

Lawyers' Rights Watch Canada

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HUMAN RIGHTS COUNCIL

Seventh session

Statement by Lawyers Rights Watch Canada¹ to the Seventh Session of the Human Rights Council regarding unlawful emergency measures in Pakistan

I. Recommendations

Lawyers Rights Watch Canada calls on the Human Rights Council to fulfill its duty to promote and protect the rule of law and fundamental rights and freedoms in Pakistan by recommending and monitoring:

1. The immediate, unconditional release of detained jurists, including: Chief Justice Iftikhar Chaudhry, Aitzaz Ahsan, President of the Supreme Court Bar, Ali Ahmed Kurd, Justice (retired) Tariq Mahmood.
2. The rescission of all laws purporting to come into force under authority of the Proclamation of Emergency of November 3, 2007.
3. The reinstatement of all judges removed from office by the Provisional Constitution Order No. 1 of 2007, November 3 2007 and removal from office of judges signing the Oath of Offices (Judges) Order, 2007 on conditions that are reasonable and just.
4. The strict adherence by Pakistan officials to laws validly in force prior to November 3, 2007 and to applicable international standards protecting the independence of

¹ Dutch Lawyers for Lawyers Foundation–L4L, Asian Legal Resource Centre Commission–ALRC, Lawyers Without Borders Canada–LWB/C, International Association of Democratic Lawyers–IADL, Republican Attorneys Association–RAV, Bar Human Rights Committee of England and Wales–BHRC, National Lawyers Guild–NLG, American Association of Jurists–AAJ, Rule of Law Project, Lahore University of Management Sciences–LUMS, International Association of People's Lawyers–IAPL, National Union of Peoples' Lawyers–NUPL, Counsels for the Defense of Liberties–CODAL, Front Line–International Foundation for the Protection of Human Rights Defenders, International Criminal Defence Attorneys Association–ICDAA, South Asian Network for Secularism and Democracy–SANSAD, Law Society of Upper Canada–LSUC, Trial Lawyers Association of British Columbia–TLABC share the views expressed in this statement.

lawyers and judges including those embodied in the UN *Basic Principles on the Role of Lawyers*² and the *Basic Principles on the Independence of the Judiciary*.³

5. Strict adherence by Pakistan to domestic law and international standards governing arrests, detentions and the humane treatment of prisoners, including non-derogable prohibition against torture and cruel and inhumane treatment or punishment and denial of due process.

II. Background

On November 3rd 2007 Pervez Musharraf, then President and Chief of Army Staff of Pakistan, issued a Proclamation of Emergency, suspended the *Constitution of the Islamic Republic of Pakistan* (Constitution) and proclaimed the Provisional Constitution Order No. 1 of 2007 (PCO) and the Oath of Offices (Judges) Order, 2007. (Oath)

These emergency measures are unlawful under the Constitution, fail to meet UN standards for states of emergency and violate international standards for non-derogable rights. These measures arbitrarily:

- Suspended⁴ rights guaranteed by the Constitution to life, liberty, freedom of expression, movement and association, equality and to freedom from arbitrary arrest; and,
- Destroyed rights to a fair trial and to effective and independent legal representation
- Barred judicial independence by summarily removing all superior judges from office and decreeing that only judges taking the Oath to uphold the PCO, and not the Constitution, could continue in office; and,
- Removed access by Pakistani people to judicial safeguards against all arbitrary and illegal acts by the state including the violation of non-derogable rights; and,
- Provided absolute impunity for criminal acts and civil wrongs by state officials.⁵

Musharraf's PCO mandated that all superior court judges would cease to hold office immediately and thereafter, the President could allow any judge taking the Oath to continue in office.⁶ The Oath, which prohibits judges from exercising any judicial authority "against the President, Prime Minister or any person exercising powers or jurisdiction under their authority", resulted in the majority of superior court judges, including over half of the Supreme Court Bench, being removed from office and many were arrested.

² Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

³ 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.

⁴ Provisional Constitution Order No. 1 of 2007, 3 November 2007, s. 2(1).

⁵ *Supra*, s. 2(3).

⁶ Oath of Office (Judges) Order, 2007, sec. 3.

Further extra-legal measures proclaimed include the Constitution (Amendment) Order, 2007 (P.O. No. 5 of 2007, Nov. 21/07) and the Constitution (Second Amendment) Order, 2007 (P.O. No. 6 December 14, 2007) (Constitutional Amendments Order). The Constitutional Amendments Orders perpetrate the illegality of the PCO by purporting to create a Constitutional requirement limiting the bench to judges taking the Oath as well as provisions validating all actions taken under the ‘authority’ of the PCO and other presidential orders and barring any “prosecutions or other legal proceedings”⁷ in respect of either the presidential orders or actions taken there under.

The Constitutional Amendments Orders assure the continuation of human rights violations unrestricted by judicial oversight, deny legal remedies in independent courts and guarantee impunity for state perpetrators.

III. The Constitution of Pakistan

The Constitution authorizes temporary emergency measures only as a necessary last resort to contain war, external aggression or internal aggression uncontrollable by other means.⁸ The Constitution does not empower or allow the president to hold the Constitution in abeyance even during a validly declared emergency. The emergency provisions contemplated by the Constitution are protective in purpose not repressive. The absence of any circumstances justifying emergency or other extra-constitutional measures was determined by the full 7-member (legitimate) bench of the Supreme Court of Pakistan on Nov. 3, 2007. The Supreme Court rejected the expectation that applications before the court would be decided against the ‘Government’ as a valid emergency measures trigger.

In addition the PCO and other orders proclaimed violate the constitutional guarantee that “...the independence of the Judiciary shall be fully secured” and the prohibition on the removal of judges except on recommendation of the Supreme Judicial Council.⁹ The suspension of constitutional provisions relating to the operation of the High Courts is forbidden during emergency measures.¹⁰

IV. UN Standards for States of Emergency

Similarly the emergency measures fail to meet all but one (proclamation) of the widely accepted threshold principles for states of emergency set out in the final report of Leandro Despouy as Special Rapporteur on States of Emergency.¹¹ These principles reflect those articulated by others as necessary to limit human rights abuses during states

⁷ Constitutional (Amendment) Order, 2007 P.O. No. 5 of 2007, s. 6 (4).

⁸ *The Constitution of Pakistan*, PART X Emergency Provisions s. 232. Proclamation of emergency on account of war, internal disturbance, etc.

(1) If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.

⁹ *The Constitution of Pakistan*, Objective Resolution and article 2A. and art .209(7).

¹⁰ *The Constitution of Pakistan Part VII Emergency Measures*.

¹¹ Leandro Despouy, Special Rapporteur per Economic and Social Council res. 1985/37, *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency*, E/CN.4/Sub.2/1997/19 <http://www.derechos.org/nizkor/excep/despouy97en.html>

of emergency.¹² Despouy concluded that the UN has an obligation to ensure that states of emergency are properly applied in a manner that maintains the rule of law¹³ and affirmed the following threshold principles of legitimacy.

- 1) Legality: A state of emergency may be “extended only in accordance with the Constitution or Fundamental Law [of the state] and the obligations imposed by international law.”¹⁴
- 2) Proclamation: The public must receive adequate notification of the scope of the emergency measures.
- 3) Notification: The proclamation of a state of emergency must be reported to the Secretary-General of the UN¹⁵ in a report that sets out:
 - a) the motivating circumstances
 - b) the territory to which it applies
 - c) the period for which it is introduced
 - d) the measures it authorizes
 - e) the provisions of the State’s Constitution and legislation and the obligations under international law that are affected.¹⁶
- 4) Time Limitation: The extent, duration and scope of a state of emergency must be strictly limited to what is required to meet the exigencies of the situation and protect the vital interests of the population.¹⁷
- 5) Exceptional Threat: A state of emergency can only be imposed in response to an imminent threat to the state that cannot be otherwise contained.
- 6) Proportionality: The scope and duration of the emergency measures must be proportional to the threat.
- 7) Concordance: Any temporary derogation of rights effected by emergency measures must be both strictly required by the exigencies of the crises and not in violation of other rights obligations including non-derogable rights.

Despouy also concluded that;

1. The rule of law, democracy and human rights form a single entity that a state of emergency cannot break either exceptionally or temporarily.¹⁸
2. Even during a state of emergency, *jus cogens* requires the observance of judicial guarantees, which are recognized as indispensable.¹⁹

¹² *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (1985) 7 Hum. Rts. Q. 3; *Study on the Implications on Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. Doc.

E/CN.4/Sub2/1982/15 1982 (Questiaux Report); INTER-AM. C.H.R. La Protección de los Derechos Humanos Frente Suspensión de las Garantías Constitucionales o “Estado de Sitio”, 39 OEA/Ser.L/VII.15, doc.12 (1966) (prepared by IACHR member Daniel Hugo Martins; *The Paris Minimum Standards of the Human Rights Norms in a State of Emergency*, approved by the 61st conference of the International Law Association in 1984.

¹³ *Ibid*, note 10, para.8.

¹⁴ *Supra*, para 52.

¹⁵ *International Covenant on Civil and Political Rights*. Art. 4 (3).

¹⁶ *Ibid* note 10, para 68.

¹⁷ Despouy, *supra*.

¹⁸ Despouy, *supra*, para 101.

V. International Standards

International standards require universal protection of non-derogable rights by all states.²⁰ The November 3rd 2007 emergency measures violated these standards by destroying judicial independence and thereby preventing judicial safeguards against abuses of non-derogable rights by the state. The four non-derogable rights: right to life, freedom from torture and cruel or degrading treatment or punishment, freedom from slavery and servitude and protection from *ex post facto* criminal law, cannot exist except through an independent judiciary that is effectively protected by and from the state.

The non-derogability of judicial independence is the foundation upon which all human rights law rests and is secured or implied by these same instruments. Pakistan, as a UN member, has accepted a duty to promote respect for human fundamental rights and freedoms in accordance with UN principles.²¹

VI. Conclusions

To be lawful the imposition, duration and removal of emergency measures must: 1) conform to the Constitution; 2) substantially meet UN standards; and, 3) maintain protection of non-derogable rights. Access to judicial safeguards of non-derogable rights remains an absolute requirement during emergency measures.

The Proclamation of Emergency of November 3, 2007 is unlawful by all these tests. All laws brought into force and all state actions taken in reliance on the legitimacy of the *Proclamation of Emergency* of November 3, 2007 must be considered as enacted and done without legal authority and therefore as null.

VII. UN Human Rights Council Mandate

The Human Rights Council is mandated to promote and protect human rights by, *inter alia*, preventing violations, removing obstacles to enforcement, engaging states in dialogue and making recommendations for the protection of human rights.²² Monitoring states of emergency, when human rights are most at risk, is therefore a key function of the Human Rights Council.

The UNHRC must first affirm the illegitimacy of the Constitutional Amendment Orders and then act effectively to encourage and promote remedies necessary to restore the Constitution (as it was prior to the Proclamation of Emergency), restore an independent judiciary and properly redress violations of the law.

¹⁹ Despouy, *supra*, para 113 citing *Zelaya v. Nicaragua*, Human Rights Committee, communication 328/1988 adopted 20 July, 1994.

²⁰ Including the *Geneva Conventions*, (common article 3), *Protocols I and II to the Geneva Conventions*, the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights* and the *Basic Principles on the Role of Judges*.

²¹ *Charter of the United Nations*, Art. 4, preamble.

²² General Assembly Res. A/RES/48/141 20 Dec. 1993, articles 3 (a), (f), (g) and General Assembly Res.A/RES/60/251, 3 Apr. 2006, art. 5(i).