

**Mandate of the Special Rapporteur on the independence of judges and lawyers**

Ref.: OL PAK 5/2024  
(Please use this reference in your reply)

14 October 2024

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 53/12.

In this connection, I write to you in relation to the proposed 26<sup>th</sup> Amendment to the Constitution of Pakistan and its implications for the independence of the judiciary and the protection of human rights in Pakistan, in particular the right to a fair trial and access to appeals and judicial review before independent and impartial courts.

Recalling that one of the main purposes of an independent judiciary is to protect human rights and check power that would violate such rights, I have various comments regarding the compatibility of these constitutional amendment proposals with international human rights law obligations binding on Pakistan.

I am especially concerned about the context in which this reform is taking place.

In this communication, I do not aim at providing a comprehensive analysis of the entire set of constitutional amendments proposals. Instead, I focus on the possible impact of the proposals on judicial independence and the proposals' compatibility with international human rights law and standards.

*Right to a Fair Trial and the Requirement of Independent and Impartial Courts*

At the outset, I would like recall that in June 2010, Pakistan ratified the International Covenant on Civil and Political Rights (ICCPR), which includes international standards on the right to a fair trial and the independence of the judiciary. I would also like to recall that much of the content of the Universal Declaration of Human Rights (UDHR), including its provisions concerning the right to a fair trial, has passed into binding customary law.

The right to a fair trial is protected in both the ICCPR and the UDHR. Article 10 of the Universal Declaration of Human Rights guarantees everyone the “right to a fair and public hearing by an independent and impartial tribunal”, while article 14 of the ICCPR stipulates that: “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

Furthermore, in its general comment No. 32 (2007) on article 14, the Human Rights Committee emphasized that the right to equality before courts and tribunals and to a fair trial is key to the protection of human rights and serves as a procedural

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means to safeguard the rule of law.<sup>1</sup> Article 14 provides in particular for the principle of equality before competent, independent and impartial courts and tribunals, the presumption of innocence, the granting of time and the facilities necessary for the preparation of the defense and the right of the accused to communicate with the counsel of their choice. Fair trial guarantees can never be subject to measures of derogation that would circumvent the protection of non-derogable rights, and derogation from “the fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times”.<sup>2</sup>

### *Context*

According to reports, in mid-September 2024, the Government of Pakistan sought to table a series of constitutional amendments in a bill under the title “Constitution (Twenty-sixth Amendment) Act, 2024” (“Bill”). The version of the Bill circulated online consists of more than 50 amendments, which appear to include provisions aimed at giving the executive and legislative branches more power over the judiciary. Reports suggest that the proposed amendments are likely to be voted upon in Parliament in the coming days or weeks.

The proposed Bill has been brought forward in this context. I would like to highlight how some of these proposed amendments, if they are adopted as they stand, run contrary to international human rights standards.

### *Creation of the new Federal Constitutional Court and its Jurisdiction*

A proposed amendment to article 175 of the Constitution would establish a Federal Constitutional Court (FCC) consisting of a Chief Justice and as many judges as determined by the Parliament or, until so determined, as may be fixed by the President. Each Province would have an equal number of judges in the FCC (proposed article 175B(1)). The President could make necessary provisions for the matters consequential or ancillary to the establishment and functioning of the FCC (proposed article 175B(2)).

Under the proposed provisions, the first Chief Justice of the FCC would be appointed by the President, on advice of the Prime Minister. Thereafter, the Chief Justice of the FCC would be selected from the three most senior judges of the Court upon recommendation by a National Assembly Committee constituted for that purpose, who would meet in private. The nominee’s name would be transmitted to the Prime Minister who would then forward the recommendation to the President for appointment. The first Chief Justice of the FCC would be appointed by the President on advice by the Prime Minister. The first judges of the FCC would be appointed by the President, in consultation with the Chief Justice. Thereafter, FCC judges would be appointed by the President following recommendations by a Judicial Commission, which would consist of the Chief Justice of the FCC, the two most senior judges of the FCC, the three most senior judges of the FCC next in seniority below the aforementioned FCC judges, the Federal Minister for Law and Justice, the Attorney-General for Pakistan, a Senior Advocate or an advocate having not less than 20 years of practice in the Supreme Court (to be nominated by the Pakistan Bar Council for a term of two years), two members from the Senate and two members from the National Assembly.

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<sup>1</sup> CCPR/C/GC/32, paragraph 2

<sup>2</sup> CCPR/C/GC/32, paragraph 6

The proposed amendment would vest a uniquely powerful role in the President for the appointment of judges of what would become the highest court in Pakistan. I would like to recall that the Human Rights Committee has pointed out that situations in which the Executive is “able to control or direct” the judiciary “is incompatible with the notion of an independent tribunal”.<sup>3</sup> International standards provide that states must take specific measures to protect judges from any form of political influence in their decision-making, including by adopting clear procedures and objective criteria for appointment, suspension and dismissal.<sup>4</sup>

The proposed amendments to articles 184, 185 and 186 of the Constitution, which provide for the original and appellate jurisdiction of the Supreme Court respectively, will remove the Supreme Court’s jurisdiction in relation to: (i) cases concerning matters of public importance with reference to the enforcement of fundamental rights, matters of constitutional interpretation, disputes between the Federal and Provincial governments (clauses 23 and 25 of the Bill); and (ii) advisory jurisdiction on important questions of law (clause 26 of the Bill).

Essentially, if the amendments are adopted, the Supreme Court would be stripped of all powers under article 184 and all cases involving human rights, “public importance”, constitutional issues and disputes between Federal and Provincial Governments, which would then be decided by the proposed FCC. All such pending cases before the Supreme Court would be transferred to the FCC.

Further, the proposed amendments provide the FCC, once established, with the power to order the transfer of applications for judicial review brought under article 199 of the Constitution (the provision that governs the right to judicial review) pending before any High Court to itself or to another High Court (clause 27 of the Bill). The provision as it stands would allow the FCC to engage in a highly unusual kind of “forum shopping”, or “judicial bench shopping”, by designating a case to a particular High Court, or to itself. If the FCC should decide to transfer an article 199 case to itself, the parties will also be deprived of the right of appeal. The decisions of the FCC will be binding on all other courts in Pakistan, including the Supreme Court (clause 30 of the Bill), while the decisions of the Supreme Court will be binding on all other courts in Pakistan, excluding the FCC.

The amendments as they stand would run counter to international standards providing that State parties should establish a competent tribunal that “is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature” to determine rights and obligations. The failure to allow access to such a tribunal in specific cases would amount to a violation of article 14 of the ICCPR. Further I recall that any limitations to a tribunal such as the one described above, that are not necessary to pursue legitimate aims such as the proper administration of justice, or that are based on exceptions to international human rights standards, would undermine the right to a fair trial.

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<sup>3</sup> CCPR/C/GC/32, para. 19.

<sup>4</sup> CCPR/C/GC/32, para. 19.

<sup>5</sup> CCPR/C/GC/32, paragraphs 48-50.

International standards are also clear on the right of appeal and judicial review<sup>5</sup>. The right to have a conviction and sentence reviewed by a higher tribunal imposes on the State party a duty to allow for the substantive review of any conviction and sentence by an impartial tribunal. The amendments as proposed would allow the FCC to selectively transfer certain cases to specific courts or to itself, and thus risk of setting up a procedure that would deny the right of review by an independent and impartial tribunal or the right to appeal.

#### *Judicial career and security of tenure*

The Judicial Commission of Pakistan, established by article 175A of the Constitution, is responsible for the appointment of judges of the Supreme Court, High Courts and the Federal Shariat Court. Currently, as provided by article 175A(2), the Judicial Commission is comprised of the Chief Justice of Pakistan, the four most senior Judges of the Supreme Court, a former Chief Justice or former Judge of the Supreme Court (to be nominated by the Chief Justice in consultation with the four member Judges), the Federal Minister for Law and Justice, the Attorney General of Pakistan, and a Senior Advocate of the Supreme Court (nominated by the Pakistan Bar Association).

The Bill provides that the appointment of the Judges of the High Courts and the Federal Shariat Court shall be carried out by a Judicial Commission consisting of the Chief Justice of the FCC as the Chairperson and the following members: the two most senior judges of the FCC; the Chief Justice and the two most senior Judges of the Supreme Court; the Federal Minister for Law and Justice; the Attorney General of Pakistan; a Senior Advocate or an advocate having not less than 20 years practice in the Supreme Court, to be nominated by the Pakistan Bar Council for a term of two years; and two members from the Senate and two members of the National Assembly, of whom two shall be from the Treasury Benches, one from each House, and two from the Opposition Benches, one from each House (during the time when the National Assembly stands dissolved, the remaining two members shall be nominated from the Senate for such period). The new Judicial Commission would have no representation of the High Court or the Provincial Minister for Law.

Concerning the filling of vacancies in court (section 13), currently, article 175A(8) states that the Judicial Commission, by majority of its total membership, shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court. However, the Bill proposes having the Commission, by majority of its membership, nominating one person for each vacancy of a judge in the FCC, SC, High Court or Federal Shariat Court to the Prime Minister who shall forward the same with his advice to the President for appointment.

I would like to recall that international standards provide that any appointment procedure must guarantee judicial independence, both institutional and individual, and impartiality, both objective and subjective.<sup>6</sup> Judges should be selected based on their

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<sup>5</sup> CCPR/C/GC/32, paragraphs 48-50.

<sup>6</sup> Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1 (hereinafter "Basic Principles on the Independence of the Judiciary").

training or qualifications in law, as well as their integrity and ability.<sup>7</sup> The method of judicial selection must include safeguards against judicial appointments for improper motives.<sup>8</sup> This mandate has repeatedly emphasized that a candidate’s integrity, legal training and qualifications are crucial elements in the appointment of judges,<sup>9</sup> and has underlined the importance of “prioritizing non-political appointment procedures, strictly linked to professional quality and merit, and commitment to the values of the rule of law and the standards outlined in the Basic Principles on the Independence of the Judiciary.”<sup>10</sup>

Selection processes should ideally be carried out by an independent authority<sup>11</sup> and should guarantee the effective participation of civil society and citizens to ensure that the selection is based on merit and abilities.<sup>12</sup>

The Bill provides that the President may transfer a Judge of a High Court from one High Court to another High Court, on the recommendation of and for such period as determined by the Judicial Commission of Pakistan. The seniority of a Judge of a High Court so transferred shall be reckoned from the date of his initial appointment as a Judge of a High Court. Such Judge shall not be appointed as the Chief Justice of the High Court to which he has been transferred under this article. Note again that this Judicial Commission will have minority representation from the Supreme Court and no representation from any High Court.

The Bill also seeks to set the retirement age of judges of the FCC at 68 compared to 65 for the Supreme Court. Additionally, if a judge from the SC is appointed in the FCC such a judge will have a fixed term of 3 years and if appointed Chief Justice of FCC they will have a fixed 3-year term as Chief Justice of the FCC. If any other person is appointed as Chief justice of the FCC who has not been a judge of the SC, then their term will expire at 68 whether they have completed the 3 years or not.

The security of tenure of judges is guaranteed by international standards that prohibit their removal from office arbitrarily or without just cause.<sup>13</sup> Security of tenure is crucial for protecting judicial independence as it allows judges to exercise their functions free from the threat of losing their position if their decisions do not please other branches of the State.

The Human Rights Committee has repeatedly expressed concern over the lack of security of judicial office created by short judicial terms or legislation allowing for judges to be removed for reasons that could be politically manipulated.<sup>14</sup> This mandate has also concluded that appointing judges for short terms weakens the judicial system and negatively impacts the independence and professional

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<sup>7</sup> Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>8</sup> Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>9</sup> A/HRC/44/47/ADD.2 (2 June 2020), para. 104, A/HRC/11/41 (24 March 2009), para. 27.

<sup>10</sup> A/HRC/50/36/ADD.1 (11 May 2022), para. 112.

<sup>11</sup> /HRC/44/47/ADD.2 (2 June 2020), para. 104; A/HRC/11/41 (24 March 2009), para. 27; A/HRC/23/43/ADD.1 (24 May 2013), para. 112.

<sup>12</sup> A/HRC/38/38 (2 May 2018), paras. 72, 76.

<sup>13</sup> Basic Principles on the Independence of the Judiciary principle 2, principle 18.

<sup>14</sup> *See, e.g.*, CCPR/C/BLR/CO/5, para. 39., CCPR/CO/71/UZB, para. 14 (expressing grave concern that “The appointment of judges for a term of five years only, in particular if combined with the possibility, provided by law, of taking disciplinary measures against judges because of “incompetent rulings”, exposes them to broad political pressure and endangers their independence and impartiality.”)

development of judges.<sup>15</sup> My last report specifically addressed the increased risk of judicial independence resulting from the early removal through legislation of sitting judges, citing the implementation of new laws imposing a novel or lowered compulsory retirement age as an example.<sup>16</sup>

### *Annual Performance Review and Enquiries about Judges*

The Bill proposes that the Commission established for the appointment of High Court Judges would conduct an annual performance evaluation of the Judges of the High Courts. If their performance is found to be unsatisfactory by the Commission, a period of improvement would be granted, as deemed appropriate. If their performance is again found to be unsatisfactory following completion of this period, the Commission would send its report to the Supreme Judicial Council. The Commission could make separate rules for setting up effective standards for performance evaluation for these purposes. One-third of the members of the Commission would have the power to call a meeting of the Commission by sending a request to the Chairperson (i.e. the Chief Justice of the FCC). A meeting could be convened by the secretary of the Commission if the Chairperson fails to convene such a meeting within fifteen days of receipt of such a request.

Further, according to the proposal, the Supreme Judicial Commission would be able to initiate inquiries against any judge of the FCC, Supreme Court or High Court not only on information from any source or direction of the President, but also on report from the respective Judicial Commission under clause 19 of article 175A. In addition to the existing grounds, one of which needs to be met, for an inquiry to be initiated, the Bill proposes adding the following ground: “may be inefficient in the performance of the duties of his office”.

International standards provide that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.<sup>17</sup> All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. The judge shall have the right to a fair hearing and to an appeal<sup>18</sup>.

Finally, on protection of judges, article 14 of the ICCPR and the Basic Principles on the Independence of the Judiciary, establish that States must ensure that those who exercise a judicial function are free from interference, intimidation, hindrance or harassment. A fundamental principle of judicial independence is that judges should not be subjected to threats or put at risk of harm<sup>19</sup> due to their work or the content of their independent decisions and judgments.

### *Debate over the proposed amendments*

I would like to highlight that the proposed amendments have caused significant alarm amongst the legal community in Pakistan. In an open letter to the judges of the Supreme Courts and High Courts, the Pakistan Bar Council and

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<sup>15</sup> A/HRC/11/41 (24 March 2009), para. 54.

<sup>16</sup> A/HRC/56/62 (9 April 2024), para. 25, 29.

<sup>17</sup> Basic Principles on the Independence of the Judiciary, Principles 17-20.

<sup>18</sup> Basic Principles on the Independence of the Judiciary, Principles 17-20.

<sup>19</sup> Basic Principles on the Independence of the Judiciary, Principle 2

317 named lawyers have urged the judges to resist the proposed Constitutional amendments, raising the concern that the amendments pose a threat to judicial independence by allowing for the appointment of judges considered aligned with the government's interests.<sup>20</sup>

In conclusion, I strongly urge careful review of the proposed amendments, since as they stand, they may pose a real risk of violation of harm to judicial independence and to individuals' rights to a fair and public hearing by a competent, independent and impartial tribunal, as guaranteed by article 14 of the ICCPR. Considering reports that there may be other draft bills with similar proposals for amendments being prepared, I take this opportunity to highlight that the analysis in my letter may be a useful tool to also determine their computability with international human rights standards binding on Pakistan. I stand ready to engage in dialogue with Your Excellency's government on this very important matter and to provide any technical advice it may require in ensuring the proposal is fully compliant with international human rights obligations.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Margaret Satterthwaite  
Special Rapporteur on the independence of judges and lawyers

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<sup>20</sup> [Asad Rahim Khan on X: "This is an assault on the Constitution; a PCO for judges; and the destruction of the Supreme Court. Do not be complicit. Open letter to the judges of Pakistan's constitutional courts: #NoToPCOCourt https://t.co/v0K3DRTiWw" / X](#)