to be found criticism of particular actions by public authorities. It was, therefore, with some justification that all the journalists and many of the other people that we were able to meet considered that the press was now much freer than at any time since the first few months after the imposition of martial law. Nevertheless the change owes more to a relaxation of government pressure than any new legal safeguards as the press is still subject to many of the controls that were used during the martial law period. Indeed almost all of them existed before that period and the only restriction to lapse with the end of martial law was the power to ban the publication of particular issues of a newspaper, formal censorship having been terminated much

earlier. Moreover, no action taken against particular papers during martial law has been revoked. This means that any paper or press which lost its declaration must apply for a new one, and success is not guaranteed since an application is more than just a formal procedure to establish the identity of the editor, printer and publisher; a declaration should be refused if the publisher does not have the financial resources required for regularly publishing the newspaper, the editor does not possess reasonable educational qualifications or have adequate training or experience in journalism, the publisher or printer has been convicted in the preceding five years of an offence involving moral turpitude (which could include convictions by the martial law courts) or is a person whom the government is satisfied "on the basis of information in its possession" is likely to act in a manner prejudicial to the defence, external affairs or security of Pakistan.

Such criteria allow plenty of scope for the refusal of a declaration because of the political background of the applicant and there is no right of appeal against the decision of the District Magistrate, which in any event does not have to be made within any prescribed time-limit. Certainly some of the groups that we met have not bothered to apply for a declaration as they believe that it will be refused because of their opposition to the government, and it is not a system calculated to inspire confidence on the part of the press. Furthermore, although a number of new newspapers have commenced publication, attempts by them or those already in existence to secure a circulation in more than one province are frustrated because they are generally refused permission for printing in more than one centre; distribution from place of publication to other centres is possible but that can often take up to half a day. In some cases, such as *Musawaat*, the Pakistan People's Party paper, it has not been possible to resume production as the press in Lahore on which it was printed had been sold off after the closure action taken against it during martial law made it impossible to repay a bank loan and a challenge to the cancellation of its declaration has still to be heard. Moreover, the licensing requirements for newspapers cannot be avoided by publishing occasional news-sheets, leaflets or pamphlets as any document containing or commenting on public news (other than a newspaper) requires prior authorisation from the District Magistrate.

The fact that most of the restrictions on what can be published do not specifically derive from martial law regulations means that they are still available for use and indeed are being used to influence and control the press; so, for example, in December 1986 the Government of Sind issued the weekly newspaper *Javed* with a notice requiring it to deposit 30,000

rupees as security for printing "highly objectionable material"; the material considered objectionable included reports on army action in Sind and alleged corruption involving the Chief Minister of Punjab, as well as poems and editorials. The grounds on which security may be required, a declaration suspended or cancelled and a press closed down are extensive. They include anything which incites or expresses approval of crimes of violence, reports of crimes of violence or sex exciting unhealthy curiosity or imitation, anything which causes a person, as a result of fear or annoyance, to do an act which he is not legally obliged to do, anything encouraging the commission of any offence or interference with the administration of the law, the maintenance of law and order or the payment of taxes or agricultural rents, anything indecent, obscene, scurrilous, defamatory or intended for blackmail, anything calculated to cause public alarm, frustration or despondency without reasonable ground to believe the information to be correct, anything bringing into hatred or contempt the government, the administration of justice or sections of the population, anything exciting disaffection towards the government or creating feelings of enmity, ill-will or hatred between the populations of different regions or different communities, sects and classes, anything prejudicing friendly relations with the government of a foreign state, anything seducing members of the police or the armed forces from their allegiance or duty, undermining their morale or prejudicing their discipline or recruitment and anything inducing a public servant not to carry out his functions or to resign his office. Some aspects of the legislation governing this was subject to constitutional challenge before martial law and in particular it was established that a newspaper should not be liable to proceedings for publishing reports of the speeches of opposition leaders, that words must not be taken out of context and that criticism of the government is not prohibited (*Ali Hussain Jamali v. Government of Sind*, 1974 P.L.D. 283). In principle these qualifications on the 1963 Ordinance should still be applicable but in practice they do not appear to constrain the government and are unlikely to give the press any real sense of security until there is a successful challenge to proceedings such as those being brought against *Javed*.

In the meantime perhaps even more significant than the actual application of legal restrictions (whether or not constitutional) is the fact that the press is continuing to apply to itself much the same regime of self-censorship as operated during martial law because it is still not sure what is acceptable. It is considered safer to err on the side of caution than risk a possible reaction by the government. Thus we came across instances where newspapers failed to report events at all or only gave a limited account of them; this was because the journalist had restricted himself in what copy

he filed or the editor or proprietor had decided not to publish the report received. The subjects which tend to be avoided or at best are given a restricted coverage are the activities and policies of the opposition parties and direct criticisms of the conduct of the President, the Prime Minister, government ministers, the armed forces and anything connected with the Islamicisation process.

Although this attitude of self-restraint is partly the result of uncertainty about whether legal action will be taken against the newspaper or individual journalists, it is also strongly reinforced by many of the informal pressures to which the press are still subject. Thus a journalist restricts what copy he files because he knows that if he ignores any 'press advice' communicated to him it may prejudice access to other information that he wants, and also because the refusal of the editor or publisher to print similar material in the past makes it pointless to create trouble for himself. An editor is influenced not only by 'press advice' but also by his proprietor, whether that is the government-owned Press Trust or a private businessman who may be concerned either about the government using its powers to cause direct financial harm to the paper through a loss of advertising revenue, a reduction in the official newsprint allocation or the cancellation of government subscriptions, or about the likelihood of injury being inflicted upon his other business activities by way of reprisal since their viability is often heavily dependent upon governmental approval or support.

It is evident that the government is still able to exercise substantial control over what can be published by the press in Pakistan. This control certainly goes further than is authorised by Article 19 of the Constitution, namely,

"reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence".

Whatever the theoretical position may be under the Constitution, the publication of information and comment is being curtailed to meet the government's own criterion of acceptability. The freedom of the press will not, therefore, be truly secure unless significant steps are taken to eliminate the continued scope for governmental influence since the end of martial law. Amongst the measures necessary for this to happen would be legislation which made the requirement of a declaration no more than a

formality to establish the identity of those who are responsible for producing a newspaper, which restored to them all the defences to a prosecution for defamation that existed before martial law and which abolished the power to close down a newspaper by cancelling or suspending its declaration. In addition there should be action to ensure that the government cannot use its control over newsprint and advertising so as to punish and coerce newspapers that do not wish to comply with its wishes; insofar as the importation of the former needs to be through the government, it should be distributed equitably and only in accordance with established criteria for assessing each newspaper's needs and the latter should be allocated solely by reference to advertising objectives. Furthermore serious consideration ought to be given to implementing proposals made in 1984 for a Press Council to safeguard the freedom of the press and to monitor journalistic standards.

Television and Radio

The restrictions on what can be reported and discussed on the broadcast media appear to be even more extensive than those affecting the press. In this respect the present position is not regarded by those we met as significantly different from that during martial law. Certainly the English news broadcasts that we were able to see and hear on PTV and Radio Pakistan during the mission were in marked contrast to what was published in some newspapers. Much of the time was given over to very formal reports of meetings by the President, Prime Minister and other ministers with visitors from other countries, brief accounts of proceedings in the National Assembly and Senate together with some foreign news. There was, however, no real reporting of the policy issues underlying these events and no coverage of the activities of any opposition parties, let alone criticism of government action. Even when there had been serious loss of life during the riots in Karachi in December there was only very limited coverage of the events which were then dominating life in that city. In view of the similar observations made to us about the broadcasts in Urdu, it must be extremely difficult for anyone relying on the broadcast media alone to have anything like an accurate idea of events in the country and the political ideas being debated. This is particularly serious since the low rate of literacy ensures that the majority of Pakistan's citizens are so dependent on these media. In addition to the restrictions about what can be reported, certain people are from time to time simply prohibited from appearing on PTV and Radio Pakistan. Apart from oppo-

sition politicians such bans include authors, journalists and poets who are regarded as critical of government policies. The extent of the restrictions on what can be broadcast on PTV and Radio Pakistan is undoubtedly facilitated by the fact that they are entirely under government control and their staff are public employees. There is clearly a need for both PTV and Radio Pakistan to be allowed the freedom to report on events in Pakistan without regard to partisan interests and for all politicians to be given adequate air-time to discuss their ideas and policies. This will only be possible if appropriate measures are taken to guarantee the independence of PTV and Radio Pakistan from government control, regardless of its ownership of them.

Freedom of Assembly and Demonstration

During martial law the authorities had no hesitation in using force to prevent or suppress demonstrations, meetings and any other public expression of views which criticised them or demanded political reforms. Many of the people detained and charged under the martial law regulations were seized while they were taking part in public demonstrations or shortly afterwards. The Constitution now guarantees freedom of peaceful assembly by Article 16 and in the period since the lifting of martial law many gatherings, processions and other expressions of view have been able to take place. However, there have also been many occasions when powers granted under legislation antedating martial law have been used to suppress or inhibit public demonstrations where the threat to public order was at the very least questionable. Moreover, the force being used to disperse many of these demonstrations is clearly excessive.

The main power which can be used to control the holding of any form of demonstration or public meeting is Article 144 of the Criminal Procedure Code. This enables a District Magistrate to order any person to abstain from a specified act and may extend to the public generally if it is directed at their behaviour when frequenting a particular place. An order can be made where it is considered likely to prevent any "obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray" and such an order can remain in force for up to two months or even longer if the Provincial Government so directs. Generally an order will prohibit the gathering of five or more people for a political assembly or procession. The most well-known use of this power since the lifting of martial law was undoubtedly

that in relation to the rally which the Movement for the Restoration of Democracy (MRD) had planned to hold in Lahore on August 14, 1986 and which was followed by the detention of many of its leaders for several weeks. The justification given for the ban was the fear of a confrontation between the MRD's supporters and those attending the rally organised by the Muslim League, the Prime Minister's party. However, the fact that there was no discussion with the MRD of possible policing arrangements to avoid such a confrontation, its only option being to cancel the rally; that bans on demonstrations around that date rapidly became nationwide; and that the detention of many MRD leaders and supporters was for periods of between 15 and 30 days suggest that there is some foundation for the allegation that the real aim of the government was to prevent any display of support for the MRD at that time rather than to maintain public order.

Furthermore, the August 14 ban is by no means an isolated incident. Thus, for example, Article 144 was used to stop all political processions in Punjab during the visit of Miss Benazir Bhutto in October 1986 and also seems to be invoked whenever an assembly is planned by the Pukhtoon Kwa in Baluchistan. The need for a power to prevent public disorder cannot be doubted but this particular power seems to be all too readily invoked to suppress any expression of opposition to government policies. Thus, a clear instance of its use as a matter of course was observed during our visit to Quetta; a protest by civil servants as part of a dispute over wages was prohibited under Article 144 without any previous disorder by the civil servants but solely, according to the official Press Notice "in order to prevent inconvenience to the public and financial and other loss to the Government of Baluchistan".

Our attention has also been drawn to a number of incidents where the threat to use the power under Article 144 was alleged to have been used as a way of trying to discourage people from turning out to some of the meetings and processions organised by the Pakistan People's Party. The use of this power is subject both to requests to the District Magistrate to rescind or alter the scope of an order and to the possibility of a constitutional challenge on the ground that it is more than is reasonably required to preserve public order. In practice, however, once an order is made it seems that a demonstration or meeting is effectively suppressed, since there appears to be no confidence in the District Magistrate and a constitutional challenge could never be heard in good time.

The express banning of assemblies is not, however, the only technique employed to prevent their occurrence or undermine their effectiveness; there are also powers which can be used to prevent people from taking part in public assemblies, whether as speakers or as members of the audi-

ence. Thus, it is possible to bar someone from a particular area under the Maintenance of Public Order Ordinance and this was used, for example, to prevent Miss Benazir Bhutto from entering the Punjab for five days from August 13, 1986. Under that same Ordinance it is possible to detain someone for up to six months with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order. It was under this power that several hundred members of the MRD were arrested on August 13 or 14, 1986 and held for up to four weeks. This was before anyone had taken part in any of the rallies banned under Article 144, and the circumstances of their detention during the previous night gave them no opportunity even to question the validity of the ban, let alone try to take part in the rallies. Moreover, even if there was a threat to public order on August 14, it was by no means clear that demonstrations thereafter would pose a similar threat, and the length of the detention was, therefore, clearly excessive in its own terms. This power has also been used to detain others calling for political change such as Aitzas Ahsan, a lawyer and former minister in the Government of Punjab, who had publicly criticised the Referendum of 1985 and called for general elections open to all political parties.

The reluctance of the government to allow many demonstrations and public assemblies to take place is also reflected in its attitude to the public voicing of any criticism of itself or of political views which it regards as unacceptable. Its response to this is to threaten to or actually bring a criminal charge of sedition against those who make the criticisms or express the views, even though there is no incitement to disorder. Thus, Manzul Baluch was arrested in May for speaking against the government and Miss Benazir Bhutto was charged with sedition for a speech that she made in Lיקuatabad on 31 July 1986. Similar charges have also been made or are being levied against those who support the constitutional changes advocated by the Sindhi-Baluch Pakhtoon Front. The use of such charges, which are not always proceeded with or only threatened, are another form of intimidation against those wishing to exercise their right to freedom of expression and peaceful assembly.

Regardless of whether a demonstration has been lawfully prohibited, there are also serious grounds for concern at the force used by the police to disperse many gatherings. We came across numerous incidents where the immediate response to a demonstration was to disperse it by lathi* charges, the use of tear gas and even the firing of live ammunition.

* 'Lathi' is a long weighted stick used by the police instead of a baton.

As a consequence the injuries and fatalities amongst those taking part in demonstrations is often extensive. It is apparent that the presumption is in favour of using force, and even a relatively minor dispute by civil servants in Quetta was met by a formidable array of police in riot gear who did not hesitate to use force to disperse the demonstrators. Even when a demonstration has not been banned on constitutionally suspect grounds, there is rarely any real need for the degree of force that tends to be used. It is difficult to see how respect for the right to freedom of peaceful assembly can be encouraged in such an atmosphere. Moreover, attempts to establish, and penalise the police for the use of excessive force in the course of demonstrations do not seem to be taken seriously. Indeed those who have made charges against individual officers have, in a number of instances brought to our attention, withdrawn them as a result of alleged intimidation by members of the police force.

The constitutional guarantee of freedom of peaceful assembly will only become a reality, therefore, if adequate arrangements are made to prevent abuse of legitimate powers. This requires, at the very least that the imposition of any controls over the organisation of and participation in demonstrations and assemblies should be subject to speedy review in the High Courts to test whether they are really necessary. It also means that there should be much greater supervision of the way in which demonstrations are policed and that any use of force which is excessive should be disciplined.

Freedom of Movement

Insofar as freedom of movement was restricted during martial law the objective was to curtail the freedom of political opponents and those considered likely to engage in political activity. Thus, while the majority of citizens could travel freely within Pakistan and abroad, people with a record of political activity and their associates could find themselves confined to particular parts of Pakistan or restricted in or totally barred from travelling outside the country. Article 15 of the Constitution has reinstated the right of every citizen to remain in and "subject to any reasonable restriction imposed by law in the public interest" to enter and move freely throughout Pakistan and to reside and settle in any part thereof. This right is in general respected by the government but, as during martial law, obstacles are still being put in the way of its exercise by political activists and anyone voicing criticism of the government. Thus there continues to be a practice of confining people to parts of Pakistan; for exam-

ple, Mr. Yahya Bakhtiar, a former Attorney-General in the Bhutto government, is restricted to the province of Baluchistan subject to the exception of being allowed to travel to Karachi to take part in court cases. Restriction on travel within Pakistan has also been used to prevent politicians mobilising support as in the ban on Miss Benazir Bhutto entering the Punjab during part of August, 1986.

In addition, travel outside Pakistan by those who criticise the government or who are thought to support its opponents is still being controlled. Particular individuals may be subjected to extensive delays in the granting of the authorisation required to purchase foreign exchange and in the issue of passports, as a result of which the purpose of the proposed visit is frustrated, or there may actually be a refusal to allow certain people to leave the country at all or only for specified purposes such as medical treatment. During the mission an attempt was made by Mr. Bakhtiar to challenge the government's decision in April 1986 that, despite the renewal of his passport for five years, he would only be permitted one visit abroad. The decision was made under section 2 of the Exit from Pakistan (Control) Ordinance which had been adopted in 1981. He had used the permitted visit to obtain medical treatment in the United States but contended in his petition that the restriction, which was imposed without any reasons being given, was a violation of his right to the equal protection of the law as other citizens were not subject to this restriction. Two days before the hearing of his petition, a new order was made directing that he should "not proceed from Pakistan to any destination outside Pakistan" and stating that the government did not "consider it necessary in the public interest to specify the grounds on which this order is made". The original order appears hard to justify as no offence has been alleged or even hinted at and the new order is an unnecessarily oppressive attempt to evade judicial review.

In the absence of any other explanation for the imposition of these restrictions on freedom of movement, it appears that the government is continuing to use its powers solely in order to control the legitimate activities of its political opponents. Although many of these restrictions may ultimately be established to be contrary to the Constitution, there is no need to await such a ruling and they ought to be abandoned forthwith. It should also be noted that the return of some people to Pakistan is still being inhibited by the uncertainty about whether they will be proceeded against for offences alleged to have been committed during the martial law period.

Chapter VIII

Rights of Religious and Other Minorities

Many aspects of the problem of safeguarding human rights in Pakistan are inextricably linked with the position of the country's various religious, linguistic and cultural minorities. While many members of these minorities have suffered violations of human rights as individuals, their minority status has, in some cases at least, been a motivating factor and the very integrity of some minorities has also suffered from direct assaults. Certain of the difficulties faced by minorities ante-date martial law, but for some they were exacerbated during it and in some respects this has been with lasting effect.

In carving the state of Pakistan out of Britain's Indian Empire it was possible to ensure that, at independence, most of the Muslims living in the areas where they constituted the majority community would not remain part of a sizeable, but nonetheless, minority group within the predominantly Hindu India. However, this motive for the creation of Pakistan did not mean that there was also the intention that this new state should be exclusively Muslim and indeed from the outset it has numbered amongst its citizens the adherents of several other religions, including Buddhists, Christians, Hindus, Parsis and Sikhs. Moreover the majority Muslim community was itself divided into three main sects; Sunni, Shia and Ahmadiyya. In the Objectives Resolution, adopted on 25 March 1949, the Constituent Assembly declared that in framing Pakistan's first constitution it should not only enable Muslims to order their lives in accordance with the requirements of Islam but should also make adequate provision for the non-Muslims freely to profess and practise their religion. In so according minority status to the non-Muslims it was intended to safeguard their

position and not to make it essentially an inferior one. Although this approach has generally been followed in Pakistan's constitutions there has been a move to increase the separation of the minorities from the majority Muslim community, their property has been subjected to attack and they are being adversely affected by the Islamisation process. Furthermore, during martial law the followers of the Ahmadiyya sect (the Ahmadis), having been reclassified as a non-Muslim minority in 1974, began to be subjected to extensive restrictions on the manifestation of their faith. The ordinance by which these restrictions were imposed has proved to be the beginning of a series of measures, either instigated or tolerated by the government, which are having an extremely grave effect on the religious freedom of this sect and which seem to be leading to its total suppression.

In addition to this religious diversity, there are also significant cultural and linguistic differences to be found within the population of Pakistan. The four main groups are the Baluchis, Pashtoons, Punjabis and Sindhis. Of these, the Punjabis are both the largest and also the most dominant, having a disproportionate representation in all forms of public office. Each group has its own language and culture although Punjabi is very similar to Urdu, the official language. While the division of the country into four provinces partially reflects the distribution of the ethnic groups, there is a substantial Pashtoon population in Baluchistan and there has also been some migration by Baluchis and Pashtoons to Sind. Although the three smaller ethnic groups are far from satisfied that they are being treated fairly, campaigns by various parties for constitutional change have met with no success and indeed are being suppressed by the government.

Non-Muslim Religious Minorities

The intention proclaimed in the Objectives Resolution that, despite Pakistan's overwhelming Muslim majority, the religious freedom of all of its citizens should be safeguarded is reflected in a number of the provisions of the 1973 Constitution. Thus, although Islam is "the State religion of Pakistan" (Art. 2), everyone has the right to profess his religion and religious denominations and sects have the right to establish, maintain and manage their religious institutions (Art. 20), no one can be compelled to pay taxes in support of religions other than his own (Art. 21), there is to be freedom of religious education, both as regards its provision and its receipt (Art. 22), there is a guarantee of equality before the law (Art. 25) and a prohibition of discrimination on grounds of religion with respect to

employment in the public services or access to places of "public entertainment or resort" (Arts. 26 and 27). All these guarantees were brought back into force by the Revival of the Constitution of 1973 Order and are generally being observed as far as the non-Muslim minorities (other than the Ahmadis) are concerned. Indeed in one respect at least their position has been improved because the recent adoption of a policy favouring private education has meant that schools can once again be established by religious institutions. As part of this policy there is also a willingness on the part of the government to hand back schools, but no colleges and universities, that had previously been nationalised. There are, however, a number of problems that are currently being faced by members of the non-Muslim minorities (other than the Ahmadis) on account of their particular religions. They arise out of a number of administrative and legislative restrictions that are directly or indirectly affecting the practice of their faiths, together with the growing impact of the Islamisation process, and are also partly the result of an increasing number of attacks on their temples and churches by private individuals which do not appear to be being adequately dealt with by the police. Although such problems do not at present amount to a substantial interference with their religious freedom they have nonetheless had the effect of making their position feel much less secure than that of Pakistan's Muslim citizens.

They find it difficult, for example, to obtain planning permission to build new places of worship. Although this might be open to challenge in a clear case, the difficulty in overcoming obstruction at the local level is apparent from the continued failure to implement the decision of a Martial Law Administrator in 1984 that compensation should be paid after the civil administration in Bahawalpur (following protests by Muslims) had stopped the completion of a church on which extensive work had already been carried out and for which permission had been granted. The public discussion of their faiths is also closely circumscribed. Thus the access which the non-Muslim religions are given to the public broadcasting services is very limited and when it is permitted during religious holidays certain religious images, such as that of Jesus Christ, cannot be shown. Furthermore, it is virtually impossible for a non-Muslim publicly to engage in missionary work or in any other way to seek the conversion of Muslims because of the fear of falling foul of s.295A of the Pakistan Penal Code which imposes a penalty of up to two years' imprisonment for outraging the religious feelings of any class of citizens. This offence inhibits but does not actually prevent conversions to any of the minority religions taking place. There would, however, be a total prohibition on any conversion from Islam to any other religion if proposals to make that a capital

offence are adopted by Parliament. Despite the existence of a constitutional prohibition on discrimination in public employment, few non-Muslims succeed in obtaining senior positions and there is an increasing reluctance to apply for them.

The Islamisation process has been an increasing source of concern for those belonging to the non-Muslim religions. Although the declared aim of the ordinances for the enforcement of Hudood, which were introduced in 1979, was to bring the law into conformity with the injunctions of Islam and this has led to them being described as Islamic Criminal Laws, they are for the most part applicable to non-Muslims as well as Muslims. Thus, for example, non-Muslims are liable to suffer the penalties of amputation, whipping or death for the various theft offences, whipping for sexual intercourse outside marriage ('zina'), death where that intercourse was without true consent ('zina-bil-jabr') and whipping for a false imputation of 'zina' ('qazf'). However, the ordinance prohibiting the drinking of intoxicants is not applicable to non-Muslims if they are using an intoxicating liquor as part of a religious ceremony. Although the mission was only informed of one instance in which any of these ordinances had been applied and in that case the penalty of whipping for adultery was the subject of an appeal to the Federal Shariat Court, these laws are imposing an exclusively Islamic Code on non-Muslims even in cases where the victims are not Muslims. Moreover this is not being done on an entirely even-handed basis since Muslims can give evidence against non-Muslims but not vice-versa and, while the presiding officer in a trial of a non-Muslim for any of the offences other than 'qazf' must also be a non-Muslim, an appeal to the Federal Shariat Court will be heard by exclusively Muslim judges. At least in some respects, therefore, these ordinances may offend against the constitutional guarantees of religious freedom and equality before the law, but they are possibly immune from constitutional challenge because of the validation given to all the ordinances made by the President during Martial Law through the introduction of Article 270A(3) into the Constitution by the Revival of the Constitution of 1973 Order. Whether or not this is so, there is undoubtedly anxiety amongst those belonging to the non-Muslim religions that their position will become even worse with the adoption of the Constitution (Ninth Amendment) Bill. Under that amendment the "injunctions of Islam as laid down in the Holy Quran and Sunnah shall be the supreme law and source of guidance", and any law held by the Federal Shariat Court to be repugnant to those injunctions will cease to have effect. Although this power is not supposed to extend to any provisions in the Constitution, including the guarantees of religious freedom, there is no confidence that this will ultimately be prove to be so.

Their concern stems partly from the existing application of Islamic criminal laws to non-Muslims but also from the fact that, when the Objectives Resolution was incorporated as an annex to the Constitution by the Revival of the Constitution of 1973 Order, the word 'freely' was omitted from the clause concerning adequate provision for minorities to profess and practise their religions. This unexplained omission leads them to fear that there will be further encroachments on their religious freedom with the development of Islamisation.

The lack of confidence on the part of non-Muslims with respect to their position has also been exacerbated by their constitution into separate electorates for the National and Provincial Assemblies. They had previously been able to take part, together with Muslim citizens, in the direct elections to the Assemblies, whether as candidates or voters. In addition they had had special representatives chosen by the directly elected members of the particular Assembly. The amendment of the Constitution during martial law, so that they could only vote for their representatives in special national constituencies, not only made the representation of their interests more difficult but also set them apart as communities both from each other and from the Muslim citizens of Pakistan. At the very least the effect of this separation has been to contribute to the feeling on the part of non-Muslims that they are less than equal citizens.

Although there were no allegations of interference with any of the religious services held by non-Muslims, the mission was told about a number of attacks on Hindu temples and a Christian church that had occurred during and since the lifting of martial law. These attacks, which were said to have been perpetrated by Muslims and which resulted in the destruction of these places of worship, took place in Jacobabad, Rahimyar Khan and Sukkur in the provinces of Punjab and Sind. While it was not suggested that these attacks had in any way been officially orchestrated, it was claimed that on every occasion the authorities had failed to take any action to force the attackers to desist and indeed that the local police had appeared to turn a blind eye to what was happening. The subsequent payment of compensation by the government was, therefore, entirely appropriate and has helped to undo some of the effects of these attacks. No such payment can, however, remove the resulting sense of insecurity which many non-Muslims feel, particularly as no prosecutions have been brought against those responsible for the attacks.

The Ahmadis

[The Ahmadiyya Movement was founded in 1889 by Mirza Ghulam Ahmad and it has become a missionary movement with adherents throughout the world. Pakistan has always been the centre of its activities and there are some four million Ahmadis in that country.] Mirza Ghulam Ahmad claimed to have received revelations that in his person the Mahdi had become present and that he was

"also the Promised Messiah and was indeed the Prophet whose advent had been foretold in the principal religions of the world."

In addition he claimed that, contrary to the general Muslim view that Jesus Christ had been raised to Heaven alive and would descend to earth again, it had in fact been foretold that another person with Jesus Christ's attributes would appear and that he was that person. His views on the permissibility of *Jihad* were much more restrictive than those of other Muslims, although the common perception that he was in favour of a total ban appears to be incorrect. [Mirza Ghulam Ahmad saw himself as having been appointed by God for the revival and support of the true faith of Islam and his followers continue to worship Allah in much the same way as other Muslims, with the faithful being summoned to prayer five times a day and the same rites and rituals being followed.] However, despite seeing themselves as part of the broader Islamic movement and having been treated as such under Pakistan's constitutions since independence, other Muslims have repeatedly declared the Ahmadis to be heretics. [It is that latter view which the Parliament and successive governments of Pakistan have eventually come to adopt.] Since 1974 Ahmadis have found themselves to be officially classified as non-Muslims and during martial law substantial restrictions began to be imposed on their religious practices. These restrictions have continued after the lifting of martial law and indeed have been extended. [Moreover Ahmadis have experienced discrimination in employment and the denial of other civil and political rights and no action seems to have been taken to prevent physical attacks on themselves and their places of worship or to prosecute those responsible.]

The main reason given for regarding Ahmadis as heretics is the claim by their founder to be a prophet which is said by other Muslims to be incompatible with accepting the finality of the Prophethood of the Prophet Muhammad. Ahmadis, however, deny that they are calling this finality into question as their founder was a prophet without a new law

and was, therefore, only claiming to be the inspired interpreter of the Quranic message and to be bringing the message of rebirth and renewal of the one true religion. This distinction has not, however, been readily accepted by other Muslims and they maintain that the religious practices of the Ahmadis constitute a grave affront to their religious sentiments. The hostility felt by some of these Muslims towards the Ahmadis and their agitation against them has resulted in widespread rioting on two occasions since independence – March to April 1953 and May 1974. Following the riots in May 1974 the opposition parties demanded that the government should re-classify Ahmadis as non-Muslims and a general strike was organised in support of their demands. Zulfikar Ali Bhutto, then Prime Minister, took the issue to the National Assembly which, on 30 June 1974 turned itself into a Special Committee to decide whether the Ahmadis should be officially regarded as Muslims. Its deliberations were kept secret but on September 7 it unanimously adopted the Constitution (Second) Amendment Act 1974. This added Ahmadis to the list of religious minorities for whom additional seats were to be reserved in the Provincial Assemblies (Art. 106(3)) and included the following declaration in Article 260 ('Definitions'):

"A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him) the last of the Prophets or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him), or recognizes such a claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or law."

It was thus unambiguously established that henceforward Ahmadis were no longer to be treated as Muslims. However, this constitutional change did not have any significant impact on them as the decision of the Lahore High Court in *Abdur Rahman Mabashir v. Amir Ali Shah* (1978 P.L.D. 113) subsequently made clear. It was held in that case that non-Muslims (which now included Ahmadis) still remained completely "free to profess and practise their religion and enjoy complete autonomy in regard to their religious tenets and institutions" and that the constitutional amendment had not established any ground on which the court could issue an injunction to restrain Ahmadis from calling their place of worship a mosque (*Masjid*) or from using the traditional form of the call to prayer (*Azan*) in it or from offering their prayer in the manner laid down by Islam. There was, therefore, no legal obstacle to the Ahmadis continuing to profess their faith in the same way as they had prior to the amend-

ment. However, there were instances where applicants for university courses were held to have been properly refused admission because they had misrepresented their religion, having written "Islam (Ahmadi)" instead of "non-Muslim".

The first real consequence flowing from the re-classification of the Ahmadis as non-Muslims came with the constitution in 1978 of Muslims and religious minorities into entirely separate electorates for the National and Provincial Assemblies (see *supra*). In order to take part in elections, whether as candidates or voters, Ahmadis would thereafter have to seek registration on the electoral rolls for non-Muslims and this they have refused to do since they regard that as amounting to a denial of their faith in Islam. They were, therefore, effectively disenfranchised and this position has survived the lifting of martial law as a result of the amendments made to the Constitution by the Revival of the Constitution of 1973 Order, 1975.

Two years after the creation of separate electorates, there was an attempt to restrict the use of certain epithets, descriptions and titles relating to holy personages. Ordinance 44 of 1980 added s.298A to the Pakistan Penal Code and this provided a penalty of up to three years' imprisonment for anyone who

"by words, either spoken or written or by visible representation or by any imputation, innuendo or insinuation, directly or indirectly"

defiled the names of these personages. These were epithets, descriptions and titles that would be used in relation to Muhammad, his wife, family and successors, such as *Khalifa-tul-Muslimeen* and *Ummul-Mumineen*, and which Ahmadis would normally use in relation to Mirza Ghulam Ahmad, his wife, family and successors on the basis that he was a manifestation of the Holy Prophet. It was clearly intended to stop the Ahmadis from continuing to use them. However, the offence was not aimed specifically at them and it did not give rise to any serious problems.

A more direct interference with the religious beliefs and practices of the Ahmadis came with the adoption, also during martial law, of the Anti-Islamic Activities of Qadiani, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance (No. 20 of 1984). [The Lahori Group are the followers of those who seceded from the Ahmadis shortly after Mirza Ghulam Ahmed's death in 1908. They do not accept the latter's prophethood but they do adhere to his views regarding Jihad and the death of Christ and are always included in the legislation directed at the Ahmadis.] This ordinance, through the introduction of sections 298B and 298C

into the Pakistan Penal Code, made Ahmadis liable to a penalty of up to three years' imprisonment for a range of activities which identified their faith with the Islamic faith or involved its propagation. Thus, they were thenceforth prohibited from using the various epithets, descriptions and titles discussed above in referring to or addressing any person other than those listed in the ordinance and could no longer refer to their place of worship as *Masjid* (s.298B(1)). Nor could they thereafter refer to the mode or form of call to prayers followed by their faith as *Azan* or recite *Azan* as used by Muslims (s.298B(2)). Furthermore any Ahmadi who

"directly or indirectly, poses himself as a Muslim, or calls, or refers to his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims"

is also liable to imprisonment (s.298C). In addition the ordinance amended the Press and Publications Ordinance, 1963 so that provincial governments could seize any books or matter which contravened the new prohibitions and also forfeit any security that had been deposited by the press responsible for printing the materials involved.]

5 [The effect of these additions to the Pakistan Penal Code has been to impose stringent limitations on the religious freedom of the Ahmadis. Not only are they prevented from using many of the Islamic forms that have been part of their traditional religious practices, but they are also expected to repudiate a central tenet of their beliefs as a result of the prohibition on associating themselves or their faith in any way with Islam. Also they can no longer seek converts from other Muslims as a result of provisions relating to propagation. Some of the offences are also framed in such broad and subjective terms that considerable discretion is left to the courts, and it is scarcely possible to know in advance whether the section is being transgressed. This is particularly true of the prohibitions on posing, directly or indirectly, as a Muslim and on outraging 'in any manner whatsoever' the religious feelings of Muslims, and the range of activities caught by them has indeed proved to be extensive.]

[Since the adoption of the Ordinance criminal proceedings against Ahmadis for breach of its provisions have been numerous.] Thus the mission was informed of many cases where Ahmadis have been charged or convicted for having in some way displayed extracts from the Quran. For example, Mohammad Idress in Peshawar (8 September 1986), Javed and Shabir Ahmad in Mardan (17 September 1986) and Munawar Kahmed in

Quetta (21 September 1986) for displaying in their shops the *Kalima Tayyaba* (meaning there is no God but Allah and Prophet Muhammad (peace be upon him) is his Messenger (Prophet)) and other Islamic sayings; Rana Karamatullah, Abdul Qadar, Rana Mubashir Ahmed and Aziz Qadir in Mansehra (24 and 25 October 1986) for having printed a verse from the Quran on a wedding card; and Abdul Majd, Mohammad Hayat, Rafi Ahmed and Zaheeruddin Qureshi in Quetta (10 July 1986) for wearing a *Kalima Tayyaba* badge. In addition there have been charges laid for preaching (Rashid Ahmed, Peshawar, 25 October 1986); for offering prayers in a mosque (Sharif Ahmad and Mohammad Yousaf, Mardan, 27 July 1986); and for calling to prayers (22 people in Mardan, 17 August 1986). There were also reports of prosecutions for having used the Muslim form of greeting (*Assalam-o-Alaikum*) and for sitting in *Iftikaf*, that is, retiring into seclusion during Ramadan. In some cases the convictions have subsequently been quashed because of jurisdictional defects arising out of attempts to bring charges for more than one offence in relation to the same behaviour and thus increase the period of imprisonment beyond the maximum of three years which can be imposed for a single offence. However, there seems to have been little doubt in those cases that a conviction would have been entirely proper if the accused had been correctly charged and they have been remanded for retrial.

[In addition to these prosecutions, numerous books and publications relating to the Ahmadiyya faith have also been banned and seized following the amendments made by the Ordinance to the Press and Publications Ordinance.] These include translations of the Quran by Ahmadis, commentaries and other religious writings and individual issues of Ahmadi journals such as *Ansarullah* and *Tahrik Jadeed*. Moreover the declaration of the Ahmadi daily newspaper *Alfazel* was cancelled in December 1984 and its press has been sealed since then. Attempts to challenge the legality of this action, which is possibly vitiated by procedural defects, have been met by the repeated adjournment of the proceedings in the Lahore High Court and the case had still not been heard at the time of the mission's visit.

[The scope of the Ordinance, particularly the offence of posing as a Muslim, is thus extremely broad and has been used to penalise Ahmadis who are practising fundamental aspects of their faith.] There is, moreover, very serious anxiety amongst Ahmadis that an attempt may be made in the future to prosecute them for other Islamic practices such as offering *Namaz*, paying *Zakat*, performing *Hajj* or keeping fast (*Roz*a) or even for wearing the clothing that is associated with Muslims. Certainly it appears sufficient from the cases that have already been decided for an

Ahmadi to be regarded as posing as a Muslim if he engages in any practice which other (non-Ahmadi) Muslims would carry out and it is irrelevant that it is part of his own religious observance. Moreover, insofar as the reference in s.298C to outraging the religious feelings of Muslims is a separate element in the offence, it seems always to be satisfied by the fact of engaging in the religious practice and evidence is not adduced of any disorder or any other signs of outrage. Because of the breadth of the offence Ahmadi in some towns have felt obliged to paint out all signs from the outside of their mosques in order to avoid the risk of prosecution. Their concern appears to have been justified in view of the order issued under the Criminal Procedure Code, s.144 by the District Magistrate of Quetta, and subsequently executed by him, that the Kalima Tayyaba be erased from the outside of the Ahmadi's mosque. A similar notice was served on Mujibur Rehman and others by the Assistant Commissioner, Rawalpindi on 29 December 1986 by which they were required to remove the Kalima Tayyaba from the outside of their mosque in the Murree Road within 15 days or face prosecution under s.298C. It is now feared that this threat will be used to require the removal of any features which make the Ahmadi places of worship mosque-like, namely, arches (*mehrab*), minarets and pulpit (*minber*), particularly in view of the demands of groups such as Tehrik-e-Khatam-e-Nabuwwat that the government demolish them and in view of the attacks on Ahmadi mosques (see below).

[There can be little doubt, therefore, that Ordinance 20 of 1984 has resulted in a substantial curtailment of the freedom of Ahmadi to practise and profess their religion.] An attempt to challenge its validity was made in the case of *Mujibur Rehman v. Federal Government of Pakistan* (1986 F.S.C. 1051). The Federal Shariat Court was asked in that case to exercise its jurisdiction under Article 203D of the Constitution and rule that the Ordinance was contrary to the injunctions in the Quran and the Sunnah of the Holy Prophet. The Court, having stated that Parliament had acted within its authority in declaring Ahmadi to be non-Muslims given the doctrinal differences between them and Muslims, went on to hold that there

"was no bar Constitutional, legal or Shari against the right of a non-Muslim to declare the unity of Allah, to acknowledge the Holy Prophet (P.B.H.) as truthful in his claim, to acknowledge the Quran as furnishing a good way of life and to act upon its Injunctions" (p.1145).

However, it rejected the submission that the prohibition against Ahmadi calling themselves Muslims or posing as such amounted to turning them

out of their religion, namely Islam, since the Ordinance merely "restrains them from calling themselves what they are not". Furthermore, while maintaining that the Muslim Sharia afforded full protection to the practice of religion by non-Muslims as well as to its profession, the Court then went on to justify the need for the provisions in the Ordinance in their entirety.

In the view of the Federal Shariat Court the prohibition on posing as Muslims was necessary because the Ahmadis had not accepted the obligation to call themselves non-Muslims which had been created by the amendment to Article 260 of the Constitution in 1974 and because of the threat to law and order posed by the hostility of Muslims to Ahmadis. Thus, the Court considered that the Ahmadis should after the amendment to Article 260

"have refrained from directly or indirectly posing as Muslims but they obstinately persevered in trying the patience of the Muslim Ummah by acting contrarily"

and because of this persistence it became necessary to prevent Muslims from being deceived into thinking Ahmadis were Muslims. This aspect of the Ordinance was thus justified in the first place as being in implementation of the 1974 amendment to the Constitution. It was, however, also justified because Ahmadis

"by posing themselves as Muslims try to propagate their religion to every Muslim they come across. They outrage his feelings by calling Mirza Sahib [Mirza Ghulam Ahmad] a Prophet because every Muslim believes in the finality of prophethood of Muhammad (P.B.H.). This creates a feeling of resentment and hostility among the Muslims which gives rise to law and order problems. His claim of being a promised Messiah and Mehdi was also resented".

The existence of a law and order problem was supported by references to the disorders that occurred during the life of Mirza Ghulam Ahmad and also afterwards (notably the riots in 1953 and 1974) but there was no indication of the existence of any problems at the time when the Ordinance was adopted other than the statement that

"Section 298C of the Pakistan Penal Code ... furnishes proof of the restlessness and anger of the Muslims on matters ultimately prohibited by the Ordinance".

As far as the prohibition on Ahmadis calling Azan was concerned, this was said to be justified on the basis that this was a distinguishing feature (*Shia'ar*) of Islam and under the Islamic Sharia it was within

"the legislative power of the Islamic State to provide punishment for the non-Muslim who does not abstain [sic] himself from adopting the *shia'ar* of Islam as has been provided in the impugned ordinance"

and a similar justification was given for the prohibition on Ahmadis using the word 'masjid' to describe their places of worship. Finally, with respect to the ban on propagation, the Court held that the Quran did not support any right for non-Muslims to propagate or preach among Muslims but nonetheless it was for

"the Islamic State to allow the non-Muslims to preach their religion as has been done in Article 20 of the Constitution but this can be allowed if the non-Muslims preach as non-Muslims and not by passing off as Muslims".

Furthermore, the Court yet again emphasised the importance of law and order and took the view that the restriction imposed by the Ordinance on propagation fell within the 'law, public order and morality' limitation on freedom of religion in Article 20 of the Constitution.

This judgment seeks to give the impression that the Ordinance's provisions, while imposing restrictions that are no more than necessary, do not involve any real interference with the freedom of Ahmadis to practise their religion or to worship in their places of worship according to its dictates. However, it is evident from the many prosecutions brought against Ahmadis since the judgment of the Federal Shariat Court was given in August 1984 that this is far from so; they have been prosecuted for offering prayers, for the rite of calling their followers to prayer and for using the Quran itself, to say nothing of having their translation of the Quran proscribed. The prohibitions created by the Ordinance and now being enforced clearly strike at the heart of the practice of the Ahmadiyya faith and the Court itself explained why this must be so; the Ordinance was said to be necessary because the Ahmadis would not deny that in which they believe, namely, that their faith is part of the broad spectrum of Islam.

The other justification for taking these particular measures against one of an estimated 150 sects in Islam was a concern to maintain law and

order. This is undoubtedly a factor to be balanced against the exercise of freedom of religion as Article 20 of the Constitution itself provides. However, the Court's explanation as to why there is any threat is solely in terms of the outrage, resentment and hostility which non-Ahmadi Muslims are said to feel towards Ahmadis practising their faith; there was certainly no suggestion by the Court that the Ahmadis were themselves seeking to instigate disorder. It is not clear, therefore, why the State should be justified in backing the refusal of some Muslims to tolerate the religious practices of others anymore than it would be in supporting an assailant against his victim.

Moreover the claim that public order considerations lie behind the restrictions that are imposed on the Ahmadis does not rest easily with the way in which the government itself appears to encourage the resentment felt by some Muslims towards Ahmadis. Thus, all official references to Ahmadis employ the perjorative term *Qadiani* and an application form for a passport requires all Muslims to declare that they believe in the finality of the prophethood of Muhammad, that they do not recognise any person who claims to be a prophet after Muhammad as a Muslim and that they "consider Mirza Ghulam Ahmad Qadiani to be an imposter nabi and also consider his followers ... to be non-Muslim". A similar declaration is required when applying for government employment. In addition many members of the government have been reported as making speeches which are extremely hostile towards Ahmadis. For example, President Zia in a message to the International Khatm-e-Nabuwwat conference in London (August 1985) referred to the measures taken against Ahmadis and said "We will, Insha'Allah, persevere in our effort to ensure that the cancer of Qadianism is exterminated"; Mr. Ghulam Dastgir, Federal Minister for Labour was reported in the *Daily Wifaq* (20 May 1984) as saying "Qadianis should recognise their minority status and end their conspiracies against Islam"; and Mr. Malik Khuda Bukksh Tiwana, Provincial Minister for Awaaz was reported in *Mashraq* (28 February 1986) as saying that life for Qadianis in Pakistan would be made impossible and the Ulema were urged "to guide the Government for the eradication of this issue". Even more hostile remarks by private citizens in the press and on the broadcast media pass unchallenged despite the prohibitions in the Pakistan Penal Code on promoting enmity between different religious groups (s.153A) and on outraging the religious feelings of any class by insulting its religion or religious beliefs (s.295A). No action was taken, for example, after a broadcast on Pakistan Television (16 November 1986) in which Dr. Mujeeb-ur-Rehman said "anyone who makes a claim of prophethood in any form and shape is a liar ... and an Islamic Government ...

is bound to order that either he should enter the fold of Islam or he be killed". There can be little doubt that such statements only help to inflame tensions and this seems rather reckless, particularly as the number of assaults on and murders of Ahmadis where the victim's religion was a motivating factor appears to be increasing. For example, both Dr. Aqeel and Babu Abdul Ghaffar, had their throats cut while they were the head of the Ahmadiyya community in Hyderabad.

Furthermore the government appears to be either ignoring unprovoked attacks on Ahmadi places of worship or allowing public order to be used as a pretext for stopping acts of worship. Thus their mosque in Mardan, North West Frontier Province was ransacked and then reduced to rubble shortly after the police, on Eid day, 17 August 1986, had arrested all the Ahmadis gathered there for prayers. While many of the Ahmadis were prosecuted or charged under S298C of the Pakistan Penal Code (see above), no proceedings have been brought against those involved in the demolition of the mosque despite an information being laid and the pictures of many of those involved being published in newspapers. The government has not awarded the Ahmadis in Mardan any compensation for the destruction of their mosque and indeed the *Daily Nawa-i-Waqt* printed on 8 September 1986 a report of an agreement between the government and the International Majlis Tahafuzz-e-Khatm-e-Mabuwwat that the mosque would not be allowed to be rebuilt. An Ahmadi mosque in Rahwali has also been destroyed and the mosques in Bhaker, Jhang and Sadar have been set on fire.

A number of Ahmadi mosques have also been sealed up on the instructions of local officials. For example, the mosque in Quetta was closed down and put under police guard on 9 May 1986 when a mob arrived outside and threatened to take it over. There had been advance warning of possible trouble, both in threatening letters and newspaper reports of various groups declaring that they would take action if the government did not change the mosque-like shape of the Ahmadis's place of worship by demolishing the mehrab, minarets and minber. The District Magistrate was contacted for help but only a handful of police came at first and they did not direct the mob away from the mosque. When the Deputy Commissioner arrived he requested the Ahmadis to leave and then, after they had refused to do so, he directed their dispersal under s.144 of the Criminal Procedure Code. Everyone inside the mosque, other than the children, was then arrested and detained for four days. They were ultimately acquitted on the charge of disobeying the order of a public servant (Pakistan Penal Code, s.188). Meanwhile the mosque was sealed up and put under police guard. Although the arrest and dispersal of the Ahmadis in this way

might be an adequate response to a difficult policing situation, there has been no explanation for the failure either to take appropriate preventive action against the mob which had initiated the threat to public order or to bring proceedings against those who took part. Moreover it is doubtful whether the maintenance of public order was the real consideration underlying the official intervention since the mosque was still under police guard during the visit of the mission seven months later. Attempts to challenge this continued sealing of the mosque have so far proved unsuccessful and, as there has been no response to requests for an alternative place to offer prayer, the Ahmadis at present have to pray in a garage. It is scarcely credible that it is not possible for the police to guarantee the members of a religious group the freedom to worship in their own mosque but there seems to be no intention of trying to do so. Ahmadi mosques have also been sealed up in Gujrat, Musewala and Sahiwal on the orders of the District Magistrate.

Further measures to control the activities of Ahmadis have been, or are in the process of being, adopted. Thus, in February 1986 the government established a committee with a brief to monitor the implementation of the laws concerning Ahmadis and to consider suggestions as to how to restrain them from presenting themselves as Muslims. In October 1986 Parliament passed the Criminal Law (Amendment) Act, 1986 which added s.295C to the Pakistan Penal Code. This provides that

"Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine".

This new offence of blasphemy, with its extremely severe penalty, is likely to make it even more difficult for Ahmadis to pursue their faith as the application of the previous legislation has already established the way in which their teachings are viewed. There can be little doubt that the specific claim to prophethood for Mirza Ghulam Ahmad, whatever the qualifications applied to it, will inevitably be regarded as a defilement of the Holy Prophet but almost any other tenet of the Ahmadi faith or even an admission of being an Ahmadi could be regarded as amounting to defilement by "imputation, innuendo, or insinuation".

Having set up a committee in September 1986 to scrutinise and check the periodicals and other literature which were being published by Ahmadis, the government has introduced a Bill into Parliament which

would further extend its power to suppress their publication. National Assembly Bill 13 of 1986 is intended to become the Publication of the Holy Qur'an (Elimination of Printing Errors) (Amendment) Act and was introduced, according to its statement of objects and reasons, in order "to provide for the punishment of a non-Muslim author who translates, interprets or comments upon an Ayah of the Holy Qur'an contrary to the belief of Muslims as also the printer or publisher of such translation, interpretation or commentary". The only defence will be that the impugned translation, etc., occurred as a result of a printing or mechanical error and the penalty for any contravention of the Act will be up to three years' imprisonment. Although Ordinance 20 of 1984 has proved effective in securing the suppression of many publications produced by Ahmadis, including the Quran, this new criminal offence has the potential for suppressing anything about their faith with which non-Ahmadi Muslims disagree. The fact that many of these recent developments have emanated from the Council of Islamic Ideology has strengthened the fear of many Ahmadis that another of its proposals will in its turn be adopted, namely that there should be an offence of apostasy, under which any Muslim renouncing *Din-i-Islam* or any of its essentials (such as the finality of the prophethood of Muhammad) would be punished with death.

Apart from being subjected to restrictions on the practice and profession of their faith, Ahmadis are also being denied other civil and political rights. Thus the mission was told of various incidents where Ahmadis appeared to lose their jobs or were denied promotion because of their faith. Some of these appear to have been simply the reaction of private employers to the adoption of Ordinance 20 of 1984 but there has also been some official prompting; some provincial officials have indicated to employers that Ahmadis should not hold 'key' positions and they have been removed as a result. This form of discrimination should not happen in the public service as it is specifically prohibited by Article 27 of the Constitution but the mission received information about cases of appointments and promotions in the armed forces, the civil service and the judiciary being denied because the applicant was an Ahmadi. Furthermore the growing interest in whether or not public office-holders are Ahmadis suggests that they are likely to be the object of increased discrimination in the future. Thus, in May 1986 the Federal Government received updated lists from the provincial governments of all the Ahmadis who held 'key' government posts following the demand of the Majlis-e-Khatme Nabuwaat that they be removed from their posts and a committee was established by the North West Frontier Provincial Assembly on 3 July 1986 to look into the appointment of Ahmadis to high posts in

the province. The re-classification of Ahmadis as non-Muslims in itself means that they are no longer eligible for certain posts such as the Presidency or membership of the Shariat Appellate Bench of the Supreme Court and of the Federal Shariat Court. Moreover Ahmadi lawyers cannot argue before the latter court when it is exercising its jurisdiction to decide whether or not a law is repugnant to the injunctions of Islam (Art. 203E(4)). This is likely to prove a serious handicap if this particular jurisdiction is extended in the manner proposed by the Constitution (Ninth Amendment) Bill, although they have not been prevented from being a party in any proceedings to test the repugnancy of a law.

Furthermore, as has already been indicated, Ahmadis are now effectively disenfranchised because the creation of separate electorates means that they can only vote and stand for election if they accept that they are not Muslims, in other words they must repudiate a central tenet of their faith in order to vote. There has also been the repeated refusal to allow the Ahmadis to hold the annual meeting of their faith at its headquarters in Rabwah. It is claimed that this refusal is for public order reasons even though the overwhelmingly majority of the people living there are Ahmadis and most of the land is theirs. Moreover non-Ahmadi Muslims have been allowed to hold meetings there. A final indignity has been the redesignation of where Ahmadis can be buried and the exhumation and reburial of those already interred. The new cemeteries may be a considerable distance away from the original ones and as a result more difficult for relatives to visit. This has happened both in Punjab and Sind provinces.

It is only the non-Muslim religions that are formally recognised by the government and the Constitution as constituting minorities and for whom any special, albeit not entirely favourable, arrangements are considered appropriate. The only way in which the interests of the various linguistic and cultural groupings in the provinces can be protected, therefore, is through the constitutional provisions establishing provincial governments and assemblies. However, the impression gained by the mission was that many of these groupings considered that the present constitutional arrangements were by no means adequate to safeguard their interests and indeed that their position was being subordinated to that of the majority Punjabi community. Moreover their attempts to campaign for the Constitution to be amended, so that there would be a much greater degree of provincial autonomy than at present and as a result more protection for their interests, are not being tolerated by the government.

Ethnic Minorities

It should also be noted that the mission received a number of allegations in the Punjab province about attacks on Shia Muslims by the majority Sunni Muslims. The allegations were that several of their places of worship had been set on fire and their religious processions had been disrupted. Although, these alleged attacks did not appear to be widespread, there was some concern about the controversy being stirred between these two Muslim sects by the fundamentalists and a fear that the much smaller Shia sect would suffer similar restrictions to those of the Ahmadis.

The grievances of many of the people that the mission met in the provinces of Baluchistan, North West Frontier and Sind were quite wide-ranging but were essentially concerned with securing the preservation of their cultural identity and obtaining a guarantee of equality, both in the provision of resources and of opportunity. Thus, for example, it was contended that the educational facilities in Baluchistan were grossly inferior to those in other provinces and this affected the employment opportunities of the people from the province. It was also argued that it was unfair for central government to have so much control over its resources, natural gas and minerals, when similar control was not being exercised over the agricultural resources of the other provinces. Moreover the royalties paid back to Baluchistan's provincial government were regarded as an unfair share of the profits which left the province without sufficient funds for its future development. In both Baluchistan and North West Frontier provinces there was a strong sense of grievance on the part of the persons met by the mission about the continued failure to stop refugees from Afghanistan occupying the pastures that they had used to graze their cattle and establishing and taking over businesses in the towns. The mission also received complaints about the serious under-representation of citizens from all three provinces in the armed forces and the federal government service and about the fact that even many key positions in their provincial government services were occupied by people from the Punjab. It was also considered that the cultural identity of the Baluchis and the Pashtoons was being undermined because the Provincial Assemblies would not permit the use of Baluchi or Pashtuk as a medium of instruction but only Urdu and English. In Sind the mission heard complaints that the government had handed over agricultural land to retired army officers and civil servants from the Punjab. Finally there was a suggestion that the present provincial boundaries were simply a continuation of the colonial arrangements made by the British and did not reflect the actual distribution of some of the cultural groupings. In particular it was felt that

the northern part of Baluchistan should be united with North West Frontier Province as the people living there were also Pashtoons.

Although these grievances are not shared by everyone in the three provinces and the extent to which they are well-founded could not be fully established, it was clear to the mission that those complaining lacked any confidence in being able to secure effective redress under the existing distribution of power between the federation and the provinces. As a result they were seeking either substantial autonomy for the provinces or their complete separation as the states of Azad Baluchistan, Pakhtoonistan and Sindhudesh. Certainly at present there is very little autonomy left to the provinces under the Constitution. Thus, although there are a number of areas in which they have legislative competence this is only exclusive in respect of those matters which are not enumerated in the two very extensive lists of what is solely for the Federal Parliament and of what that body can legislate upon concurrently with the Provincial Assemblies (Art. 142). In those latter areas Federal legislation will always take precedence (Art. 143). The executive authority of the provinces must be exercised so as not to impede the exercise of the executive authority of the Federation and, although they may have delegated authority to act on behalf of the latter, they are also subject to its directions in a range of matters including public order and the economy (Arts. 137 and 145-149). Although the provinces do have some powers of taxation, they mainly depend upon the allocation of federal taxes and other grants-in-aid as determined by the President on the recommendation of the National Finance Commission, a body comprising the Federal and Provincial Finance Ministers (Arts. 160 and 163). Furthermore, following a declaration of emergency by the President, the Federation can take over both the legislative and executive functions of the Provinces (Art. 232).

The limited nature of the autonomy left to the provinces antedates martial law but it was further undermined by the enhanced executive role given to the Governor, a Presidential appointee, as part of the amendments made when the 1973 Constitution was brought back into force in 1985. Thus, the executive authority of each province is now vested in the Governor and not just exercised in his name (Art. 129); he can require bills and ministerial decisions to be reconsidered before their adoption (Arts. 116 and 131); he is able until 1988 to determine which person commands the confidence of the Provincial Assembly and should be appointed as Chief Minister (Art. 130); and he can dissolve the Assembly, with the prior approval of the President, where he considers that a situation has arisen in which the government of the province cannot be carried on in accordance with the Constitution and an appeal to the electorate is neces-

sary (Art. 112).

Such an increase in the control that can be exercised directly or indirectly by the Federal Government, of course, runs counter to the campaign for greater provincial autonomy by bodies such as the Sindhi Baluch Pashtoon Front. However, the prospects for it being allowed to campaign freely for an expansion of the powers of the provinces, let alone for anyone seeking complete separation, look remote despite the lifting of martial law. This is because, having been excluded from the non-party elections of 1985, it is increasingly unlikely that the Front's candidates will be allowed to stand for election, either at the national or provincial level, if subsequent elections are held on a party basis. They are likely to be barred since the government takes the view that the campaign for provincial autonomy, which necessarily involves criticism of the Army and of the Punjab's domination of the other three provinces, amounts to sedition (Pakistan Penal Code, s.124A). Under this offence advocacy of change by lawful means is not a defence if hatred, contempt or disaffection is excited against the Federal or Provincial governments and this is apparently considered to be the likely result of the complaints being made. During the visit of the mission several leaders of the Sindhi Baluch Pashtoon Front, were in detention pending their trial on such a charge. Those who support a more radical remedy, namely, the provinces becoming separate states, are likely to fall foul of s.123A of the Pakistan Penal Code which prohibits anyone advocating "the curtailment or abolition of the sovereignty of Pakistan in respect of all or any of its territories" and indeed the police in Mirpur Bathoro registered a charge under this section against 35 people calling for the creation of Sindhudesh on 11 December 1986. Again this is a charge which will stifle the advocacy of change even though it is intended that it should be achieved by constitutional means. There appears, therefore, to be no possibility of lawfully seeking a revision of the constitutional arrangements concerning the provinces as a remedy for the grievances felt by many who live in Baluchistan, Sind and North West Frontier Province.

Conclusions

Despite the lifting of martial law there continue to be serious interferences with the freedom of religious minorities, to a very considerable extent in the case of the Ahmadis but also significant as regards the non-Muslim minorities. As far as the latter are concerned the return of schools to religious control is clearly a welcome development. Nevertheless the

members of these minorities and their churches are experiencing some difficulties, particularly with local administration, and the failure to prevent attacks on their churches and temples is extremely disturbing. Their political freedoms have been adversely affected by the institution of separate electorates and they are also in a state of uncertainty as to the impact that the Islamisation process will have on their religious observances. It is vital, therefore, that the non-Muslim minorities be assured by the government that the present constitutional guarantees with respect to religious freedom and equality are not going to be eroded and that strenuous efforts are made to ensure that they are respected at all levels. Equally it is important that steps be taken to safeguard their temples from future attacks. Finally, if it is not possible to replace the system of separate electorates, perhaps with the representation of the concerns of minorities alongside other special interests in the Senate, the government ought to reconsider the use of nationwide constituencies for election to the National Assembly.

The Ahmadis have suffered a relentless decline in their religious freedom ever since measures began to be taken during martial law in pursuance of the 1974 amendment to the Constitution that re-classified them as non-Muslims. Although they are assured by the government that their religious freedom will be respected, this is only on the basis that they cease to perform essential rites of the religion and no longer worship in buildings designed and decorated to reflect their belief in the Quran. In effect, therefore, the religious freedom they are offered is for a religion which is not their own. Moreover, while there are public order concerns arising out of the hostility of some Muslims to Ahmadis, these are not being instigated by the Ahmadis. On the contrary, they are suffering violence both to their person and their places of worship with no serious attempt being made to afford them protection. Indeed, members of the government have encouraged the feelings of hostility. The measures against the Ahmadis which were introduced during martial law have been added to since the restoration of civilian rule and it seems improbable that, if these and others planned are implemented, Ahmadis will be able to follow their faith without risking their life or prolonged imprisonment. Moreover Ahmadis appear to be suffering extensive discrimination on account of their faith. There are undoubtedly substantial doctrinal differences between the Ahmadiyya and other Muslim sects but the recognition of Islam as the state religion and the maintenance of public order do not require the persecution which the Ahmadis are currently enduring. The government should, therefore, reverse the measures which it has been taking against the Ahmadi community and take steps to ensure that they

do not suffer unlawful discrimination or attacks on their person and places of worship. It should also seek to prevent similar hostility to that engendered against the Ahmadis from being stirred up against the Shia Muslims.

The mission encountered a strong sense of grievance on the part of Pakistan's cultural and linguistic minorities and, while it was not possible to verify all the claims, it was apparent that they are facing serious problems in simply campaigning for redress. The present balance of power between the Federation and the Provinces is clearly weighted in favour of the former and, although this is capable of being justified, it is regrettable that those who wish to change the balance as a way of securing redress for these minorities should be regarded as criminals, even though they wish to proceed by entirely constitutional means. It is to be hoped, therefore, that the government will remove the various obstacles which prevent the groups representing these cultural and linguistic minorities from taking part in the political life of Pakistan.

Chapter IX

The Impact of Islamisation on the Rights of Women

Pakistan – An Islamic State

That Pakistan is an Islamic State is unequivocally stated in the title, preamble and clause one of the 1973 Constitution – "The Constitution of the Islamic Republic of Pakistan". As the preamble states, the Constitution represents a "faithful[ness] to the declaration made by the Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice; Dedication] to the preservation of democracy achieved by the unremitting struggle of the people against oppression of tyranny; inspired by the resolve to protect ... national and political unity and solidarity by creating an egalitarian society through a new order ...", and Chapter IX of the Constitution contains the "Islamic provision", which includes the means for laws to be brought in conformity with the injunctions of Islam, and the establishment of the Council of Islamic Ideology to recommend legislative changes to Parliament and Provincial Assemblies.

The principles of an Islamic ideology based on democracy and social justice were envisaged at the very beginning of the establishment of Pakistan as an independent nation; and Muslim men and women alike believed that they would be equal before the law.

This belief is reflected in Article 25 of the 1973 Constitution:

" (1) All citizens are equal before law and are entitled to equal protection of law.

- (2) There shall be no discrimination on the basis of sex alone.
- (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."

This Article largely reflects the content of Articles 2 and 7 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948.

Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinctions of any kind, such as race, colour, sex ...", and Article 7 provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

The 1973 Constitution also provides that "steps shall be taken to ensure full participation of women in all spheres of national life" (Article 34), allocates 20 seats in the National Assembly to women (Article 51), and safeguards against discrimination in respect of appointments to the service of Pakistan (Article 27) and in respect of access to public places (Article 26).

On the assumption of the office of Chief Martial Law Administrator in July 1977, Zia-ul-Haq suspended the fundamental rights contained in the 1973 Constitution, ordered that the 1973 Constitution was in abeyance and proclaimed that Islamisation was his prime objective. "He took on himself the task of Islamisation of Pakistan".¹

As the first step in the Islamisation process, Zia-ul-Haq established the Shariat benches of the civil courts in 1978 to determine whether laws were repugnant to the injunctions of Islam.²

Then, in 1979, the introduction of the four Islamic criminal laws, the "Hudood Ordinances", represent[ed] the strength of Zia's commitments to the Islamisation process and embodied the most detriment to women's rights in Pakistan.

The Hudood Ordinances

The preamble to each of the four Hudood Ordinances declares that they modify the existing law and bring it in conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah. Punishments for Islamic crimes are divided into two categories: one is called *hadd* (the

plural of which is "Hudood") and the other is called *tazir*. Hadd means measures or limit and in law means a punishment, the measure of which has been definitely fixed in the Quran and Sunnah. Tazir is a punishment other than hadd and under general Islamic jurisprudence "the Court is allowed discretion both as to the form in which such punishment is to be inflicted and its measure."³

In Pakistan, however, the Hudood Ordinances prescribe the hadd and *tazir* punishments, so no discretion is left to the trial judge.

The Hudood Ordinances, which continue in force today, are the Offences Against Property (Enforcement of Hudood) Ordinance 1979, the Offence of Zina (Enforcement of Hudood) Ordinance 1979, the Offence of Qazf (Enforcement of Hadd) Ordinance 1979 and the Prohibition (Enforcement of Hadd) Order 1979.

The Offences Against Property Ordinance makes certain types of theft, namely theft of property valued at 4.75 grams of gold or more, liable to the Islamic punishment of hadd and leaves other offences to be punished under the Penal Code. The hadd punishment for a first offence is amputation of the right hand; for a second offence, amputation of the left foot; and for the third offence, imprisonment for life, which can be set aside by the Court, on such terms as it sees fit, if the offender is sincerely penitent.

The Prohibition Order replaced the earlier laws enacted during President Bhutto's time, and makes it an Islamic offence for Muslims to drink or possess liquor. For non-Muslims, apart from liquor required for religious ceremonies, liquor is obtainable by permit only. The hadd punishment for drinking is whipping of 80 stripes and the *tazir* punishment is imprisonment of up to three years or whipping not exceeding 30 stripes, or both.

The Zina Ordinance defines *zina* as wilful sexual intercourse between a man and woman who *are not* validly married to each other, and thus makes adultery and fornication, by single and married adults alike, Islamic offences. The Ordinance also makes rape an Islamic offence. The hadd punishment for adultery, fornication and rape for Muslim males who are over 18 years or have attained puberty and Muslim females who are over 16 years or have attained puberty was initially death by stoning, but is now whipping of 100 stripes, as it is for a non-Muslim male or female. In the case of rape other additional punishments, including the death sentence, may be imposed, as the Court deems fit.

The Qazf Ordinance makes it an offence to accuse falsely a virtuous man or woman of *zina*, i.e. adultery or fornication, and the hadd punishment for such an offence is whipping of 80 stripes and the *tazir* punishment

is up to two years imprisonment and whipping of not exceeding 40 stripes with a liability for a fine as well. As discussed more fully in a later section, the Qazf Ordinance contains a further provision which has a serious impact on women's rights. When a wife is accused of adultery by her husband she must deny this accusation on oath. If she denies the accusation, the marriage is dissolved by the Court and no appeal lies from the Court's order. If the wife refuses to deny the accusation on oath she is imprisoned until she agrees to follow the statutory procedure of denial or until she accepts the husband's accusation as true. If she accepts the accusation as true, she is liable to the hadd punishment for adultery. In comparison, if the husband accuses his wife of adultery but refuses to follow the procedure set out in the Ordinance of swearing on oath the truth of the accusation, he is imprisoned until he agrees to follow the set procedure. When he does swear as to the truthfulness of the accusation, his marriage is dissolved. There are no equivalent provisions for a wife to accuse a husband of adultery and obtain a divorce nor to have the hadd punishment for adultery imposed on the husband under this Ordinance.

Quite apart from the severity of the penalties imposed by these Ordinances, the gravamen for women's rights is the evidential requirements for the imposition of the hadd punishments. Before liability for hadd is incurred for the aforesaid offences of theft, qazf, or drinking, *two* Muslim adult *male* witnesses who are "truthful persons and abstain from major sins"⁴ must give eye witness evidence, or the accused must make a confession. For the offence of adultery, fornication or rape, *four* adult Muslim *male* witnesses who are truthful persons and abstain from major sins" give evidence as eye-witnesses of the act of penetration necessary to the offence".⁵ For all the offences, except drinking, if the accused is a non-Muslim, the eye witnesses may be non-Muslims. Thus, the evidence of any number of women, who witness the commission of any of the above offences, is not sufficient to justify any hadd punishments, although the tazir punishments may be imposed at the court's discretion. Even if a woman is a Muslim, her evidence lacks sufficient weight to penalise a non-Muslim accused. As former Supreme Court Judge, Mr Justice (retired) Dorab Patel notes:

"As Muslim women can be convicted on the evidence of men and as non-Muslims can be convicted on the evidence of Muslims, but not vice versa, these provisions are discriminatory. There is, however, an irony in the proviso about non-Muslims. As discriminatory provisions have to be construed strictly, it is clear that a non-Muslim woman can give evidence in the prosecution of a non-Muslim, and so she has a right of which her Muslim sister has been deprived."⁶

These laws have been the subject of much criticism and protest because for the first time in Pakistan a distinction was drawn between the evidence of men and women with clear discrimination against women's evidence. One such article illustrates "the total unreasonableness"⁷ of these evidence requirements, by examples:

"A thief breaks into a house inhabited by a mother and her daughter and deprives the mother of her possessions. He is apprehended and identified but hadd cannot be imposed on him as the only person in a position to testify lacks the competence to do so. If rape is committed in a girl's hostel it would again be impossible to punish the accused of an offence liable to hadd as all the inmates would be disqualified from bearing testimony on account of their sex."⁷

The restrictions placed on women's evidence have their foundations in Islamic jurisprudence and the Muhammadan law, which views women as weak in character and of inferior competence. This is carefully explained in the book entitled "Islamic Laws of Hudood and Tazir" as follows:

"Matters which are of the category of public right and require absolute certainty of proof, such as offences entailing the punishment of hadd, can only be proved by the testimony of two male witnesses and in one case, namely that of whoredom, by four female witnesses. A woman is regarded as of inferior incompetence in respect of giving evidence because of her weak character."⁸

Four petitions have been filed in the Federal Shariat Court by women's organisations, challenging those sections of the Hudood Ordinances which exclude women from giving evidence in cases of crimes punishable by hadd, on the grounds that they have no basis in the Quran or Sunnah and are repugnant to them. One woman lawyer writes: "In fact these discriminatory provisions are based on juristic opinion formulated subsequent to the time of the Holy Prophet."⁹

The petitions which were filed in 1983 are still awaiting hearing.

Law of Evidence Order 1984

The introduction of the Qanun-E-Shahadat (Law of Evidence) Order 1984 further emphasised women's lack of status and competence before the

law. Under the heading "Competence and Number of Witnesses", section 17 of the Order provides:

- " (1) The competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah.
- (2) Unless otherwise provided in any law relating to enforcement of Hudood or any other special law –
 - (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and
 - (b) in all other matters, the court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant."

Whilst sub-section one can be criticised for being very vague and uncertain and dependent on an unspecified interpretation of the Quran and the Sunnah, sub-section two imposes distinct restrictions on the ability of women to give evidence before a court, or attest documents in relation to future and financial obligations reduced to writing. Thus, in all written commercial transactions, a woman or more than one woman, regardless of their qualifications, cannot be competent witnesses to a contract or prove that a contract took place, without a man being present. There are no impediments, however, to a woman being a party to or witnessing an oral transaction, provided it is not reduced to writing.

The justification for section 17 purports to have its basis in verse 282:2 of the Quran, which says:

"... believers, when you negotiate a debt for a fixed term, draw up an agreement in writing ... and have two of your men to act as witnesses; but if two men are not available, then a man and two women you approve, so that in case one of them is confused the other may remind her."¹⁰

Section 17 of the Law of Evidence Order 1984, has been strongly criticised¹¹ as being a misinterpretation of the Quranic verse, as the latter relates only to monetary notes or debt notes; its suggestions for witness requirements are recommendatory only, not mandatory, and it provides no

justification for widening the ambit of section 17 of the Evidence Order to include "financial or future obligations." Further, there is a jurisprudential debate as to whether the Quranic verse, emanating from the Medina period, had been superseded by other verses, relating to the competence of men and women to give evidence, which were revealed at a later date.

Whatever the true Islamic interpretation of the Quranic verse may be, the qualification that two women are required "in case one of them is confused" is anachronistic in an age where women obtain the same educational qualifications as men and attempt to pursue the same professional and commercial careers. The effect on women professionals is amply and forcefully demonstrated by Mrs Rashida Patel's address to the Jurists Conference in Karachi in March 1986, where she stated:

"By pseudo-Islamisation, under the Qanoon-e-Shahdat Order 1984, [Law of Evidence Order] a woman lawyer preparing a document, cannot attest it as a full human being, she has to call the illiterate peon to thumb impress the attestation. Women lawyers as well as forward looking and enlightened men and women are fighting against the orthodox stance of pushing the women of Pakistan backwards."¹²

Not only have women lawyers and women's groups protested against the introduction of the Evidence Order, but also constitutional lawyers, a retired judge and legal commentators have criticised harshly the effects of such legislation. One commentator states:

"A woman may possess a very retentive memory, she may be better qualified than most men to give evidence but would be disqualified from doing so for no other reason than that she is a woman. Besides being opposed to common sense and reason these recent legislative innovations do not stand up to constitutional scrutiny."¹³

It is apposite to observe that the Hudood Ordinances and Evidence Order were introduced by President Zia-ul-Haq during the last martial law period, when he had suspended all fundamental rights under the 1973 Constitution. On the reinstatement of the revised 1973 Constitution and fundamental rights in December 1985, the Hudood Ordinances and Evidence Order remained in force and by Clause 19 of the Constitution (Eighth Amendment) Act 1985, were validated as laws enacted by "competent authority and, notwithstanding anything contained in the Constitution, shall not be called into question in any court on any ground whatsoever".

As discussed in the previous chapter, the constitutional question as to whether martial law enactments or actions are justiciable remains unresolved. It is apparent, however, that if Article 25 of the Constitution providing that all citizens are equal before the law and Article 34 ensuring full participation of women in all spheres of national life are to have any credence or meaning at all, the discriminatory provisions of the Hudood Ordinances and the Evidence Order, which clearly offend against these constitutional safeguards, should be repealed.

The Effect of Islamic Laws on Women's Rights

To assess the impact of the Hudood Ordinances and the Evidence Order on the rights of women, it is appropriate to examine the cases in which these laws have been applied and their results.

The first case illustrates the harshness of the Zina Ordinance on women, and the resulting decision caused a public outcry of such magnitude that the decision was overturned. Safia Bibi, a blind girl, was employed as a domestic servant and was raped by her employer and his son. She became pregnant and her father filed a criminal complaint of rape. The trial court acquitted the two accused on the basis that there was doubt as to whether Safia Bibi was a consenting party. Safia Bibi, however, was convicted under the Zina Ordinance as she had given birth to an illegitimate child and was therefore guilty of fornication. The decision attracted so much publicity and condemnation from the public and the press that the Federal Shariat Court, of its own motion, called for the records of the case and ordered that she should be released from prison on her own bond. Subsequently, on appeal, the finding of the trial court was reversed and the conviction was set aside.

There are many reported cases where a complaint of rape has been made and the court has convicted and punished both parties for zina (i.e. either adultery or fornication), and according to one legal commentator these sentences are often upheld by the superior courts.¹⁴ In one case, *Sohail Iqbal v. The State*¹⁵, the accused faced a charge of rape in which it was alleged that he had dragged the complainant into a room, gagged her and bound her hands, and the medical evidence confirmed recent abrasions and contusions and fresh tearing of the hymen. The accused was convicted of rape and a *fazir* punishment was imposed of ten years' rigorous imprisonment, ten stripes of whipping and a fine of 2,000 rupees payable to the complainant as compensation. He appealed to the Federal Shariat Court and his conviction was "converted" to zina (i.e. fornication), the sentence

was reduced to five years of imprisonment, the sentence of whipping was confirmed, but the payment of the fine was set aside "since there is a possibility that [the complainant] might have been a willing party to the offence...".¹⁶ The complainant was not convicted in this case, but on a further appeal to the Supreme Court the accused submitted that if there was consent, the complainant should also have been convicted. Although the Supreme Court did not interfere with the sentence, it dismissed the appeal with the following stern comments on the Federal Shariat court's decision:

"With respect it is pointed out that the Federal Shariat Court failed to notice that the correct age of the victim was only 16 years as against the petitioner, a fully grown up male in his mid-twenties. She had a frail body weighing only 94 pounds. She bore marks of violence on the backs of both the forearms ... typical of use of brutal force. She was a virgin before the act. The fact that gagging of her mouth with a cloth did not produce any injury was not indicative at all of either it being a false assertion or that it was unnatural ... We are unable to agree that it might have been a case of consent."¹⁷

The difficulties for women are insuperable. If a woman is raped, does not take complaint action, and later finds she is pregnant, she faces punishment from her own family for loss of honour, and criminal punishment for obvious fornication "because pregnancy of an unmarried girl is not considered only a grave sin but also disgraceful for the entire family".¹⁸ If she does make a complaint, she faces the very real prospect of not being believed and receiving criminal punishment for fornication, while her assailant may be exonerated. In *Jehan Mina v. The State* an orphaned 13 year old girl was doing domestic work for her aunt when she was raped by her uncle and his son. She became pregnant and some months after the offence told her relatives. She was beaten by them and they threatened to kill her, but one of her uncles protected her and filed a complaint of rape. The trial court disbelieved the girl and acquitted the two accused on the grounds that the statement of the complainant was not enough to justify a conviction and that the complainant did not disclose the offence at the time of commission. The 13 year old girl, however, was convicted of zina (fornication) and received the hadd punishment of whipping of 100 stripes. On appeal, the Federal Shariat Court sentenced her to "Three years R.I. [rigorous imprisonment] plus 10 stripes in view of her tender age and also on account of the fact that her father was dead and her mother had contracted another marriage and she was therefore a girl who lacked

the benefit of paternal affection. The stripes should be inflicted in accordance with the provisions of Section 5 of Execution of Punishment of Whipping Ordinance 1979. Since the appellant has given birth to a child and the rearing of the child is of utmost necessity therefore, following the precedent of the Holy Prophet ... we have decided to suspend the execution of punishment of whipping as well as the sentence of imprisonment till the child attains the age of two years ... and thereafter it will be carried out when the child has attained the age of two years."¹⁹

In one rape case the accused and complainant were both convicted of zina (fornication), and on appeal the man was acquitted while the woman continues to serve a five year prison sentence.²⁰ In another case, the trial court has convicted an accused of rape, and the Federal Shariat Court has found that the complainant consented and reduced the sentence to one of fornication, when in the opinion of the Supreme Court it had no cogent reason for doing so.²¹ There are also cases where twelve year old victims of rape have received punishment for zina (fornication)²².

Even married couples have been accused of zina (fornication and/or adultery). In one case, a letter was sent to the Police alleging that the accused, a married woman, was pregnant while separated from her husband. The woman was arrested and at her trial her marriage certificate was produced and her husband gave evidence that he was still married to her and was the father of her child. Nevertheless, the trial court convicted her of adultery and sentenced her to five years' rigorous imprisonment, whipping of 10 stripes and a fine of 1,000 rupees. Fortunately, on appeal, her conviction and sentence were quashed.²³ Such a case illustrates how vulnerable women are to false accusations of adultery or fornication.

Even under the Qazf Ordinance, if a woman has been falsely accused by her husband, there is no specific provision allowing a wife to accuse a husband of making a false accusation of adultery. This was confirmed by a decision of the Federal Shariat Court²⁴ and highlights the impossible difficulties of a woman under the Qazf Ordinance 1979.

Mr Muhammad divorced his wife Dur-e-Shahwar by a Deed of Divorce after seven years of marriage on the grounds that his wife was unchaste and the three children born during the marriage were illegitimate. She applied to the Family Court for maintenance of the children and he insisted that the children were illegitimate. She then filed a complaint of qazf (slander) under the Qazf Ordinance and the Judge ordered the arrest of Mr Muhammad. He challenged the order by seeking a criminal revision in the Federal Shariat Court and the most pertinent issue was whether spouses could file a complaint of qazf against each other. The court decided that where one spouse could not produce four witnesses to

prove the offence of zina (adultery) against the other, the accusation of zina must follow the divorce (Lian) proceeding. Thus, under the Qazf Ordinance, Section 14 sets out the procedure of Lian to provide that "When a husband accuses before a Court his wife ... of zina, and the wife does not accept the accusation as true" the procedure of Lian shall apply. The husband then swears on oath four times that he is truthful about his accusation against his wife of zina (adultery), and his wife swears four times that he is a liar, following which the Court dissolves the marriage. If the wife admits the truth of her husband's allegations she receives the hadd punishment for zina. The decision effectively allows only husbands to make an accusation of adultery against their wives, as Lian or divorce proceedings can only be commenced at the husband's instigation, namely when he accuses his wife of adultery.

As one woman lawyer comments:

"Therefore, if any man wants to accuse his wife of adultery without reason or evidence, he now has a legal mandate to do so. In addition to this, he gets his divorce through as well ... On the other hand, the woman receives her divorce, ill repute and no legal right to avenge all this. What is even worse is when Lian proceedings are allowed where men disown their own children. The legal status of a child is then of an illegitimate person. Even if the child proves his paternity, the recent interpretation gives his mother no right to sue her husband for qazf ... If the courts in Pakistan take the view that spouses cannot be punished for qazf, where they allege adultery, then they must also give women the right to initiate Lian proceedings."²⁵

The climate of fear created by the Hudood Ordinances and the courts' interpretation of them, has led to severe injustices for women. Not only have legal writings stressed the results of the Islamisation of laws, but also the Mission received confirmation from lawyers, women's groups, church and social service agencies that women, particularly the rural poor and the uneducated, are bearing the brunt of the harsh and unreasonable consequences of the legislation. The Zina Ordinance "has led to trials and convictions of simple young girls and women of poor families". Because in an offence of zina the male accused is often set free and the female accused is convicted, "[T]his is creating panic in society and making women vulnerable to terror. In a number of cases complaints of rape ... are not filed anyway due to social taboos and the law and order situation. Now the Zina Ordinance is making the filing of complaints of rape even more dangerous and problematic for the female victim."²⁶

There is a concern among the women lawyers we met that rape and sexual violation of women is increasing because the accused are rarely convicted and the repercussions for the women, who admit they have been raped, are so great. In addition to the increase of crimes against women, many believe that an atmosphere hostile to women has emerged.

Because of the ineffectiveness of the Qazf Ordinance in safeguarding women against false accusations of adultery, there are instances of husbands threatening to implicate friends or relatives in a complaint of adultery to force wives to hand over property and accept a divorce. "The threat of disrepute is so frightening to the woman that often she succumbs to such blackmail."²⁷

The justification for introducing Islamic punishments contrasts somewhat markedly with the reality of their enactment. In the introduction to *Islamic Laws of Hudood & Tazir*, the writers state:

"The Islamic punishments are deterrent so that the criminal tendencies may be curbed for years and years. The effect of it is apparent. In Western societies fornication and adultery are a matter of daily routine but in Islamic countries like Saudi Arabia are only heard of as rare occurrences. It is to be noted then while the punishments for such offences are far too severe from the Western point of view it is equally in case of very strict proof that such punishments are awarded and false accusation (qazf) in this regard is also severely punishable."²⁸

If true Islamic justice is based on the principles of democracy and social justice as the 1973 Constitution declares, then women must be accorded equal rights before the law. The Islamisation of the laws in Pakistan does little to safeguard or protect women against the occurrence of criminal offences and discriminates against them, if redress is sought from the courts. As one lawyer notes:

"The so-called Islamisation of criminal laws in Pakistan has not resulted in deterring crime nor has it led to an increase in the respect for, and safety of, women. Its contribution to human rights and dignity has been negative."²⁹

Other Effects of the Islamisation Process

Apart from the Islamisation of criminal laws, there are other spheres of women's activities which have been affected by the Government's commitment to Islam. As a result of directives contained in the

President's Orders of 17 January 1980, no tournament of women's sports is to be open to the public. If women do participate in sports they are to wear a full track suit or long tunic and slacks (shalwar kameez). There is a ban on women participating in international sports events and in mixed sports events, so no sportswomen in Pakistan can compete internationally.

The Government has also banned the cultural activity of dancing by women, so there are no programmes on television depicting women dancing and there is no dancing at Government functions.

A petition was filed in 1983 before the Federal Shariat Court challenging the appointment of women as judges or magistrates on the grounds, *inter alia*: 1) that women judges do not wear purdah (the veil) and this is un-Islamic; 2) that no women were appointed during the time of the Holy Prophet; 3) that according to Muslim law "The evidence of a woman is half of that of a man and her share in the inheritance is equal to half of that of her brother, and thus the judgment of two ladies only can be equivalent to that of a male".³⁰ Fortunately, the Federal Shariat Court dismissed the petition as having no merit, and determined that men and women were equal under the Quran and that they could find no justification for imposing a condition on an appointment of a woman judge.

In relation to the evidence of women being excluded in certain cases, the Court said:

"69. The view that a woman cannot appear as a witness in matters of Hudood and Qisas [discussed later] is only a juristic view and is not based on either Quran or Hadith. It is not based on any precedent of the Holy Prophet in which he might have refused to accept the evidence of a woman in such matters."³¹

This judicial pronouncement is heartening for the women in Pakistan, but it is a sad comment that the legislation which incorporates these "juristic views" still remains.

Government directives have also dictated the appropriate dress for women and have supported the notion of segregation. As one writer observes:

"In his second speech to the nation Zia promised that the sanctity or purdah (the veil) and the security of women in the four walls of their homes would be protected, meaning that those women wanting to observe purdah would deserve protection ... Later, however, the Government started issuing directives that all women Government employees should wear Islamic dress."³²

On television, all women announcers had to cover their heads and the official PIA (Pakistan International Airlines) air hostess uniform consists of a *shalwar kameez* (long tunic and pants) which covers from neck to ankle as well as a head shawl. There have been instances of women having been publicly slapped for not wearing head covering or husbands receiving public criticism if their wives do not have their heads covered.

In 1978, the Government proposed a separate women's university. This was opposed by women, in part because it was feared that it would preempt them from studying at co-educational universities and would institutionalise segregation of women and possibly lowering of standards of education. The Federal Shariat Court, in reviewing the statutes governing two universities, suggested to the two provincial governments concerned that they might consider the advisability of making separate seating arrangements for girl students in purdah, providing separate retiring rooms for them, as well as female lecturers, and for the Sind Government to consider a separate entry and exit for them to and from classes. These recommendations have not been followed as yet. Obviously it is a valid concern that segregation of women for education purposes will lead to difficulties for women joining professions and pursuing careers in which they must work with men.

With laws, Government directives and policies aimed at restricting the rights and activities of women, the climate for women in Pakistan appears hostile.

One magazine featured an article on the plight of women university students:

"The target is women. Not just any women but the women students of Karachi University. The weapon is acid – reportedly nitric acid – in syringes. The motive: to undress, to harass, to spread panic, to drive women out of the university."³³

On 30 October 1986 a woman physics student at the Karachi University was squirted with nitric acid and sustained first degree burns to her arm and leg. Three further cases were recorded at the university's medical clinic, where women had had acid squirted on their backs or feet, destroying their clothing and causing superficial burns. It has been alleged by a student group that there have been more than four cases and the number is closer to twelve. The reason for the attacks has been expressed as follows:

"Most women students at the campus do view it in the context of Government attitudes vis-à-vis women. They see it as the latest in a

chain of moves to put women down and shut them out from every sphere of life. 'First it was the law of evidence, then it was the Shariat Bill and now this ... But we will not stop coming to the University'".

Whatever the true reason may be, the fact remains that women are subject to hostility and experience real discrimination.

At the time of the Mission's visit, the National Assembly voted unanimously to debate (at a later juncture) the issue of discrimination against the admission of women medical students to medical colleges in the Punjab. The Punjab provincial government had set different merit criteria for the admission of male and female students requiring the women to achieve 825 marks as opposed to the men's 731 marks, in contravention of Articles 26 and 27 of the Constitution. In addition, the number of places available for admission had been reduced, making it even more difficult for women to gain admission to the colleges.³⁴

The Islamisation of laws is a continuing process in Pakistan and at the present time there are several proposed draft laws, which have attracted harsh criticism and deserve some mention.

Proposed Future Laws:

Qisas & Diyat Draft Ordinance:

The concepts of *qisas* meaning retaliation and *diyat* meaning blood money contained in this draft Ordinance provide relatives of murdered persons with retribution by punishment and compensation by monetary payment. Many clauses of the Ordinance discriminate against women. The evidence required to prove murder punishable by the hadd punishment is the evidence of two adult Muslim male witnesses only. The value of *diyat* (compensation to the relatives of the deceased in unintentional homicide cases) is half that accorded to a man. In the definition clause "adult" is defined as girls of 16 years of age or more, whereas boys are not adults until 18 years of age, and as adulthood determines the type of the punishment to be awarded under the Ordinance, this will have an injurious effect on young women. As one woman lawyer asserts: "The uproar by the women of Pakistan has deterred this proposal from becoming law"³⁵, although the Minister of Justice has indicated that the National Assembly will consider the draft law.

The Shariat Bill:

Introduced into Parliament as the Shariat Bill 1985, it makes the injunctions of Shariah, namely the Quran and Sunnah, and also any act or rule based on consensus, the basis of all laws, past and future.

The legislature has no powers to pass any laws in conflict with Shariah, and "experienced, outstanding and recognised ulema shall be appointed as judges and 'amicus curiae' in all the courts as deemed necessary."³⁶

The Ninth Amendment:

The Constitution (Ninth Amendment Bill) has provoked an outcry from women's groups and leaders in Pakistan. The focus of the women's concern is that the bill seeks to extend the jurisdiction of the Federal Shariat Court to include Muslim personal law, which would include all family law legislation.

As one journalist observes:

"Since virtually every issue pertaining to the rights of women falls under Muslim personal law, one can only speculate about the implications this would have on that legislation which has in the past sought to alleviate the Pakistan woman's lot. For example, the 1939 British-enacted Dissolution of Marriage Act, which is retained in the present Constitution, and the Muslim Family Laws Ordinance 1961 though incomplete in itself, were both widely acclaimed as steps 'in the right direction towards restoring to women some of their basis rights'. One can almost assuredly conclude in the light of the now enacted Hudood Ordinance and [the Law of Evidence Order 1984] that these would be two of the first targets of attack."³⁷

Because of the many interpretations in the Quran of women's role and rights in family life, many fear that not only will the Ninth Amendment nullify the protection to women under the present family laws, but that it provides an effective vehicle for discriminating against women and depriving them of their present rights by a strict or narrow interpretation of the text of the Quran.

Many commentators see the Ninth Amendment Bill and the Shariat Bill "as a cover to further political aims"³⁸ and "to placate the fundamentalist lobby by offering them virtually total control over certain limited

segments of society (those that they are indifferent to) and retaining control over others."³⁹

With ulema (Islamic religious leaders) already being appointed to the Shariat courts, and a proposal to appoint them as judges in all courts, the fear that one particular group of religious leaders is being given enormous powers is well grounded. If, in fact these ulema represent the "fundamentalist lobby" then *their* interpretation of the texts of the Quran and the Sunnah becomes "the supreme law and source of guidance for legislation" (as stated in the Ninth Amendment) and the dangers for "segments of society" such as the women, become more manifest.

In the application of the Government's commitment to Islam, the principles enunciated in the Preamble of the 1973 Constitution of "democracy, freedom, equality, tolerance and social justice, as enunciated by Islam" must be properly observed. The "Islamisation of laws" to date has not accorded to women any equality or freedom, and nor does it conform with the Constitutional provisions of equality before the law and non-discrimination. If the government is to avoid the criticism that the Islamisation process is being used as a political tool to retain power, it must take steps to abolish all discriminatory and retrogressive legislation and revise and improve all Government policy directives to ensure true "freedom, equality, tolerance and social justice" for the women in Pakistan.

Conclusions on Islamisation on the Rights of Women

1. Because of the discriminatory nature of their provisions, section 7 of the Offences Against Property (Enforcement of Hudood) Ordinance 1979, section 8 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979, section 6 of the Offence of Qazf (Enforcement of Hudood) Ordinance 1979 and section 17 of the Qanun-e-Shahadat Order 1984 should be repealed.
2. The provisions of the Eighth Amendment which validate the above-named laws should also be repealed.
3. The proposed Qisas and Diyat Ordinance and the Ninth Amendment Bill will further discriminate against women and we would recommend that they not be enacted.
4. All Government policies which prevent women from participating in sports events, mixed, international or otherwise, should be revoked and encouragement given to women to participate fully in all sporting activities.

5. Similarly, government policies which curb cultural activities of women, such as dancing, must also be revoked.
6. The Government must not seek to segregate women or restrict women's dress by requiring adherence to a particular dress code. All policy directives to this effect should be revoked.
7. The Pakistan Government is urged to sign the Human Rights International Convention on the Elimination of All Forms of Discrimination Against Women.

Notes

1. Rashida Patel "Islamisation of Laws in Pakistan" (1986: Faiza Publishers, Karachi) p. 18.
2. For a full discussion of the Shariat Courts see Chap. III "The Independence of the Judiciary and the Bar" *ante*.
3. Z.H. Chaudhary & M.G.A. Mubashar: *Islamic Laws of Hudood & Tazir: Introduction to Islamic Law of Crimes* (1984: Lahore Law Times Publications) p. 1.
4. S.7(b) Offences Against Property Ordinance 1979, S.6(c) Qazf Ordinance 1979, S.9(b) Prohibition Order 1979.
5. S.8(b) Offence of Zina Ordinance 1979.
6. Dorab Patel: "Pakistan must ensure provincial autonomy and democratic norms" *Viewpoint*, 15 August 1985, p. 19.
7. "Women's Rights and the New Constitution" Makhdoom Ali Khan, *Viewpoint*, 14 Nov 1985, p. 9.
8. Z.H. Chaudhary & M.G.A. Mubashar (*supra*), p. 11.
9. R. Patel: *Islamisation of Laws in Pakistan?* *supra*, p. 46.
10. *The Holy Quran* as translated into English by Prof. Ahmed Ali.
11. R. Patel *supra* p. 81.
12. "Free Legal Aid" Rashida Patel. Paper prepared for the Jurists Conference 28 and 30 March 1986 Karachi.
13. Makhdoom Ali Khan, *supra* p. 9.
14. Asma Jahangir "How Far Are Penal Laws Effective in Protecting Women" unpublished article, at p. 2 refers to the reported decisions as follows:
 1983 Supreme Court Monthly Review 33 PLD 1983 FSC 183
 Pakistan Law Journal 1983 FSC 124 PLD 1982 FSC 248
 National Law Report Criminal Law Journal 557
 National Law Report Criminal FSC 311
 1983 Supreme Court Monthly Review 866.
15. NLR 1982 Criminal 348 (Federal Shariat Court).
16. *Ibid* p. 352.
17. NLR 1982 Criminal 500 (Supreme Court).
18. *Shabbir Ahmad v. The State* P.L.J. 1982 at p. 177.
19. P.L.J. 1983 FSC 134 at p. 138-139.
20. *Shabbir Ahmad v. The State* P.L.J. 1982 FSC 174.
21. *Ghulam Sarwar v. The State* Pakistan Law Journal, Supreme Court 147.

22. Asma Jahangir *supra*, p. 3.
23. *Nehmat Bibi v. The State* P.L.J. 1984 FSC 51.
24. *Haji B.S. Muhammad v. Dur-e-Shahwar and the State* No. 31/11 1984 Federal Shariat Court (Revisional Jurisdiction).
25. Asma Jahangir "Women Turn to Courts for Rights" (specific date unknown) 1984 Frontier Post p. 4-5.
26. Rashida Patel *supra* p. 47-48.
27. *Ibid* at p. 90.
28. *Supra* at p. 23 (see note 3 for full reference).
29. R. Patel *supra* p. 59.
30. *Ansar Burney v. Federation of Pakistan* PLD 1983 FSC 73 at p. 75.
31. *Ibid* at p. 90.
32. Nighat Said Khan: "Women in Pakistan: A New Era?" Change: International Reports Women & Society 1985 (Calvert's Press) p. 6.
33. "Corridors of Fear" *The Herald* December 1986 p. 87.
34. 11 Dec 1986, *The Nation*: 11 Dec 1986, *The Pakistan Times*: 11 Dec 1986, *The Muslim*.
35. R. Patel *supra*, p. 148.
36. Clause 10 Shariat Bill 1985.
37. Sairah Irshad: "The Divine Right of Mullahs?" *The Herald*, July 1986.
38. Anwar Iqbal "The Shariat Bill Controversy" 12 Dec 1986 *The Muslim Magazine*.
39. S. Irshad "The Divine Right of Mullahs" *supra* p. 113.

Chapter X

Workers' Rights

The urban industrial workers who are occupied in the manufacturing, mining, energy and transport sectors constitute only 14% of the total labour force. To this another 4% belonging to the construction sector can be added. The majority of the population, about 57%, are employed in agriculture. The plight of the agricultural workers is said to be much worse than that of the industrial workers. The mission was repeatedly told by many that feudal ownership and relationships still dominate agricultural production, contributing to the exploitation of the landless labourers. The mission was also told that no laws have been enacted to deal with minimum wages or living and working conditions of the agricultural labourers. However, the mission did not have an opportunity to verify first-hand the living and working conditions of agricultural labourers.

During its stay in Pakistan, the mission met with several workers and trade union representatives from different industries. According to them, successive governments have restricted the rights of the workers, particularly the freedom of association and collective bargaining. This is despite the fact that the government of Pakistan as far back as 1951 ratified the ILO Conventions no. 87 on Freedom of Association and Protection of the Right to Organise, and no. 98 on Collective Bargaining. Additionally, the 1973 Constitution, like the previous ones, affirmed the right of workers to organise themselves in trade unions.

The curtailment of the rights to organise and to collective bargaining have always been severe during the martial law regimes the country has undergone. The last martial law period was no different for the workers in this respect.

With the imposition of martial law in July 1977, several martial law regulations and orders were promulgated which curbed the rights of workers. For example, the Punjab Martial Law Administrator passed Martial Law Order no. 5 on 9 July 1977, which banned all trade union activities including strikes and contained the following clause:

"Employees will be expected to perform full-time work with complete dedication and honesty, failing which they will render themselves liable to disciplinary action."

A similar Order was passed by the Provincial Martial Law Administrator of Sind, thereby covering 90% of the workers in the country.

Martial Law Regulation no. 5, promulgated on the day martial law was imposed, banned all meetings and processions except religious, funeral or marriage processions. In cases of contravention, punishment was up to seven years' rigorous imprisonment with fine and whipping.

Martial Law Regulation no. 5, which was promulgated in 1981, imposed a ban on 'agitational activity' carried on by government employees and those serving in corporations established under law. The 'agitational activity' was defined as being any activity which was likely to impair the normal functioning or efficiency of any department or office including inciting a strike or a go-slow movement. The punishment provided under this Regulation was up to five years' imprisonment with fine and whipping.

The mission was told that large numbers of workers were arrested for violation of these and other regulations or Orders and were tried in summary military courts and imprisoned. The punishment of whipping was extensively used. In addition to arrests and detention, heavy force was used against workers to put down strikes organised by them. One example given was the 1978 strike by the workers of the Colony Textiles Mills at Multan, Punjab. This was crushed by the army which resorted to shooting and killing at least 20 workers.

In view of the repression and restriction faced during the martial law period the trade union representatives welcomed the lifting of martial law. However, they also qualified it by saying that the present government should show its commitment to protecting the interests of the workers by

- abrogating Martial Law Regulation no. 52 which continues to be in force as a result of the 8th Amendment to the Constitution;
- releasing workers who are undergoing imprisonment for convictions

- made by military courts;
- reinstating those illegally dismissed during martial law; and
- amending the Industrial Relations Ordinance (IRO) of 1969 so as to bring it into conformity with ILO Conventions 87 and 98.

Martial Law Regulation 52 was promulgated in 1981. It banned 'all unions, organisations, groups or associations of any type in the Pakistan International Airlines Corporation (PIA)'. Under this Regulation, nearly 5,000 workers were dismissed without any notice or enquiry. When criticism mounted after the dismissal of these workers, the martial law government gave as an excuse that it was done in order to reduce the surplus staff. This is challenged by the PIA employees who say that the regime recruited nearly 1,900 persons, mostly drawn from the army, immediately after the promulgation of Martial Law Regulation no. 52.

The mission is surprised that the Regulation has not been repealed even after martial law, particularly in view of the adverse comments made on the Regulation by the ILO Governing Body Committee on Freedom of Association. The Committee, in its 233rd report, had stated:

"As regards the prohibition of trade union activity in certain important public enterprises, laid down in Martial Law Regulation no. 52 of 1981, the Committee considers that such a prohibition constitutes a serious violation of freedom of association; it expresses the firm hope that this regulation will be repealed as soon as possible and requests the government to transmit information on any measures taken to this effect."

The other major concern of the workers' representatives was the restrictive nature of the Industrial Relations Ordinance (IRO) of 1969. They felt it should be suitably modified to bring it into conformity with the ILO Conventions 87 and 98.

The IRO of 1969 is the major law dealing with all aspects of employer-employee relationships. This Ordinance replaced the Industrial Dispute Act of 1947 and the Trade Union Act of 1926. Compared to these two laws, the IRO is said to limit the rights of workers in many ways. For example, under the Trade Union Act of 1926, every trade union to which a worker belonged had the right to represent the workers irrespective of whether or not the concerned union had the support of the majority of workers. Contrary to this, under the IRO, a trade union can represent a workers' interest only if it is eligible to be a 'Collective Bargaining Agent (CBA)'. Under Section 22 of the IRO, if there is only one union in an estab-

lishment and if it has a membership of not less than one-third of the total workmen employed, then upon an application made by such a trade union to the Registrar it shall be certified as a CBA. When there is more than one union the Registrar will hold a secret ballot and the trade union that receives the highest number of votes and not less than one-third of the total votes, will be certified as the CBA.

According to workers and trade union representatives, the whole process is complicated, particularly when there is more than one union in an establishment. For example, if a union wants to contest a secret ballot it has to submit a list of its members showing the parentage, age, section, department, ticket number and date of becoming a member. In cases of federations, the names of its affiliated unions together with a list of members and other particulars such as parentage and age also have to be furnished for each affiliated union.

More than its complex procedure, the workers who met with the mission complained that once a union is certified as a CBA the workers cannot pass a no confidence motion and bring in a new union as CBA during two years. The workers also stated that the employers interfere in the choice of a CBA by spending lavish amounts in favour of unions they prefer and at times even intimidate workers to vote for certain unions. More importantly, the IRO, by making the CBA responsible for all collective and individual disputes of workers in an establishment, disqualifies minority unions from representing the individual claims of its members.

This aspect was commented upon by the ILO Committee of Experts on the Application of Conventions and Recommendations. In their 1985 Report on the Application of Convention no. 87 by the Government of Pakistan, the Experts Committee observed:

"The Committee draws the attention of the government to the fact that, by virtue of the right of workers to join organisations of their own choosing provided for by Article 2, the members of trade unions should have the right, as regards their individual claims, even if their union is a minority one, to be represented by their own organisations for the defence of their occupational interests."

As regards strikes, under Section 32(1) of the IRO workers can resort to strike if the conciliation proceedings have failed. However, this is subject to restrictions set forth in Section 32(2) and 33(1) of the Ordinance. Under Section 32(2) a strike can be prohibited if it lasts for more than 30 days. Under Section 33(1) a strike can be prohibited even before the expiry of 30 days if the strike causes serious hardship to the community or is

prejudicial to the national interests or if it takes place in public utility services. The following have been declared as public utility services: (1) the generation, production, manufacture or supply of electricity, gas, oil or water to the public; (2) any system of public conservancy or sanitation; (3) hospitals and ambulance services; (4) fire fighting services; (5) any postal, telegraph and telephone services; (6) railways and airways; (7) ports; and (8) watch and ward staff and security services maintained in any establishment.

Besides Section 33 of the IRO, the Essential Services Act of 1952 also prohibits strikes in any employment to which the Act applies. Also the wages and working conditions of workers in establishments that come under this Act are to be regulated by the Chairman of the National Industrial Relations Commission and not through collective bargaining. This law is similar to the one enacted by the British during the Second World War to maintain essential supplies. Contrary to its original purpose, this law is in operation even in ordinary times when there is no emergency.

The ILO Governing Body Committee on Freedom of Association, in its 238th report, commented as follows on Section 33 of the IRO as well as on the Essential Services Maintenance Act:

"The Committee takes note of the government's explanations according to which the continuing application of the Essential Services Maintenance Act 1952 to certain sectors of the economy is necessary because of their essential character ... it would first point out that the criterion used ... by it ... in determining whether any service is essential in the strict sense of the term is whether the service in question is one whose interruption would endanger the life, personal safety or health of the whole or part of the population ...

"As regards the strike ban imposed by Section 33 of the Industrial Relations Ordinance, the Committee would endorse the 1983 observation made by the Committee of Experts on the Application of Conventions and Recommendations in the context of Convention no. 87 to the effect that such a restriction should be limited to essential services in the strict sense of the term ... that the hospital sector and services for the supply of water are essential ... that the petrol, oil industry, ports and transport services are not essential in the strict sense of the term. The Committee accordingly again requests the government to take appropriate steps to ensure that full trade union rights, including the right to negotiate collectively their conditions of employment are restored."

The mission was also informed that strikes are totally banned in export processing zones. Such a ban is justified by the government as a condition necessary to attract foreign investors. The total ban on strikes is against ILO Convention 87.

Another major concern that was expressed to the mission is about the increasing number of contract labourers. During the martial law period many employers introduced a contract labour system into their enterprises. Under this system, the employer only deals with the contractor and does not have any responsibility for the labourer. In short, though a contract labourer works in an establishment, he or she is not included in the register of employees of the establishment. As a result, the contract labourers cannot claim any of the rights or benefits under different labour laws. Even in the case of accidents, they are at the mercy of the employer for compensation or medical benefits and are not entitled to them automatically. The mission was told repeatedly that employers are using the contract labour system to totally circumvent the labour laws. With the number of unemployed increasing many are willing to work under a contractor for whatever wages are offered and without any other benefits. It is also common for contractors to deduct a commission from the labourers' wages.

The trade unions' representatives hoped that the present government would enact a law prohibiting the contract labour system and effectively implement the law.

Concern was also expressed about the widespread use of child labour. However, the mission, for want of time, was not able to look into this problem in more detail.

Recommendations

The government is respectfully urged to consider at an early date the following measures:

- (1) The repeal of Martial Law Regulation no. 52 and the restoration of full trade union rights to the employees of Pakistan International Airlines. The review and reinstatement of PIA employees who were dismissed during martial law under Martial Law Regulation no. 52.
- (2) The review of cases and the reinstatement of persons who were convicted and dismissed during martial law for trade union activities.
- (3) The release of persons who are still undergoing sentences imposed by military courts for having undertaken trade union activities.

- (4) The restoration of rights of freedom of association and collective bargaining to workers in the free trade zones and to restrict the application of Section 33 of the IRO and the Essential Services Maintenance Act to those industries in the strict sense of the term 'essential'.
- (5) The review of the IRO 1969 so as to bring it into conformity with ILO Conventions 87 and 98. In particular to suitably change the system of Collective Bargaining Agent so that minority unions retain their right to represent their members' individual claims.
- (6) Study the problem of the contract labour system and enact suitable laws to abolish the use of contract labour.

Chapter XI

Economic and Social Rights

In the last two decades, Pakistan has witnessed an annual average growth in its G.D.P. of about 5.5% which is considered a high rate of growth for a developing country. However, this growth has not contributed to overall development. According to Mr. Shahid Kardar, a Pakistani economist, Pakistan

"... despite its fairly impressive growth since independence, still has one of the highest infant mortality rates in the world at 142 per thousand – a rate which has remained stagnant since 1971. It has a population with a literacy rate of 24%, among the lowest in the world. The state only allocates 2% of its GNP and 8% of public expenditure on education as against 4 to 6% of GNP and 12 to 15% public expenditure in other Asian countries. It has an economy in which almost 35% of the population cannot satisfy its minimum nutritional needs and of which only 31% has access to safe water. It has a health sector in which there is one physician and one hospital bed for 5,653 and 1,815 persons respectively. A massive 84% of the population does not have sewage facilities while 81% of the housing units have, on average, 1.5 rooms per seven persons."¹

A World Bank document² makes a similar comment with regard to health, nutrition, housing and water supply. According to this document,

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- (1) "The gathering economic crisis and the dwindling options" – Shahid Kardar – M.L. Quereshi Memorial Lecture – A publication of Group 83 – Lahore.
 - (2) A World Bank Country Study – Pakistan Review of the Sixth Five-Year Plan.

'nearly half of all deaths occur in children under five years of age from diarrhoeal disease, respiratory infections, neonatal tetanus, and childhood infectious diseases, all of which can be effectively prevented. Malnutrition is also an important underlying cause of death in young children. Health facilities are unevenly distributed with poor coverage in remote areas and a concentration of resources in hospitals in urban areas. Appropriate services to meet the main health needs should be based on prevention, health education, environmental improvement and simple curative treatments, but Pakistan's health system is heavily committed to a Western medical approach - high cost and high technology, hospital-based with an over-reliance on expensive and inappropriately trained doctors.'

On nutrition availability, the World Bank document states:

"... although on an aggregate basis the overall availability of food in Pakistan is good compared to most other countries in the region, malnutrition among infants and young children and pregnant and lactating mothers is still a substantial public health problem; for example, among children under five years of age, there is 7-10% prevalence of severe energy protein malnutrition."

On housing, the World Bank document states:

"... although the housing shortage has affected all levels of society, the principal sufferers have been the lowest income groups who have swelled squatter settlements in cities throughout the country. It is estimated that about 25% of the urban population live in squatter settlements."

As regards water supply, according to the World Bank document, at present potable water is available to about 38% of the entire population while drainage/sanitary facilities of acceptable standards are available to only 16%.

Concern was also expressed about the growing external debt which is said to be 30% of GNP. According to some, the burden might increase with the decrease in remittances from Pakistanis working in the Gulf countries.

A marked imbalance exists between provinces. Punjab and Sind are relatively more developed than Baluchistan and NWFP. This has given rise to the feeling that particularly Punjab is prospering at the expense of other provinces. Also, that the martial law rule benefitted mostly the Punjabis who constitute nearly 90% of the armed forces. In addition, the growing role of the armed forces in running public corporations, industries,

trade and even transport tends to benefit the Punjabis more than others.

The present government has expressed its keenness to tackle some of the basic problems. The Prime Minister has announced a five-point programme costing 90 billion rupees which aims at doubling the literacy rate, electrification of 90% of the villages, construction of rural roads, increased supply of potable water and expansion of health care facilities.

Many, while welcoming the Prime Minister's initiative, emphasised that without real democratic process these programmes are bound to fail as in the past. According to them the repeated military rule has contributed to the narrowing down of decision-making processes with very little participation of the people in the planning or implementation of development projects. As a result, the development programmes tended to benefit the dominant classes in the rural areas. Also, the military's own interest is involved in maintaining the status quo. As a result, in the last 40 years the landed class, particularly the feudal class and the urban rich, were given preferential treatment. For example, no serious land reform has been undertaken, no tax has been imposed on agricultural incomes and, in addition, cheap loans and support prices for agricultural products are given. The urban rich have been given licences to start up industries, concessional finances, etc.

In view of this, many who met with the mission expressed the opinion that basic reforms should be undertaken to avoid a major crisis in the future. They also expressed the idea that greater accountability of the rulers to the people will contribute further to the development of the rural poor and other disadvantaged sections.

Mr. Shahid Kardar, in his article referred to earlier, has suggested the following to reverse the present trend. This is reproduced here since it reflects the opinions expressed by many who spoke to the mission on this subject.

- "(1) A re-examination of our foreign policy, the role of the armed forces and their organisational structure and the need/necessity of having such a large standing army;
- (2) Radical land reforms which, apart from breaking the social and political hegemony of the landed elite in the rural areas, will also result in the distribution of vast tracts of land to the landless, who can then be assisted by State-sponsored incentives and assistance schemes;
- (3) Strong domestic institutions, greater decentralisation of power and decision-making and a political structure in which powers are with elected representatives rather than with the bureaucratic machin-

ery, i.e. the civilian services should be made more accountable to the democratic institutions;

- (4) A massive increase in the education and health programmes to raise the productive skills of the poor and defenceless; and
- (5) A basic transformation of the rural and agricultural scene through the development of the physical and social infrastructure."

Chapter XII

Human Rights Abuses in Villages

The fundamental rights contained in the 1973 Constitution, and which are now in force, include the right that "no person shall be deprived of life or liberty save in accordance with law".¹

At the time of the Mission's visit to Pakistan, many villages in the Sind province had been attacked. Two members of the Mission visited three of those villages and the following accounts detail the incidents that occurred in those three villages in which lives were lost, property was destroyed, valuables were looted, and the villagers were arrested and detained. The Mission spoke, through an interpreter, with the village people who described the details of the incidents. At this time, no investigation has been conducted by the Government to ascertain the perpetrators of these abuses. The official explanation given for these incidents is that the "Dacoits", who are nomadic bandits, raided these villages and were responsible for the ensuing damage and loss of life.

The villagers, on the other hand, were able to recognise military uniforms and say the raids were clearly military operations which, in two cases, also involved the local police. They were able to identify the difference between police and army by the style of dress, but they could not name or recognise any of the persons involved.

To date no action has been taken by either the federal or the provincial governments to enquire into or investigate in any way the atrocities which occurred. Moreover, no police report has been filed in respect of

(1) Article 9, 1973 Constitution; and that "the dignity of man and, subject to law, the privacy at home, shall be inviolable."

each of these incidents and in some cases an amount of compensation has been paid to some of the villages and the matter simply rests.

The first of the three villages visited was Khisano Mori. It is a small village located 16 miles from Hyderabad in the Sind province of Pakistan. On 18 August 1986 there was a political gathering in the principal town of Khisano Mori at which opposition leaders from the M.R.D. (Movement for the Restoration of Democracy) and the P.P.P. (Pakistan People's Party) were asking for the release of the co-chairman of the P.P.P., Ms Benazir Bhutto, who had recently been arrested. It was a peaceful protest and the speakers were addressing the crowd from the top of a small hotel on the intersection of the main road from Hyderabad and a small side road to the Khisano Mori villages which were one to two miles away. During this gathering, police officers and other law enforcement agencies proceeded to fire at the speakers and killed two men, Mohammad Unar and Hakim Ali Wasam, and injured many others who had gathered to listen. Small hotels and shops were damaged and burnt by the law enforcement agencies, causing severe damage and destroying the livelihood of the impoverished storekeepers in the area.

Bullet holes covering the hotel and its signs were clearly visible at the time of our visit, as were the charred remains of some shops and the razed area where others had been burnt to the ground.

The law enforcement agencies, including the police, proceeded to the nearby surrounding villages. In these villages the women and children were alone as their menfolk had gathered in the town for the demonstration. When the police arrived, they demanded to know the whereabouts of the menfolk. Because the women were unable to tell them, the police then slapped, abused and kicked the women, raided their belongings, and at one small village compound, arrested six women and took them to the police station. They were beaten at the police station as well, and some women maintain they were grabbed by their hair and dragged when they were taken to the police station. They were detained for four days and four nights and during their incarceration the police threatened to shoot them if they could not tell them the whereabouts of their husbands or menfolk.

In order to obtain their release, relatives paid the police bribes, and in this particular instance, 5,000 rupees were paid for each of the women to be released.

We were told that two of the women were pregnant and as a result of the police treatment they both miscarried.

In another small neighbouring village, another woman miscarried a child of 2 1/2 months as a result of police maltreatment in arresting and

detaining her. In this particular village the worst tragedy occurred to a woman whose only son, aged 15 years, was so badly beaten by the police that he sustained serious head injuries and is now confined to a mental institution with permanent brain damage. His mother attempted to protect her son from the police and she was beaten, kicked and taken to the police station until money was paid for her subsequent release. With her only son now rendered insane, the only means of survival for this woman, whose husband is bedridden, is her husband's sister who works as a maidservant in a city household, and who sends money back to support them.

In another instance, a woman and three children were put in jail and were detained for eight days until 10,000 rupees were paid by her relatives to release her. In order to obtain this money they sold a small piece of jewellery, namely a gold earring, to raise the funds. In a further instance, six women were taken to jail, one of whom had a 1 1/2 month old child. The police snatched the child from the woman and left him in a nearby field. It was fortunate that one of the villagers some time later spotted the child in time and he survived.

These incidents took place progressively from 6.00 pm in the evening of 18 August to 7.00 am on 19 August when another village was similarly raided by the police. In this instance, three more women were beaten and taken to the police station, one of whom was seven months pregnant. They were kept in prison for two days, during which time the pregnant woman had a miscarriage. No medical assistance was given to her, so the other detained women in the police station had to attend to her. Another woman had an eight day old child who was left in the village when she was arrested. At the insistence of her father-in-law, the police released her, as the baby was becoming sick and weak without any sustenance from his mother. The other women were released once 2,200 rupees had been paid for each person.

Approximately 90 women from all the surrounding villages of Khisano Mori were arrested and transported into the nearby Tando Jam Police Station. The reason that money was paid for the release of these women was due to the rumours spread by the police that the women were being raped and that the only way their release could be obtained was on payment of money. Because honour is a dominant factor in village society, the poor relatives of the women raised the money in order to release them from such dishonour and disgrace. As no charges were ever brought against these women, the large sums of money paid clearly were not bail payments. In the circumstances, the money was received by the police officers as bribes.

No preliminary reports have been lodged and no enquiry or investi-

gation has taken place.

The second village we visited was Tayyab Thaheem. This village, together with all its surrounding village compounds, consists of approximately 500 people and is situated in Tahsil Tando Adam in the district of Sanghar in the Sind province. To obtain access to this village, one must travel off the main road, down a two mile, no-exit dirt road. This becomes an important factor when one examines the Government explanation, that the villagers were blocking the main highway so action had to be taken by law enforcement agencies. On 22 August 1986, at approximately 3.30 pm, army trucks and jeeps, accompanied by police, surrounded this village and proceeded to enter the village complexes. They broke in and raided a feudal landlord's house which belonged to the president of the P.P.P. of Sankkur district. Bullets were fired through the gates, which enclosed the house and mosque complex, and at the machinery and tractors which were stationed outside. The bullet holes are still clearly visible. They forced their way in through the gates surrounding this small complex, and bullets were fired into the lounge, the guest's bedroom, and the dining room of the main house in the complex. The other living quarters were similarly raided and bore the marks of bullets in the doors and walls of all the principal rooms in each dwelling. The main jewellery box was smashed and the contents taken and two of the men, who were relatives of the president of P.P.P., were tied up and threatened that they would be shot. One of the men recognised some of the local police, who were clearly receiving orders from the military personnel who were also present. He could distinguish between the two because the military wore khaki clothes, whereas the police wore black shirts and khaki trousers. The men were taken to a nearby canal, and with the intervention of the superintendent of police who arrived at the request of the men's relatives, they were not shot, but simply arrested and detained for some 2 1/2 months.

The police subsequently charged them with attempted murder, but nothing further has proceeded on those charges and the men were finally released.

At the time of our visit, all the bullet holes surrounding this house complex were clearly visible and the inhabitants of the house had collected together all the ammunition that was fired. This evidence was consistent with indiscriminate firing from the outside into the inner parts of the complex.

The army and the policy contingency then proceeded further down the road and entered the small village compound, still firing indiscriminately.

The villagers showed us the way in which they sought protection at

the time of the raid, hiding beneath such available furniture as their little wooden beds and tables in their open straw huts. An eight year old girl was badly wounded as a result of the shooting. The father of the girl, who was being arrested by the police, pleaded that he be released so that he may seek some medical help for his daughter. However, the girl died, after which the police let the father go. They then arrested the girl's uncle instead. Such property as there was in the village was damaged, and any items of jewellery were taken by the army and the police. They also took all the ammunition and arms which were used for hunting and for the villagers' personal protection. These items have not been returned.

Approximately 40 to 45 people were arrested from the Tayyab Thaeem village and were kept together in very cramped conditions in one small room.

Again, the bullet holes in the mud walls of these straw huts were still visible. Apart from the Government explanation that military action was required because the villagers were blocking the main thoroughfare, no investigation was instigated, nor was an official report filed. The father of the eight year old girl who was killed, received 7,000 rupees and it is thought that this was provided by the provincial government. Of the 7,000 rupees, the father told us that the first 1,000 was spent on the funeral and religious ceremonies accompanying the burial of his daughter.

Neither the feudal landlord nor the other villagers received any payment for damage to property, buildings, machinery or valuables taken.

The third village visited was the Jam Goht village, where the saddest and most tragic of these incidents took place.

On 24 November 1986, the inhabitants of this very small village, which is in a remote part of the Sind province, were in the third day of funeral ceremonies for the wife of the eldest man of the village. Many inhabitants from nearby villages were also in attendance and stayed overnight until the festivities were concluded. At 4.00 am in the morning the inhabitants were awoken to find that their village was completely surrounded by 2,000 to 3,000 military men who formed three concentric circles around the village. Shots were then fired at the sleeping villagers, some of whom were lying on blankets on the ground at the entrance to the guest room situated a little distance from the main village complex. Five villagers were killed, and 50 to 60 of the men sleeping in the guest room were blindfolded and made to lie face down on the ground. Large sticks were then used by the military to beat them across their backs and legs.

At the time of the Mission's visit on 6 December 1986, the oldest man in the village, a 75 year old, still had the welt marks across his back and torso from the beating he received, and his ankle and foot were so badly

beaten and lacerated that he could not walk on that leg. The bandages also indicated that the wounds had not healed.

In the compound of the village where the women were sleeping, the military slapped and beat the women and threw them face down on the dirt. They in turn were blindfolded while their possessions were looted and their huts ransacked. All their good blankets, jewellery and other possessions were taken, their crockery, including their plates and saucers and other cooking dishes and implements, were smashed. In addition, the military destroyed by fire the 400 mounds of rice that comprised the village's major food supply which they had carefully harvested.

The following day the police, on instructions from the military, came to collect the dead bodies and to arrest the blindfolded men, who were kept in custody for five days.

The most tragic part of this incident is that the five men who were killed were the sole income earners for this particular village. In village society, the income earned by the men keeps not only their families but also the elderly folk in the village for whom they provide food, clothing and other necessities. The only other man left in the village was the 75 year old who was no longer capable of working. The tragedy for the widows, their children and their relatives is that they no longer have a source of income or livelihood. The Mission was told that it was not proper for these women to marry a second time and there are attendant problems on women obtaining adequate payment for their work in the fields.

At the time of our visit, the blood-stained blankets and the sticks that were used by the military were still present at the scene, as were the imprints of the boot marks in the nearby paddocks and fields where there had been no rain since 24 November. In short, the important items of evidence were all clearly visible at the scene so that any investigation would be able to be conducted without much difficulty. However, no investigation had taken place, and when this incident was raised with the federal ministers of the present government, no explanation of the incident was able to be given, nor was there any indication that an investigation would be held in the future.

We received some explanation as to the motives behind these attacks. The principal explanation seemed to be that all of these villages were known to support the P.P.P. and these attacks were designed to frighten the people from openly supporting the opposition. Other explanations were also received, including the government explanation that these were the actions of Dacoits. However, the description by the villagers of the uniforms that their attackers were wearing convinced them that these operations were in some cases the police, in other cases the

military, or a combination of both. Without a proper investigation, the real motives of the attack and the true identity of the attackers cannot be verified.

It is, however, incumbent on the provincial or federal government to institute investigations to stop this appalling loss of life and the human rights abuses. If the Government is committed to upholding the Constitution together with its safeguards for fundamental human rights, some action must be taken to have the perpetrators brought to trial.

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