

# THE GANG-RAPE OF MUKHTAR MAI AND PAKISTAN’S OPPORTUNITY TO REGAIN ITS LOST HONOR

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## INTRODUCTION \*

On June 22, 2002, a tribal council in the Pakistani village of Mirwali was in session to resolve an issue between two tribes.<sup>1</sup> Members of the village’s Mastoi tribe had accused a twelve-year-old boy of another tribe of having an affair with an older woman from the socially-higher Mastoi tribe.<sup>2</sup> The boy denied the accusation and explained that three Mastoi men had kidnapped and sodomized him earlier in the day, and when he had threatened to report the incident, they concocted the story about the affair.<sup>3</sup> The boy’s father appeared

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\* The author would like to dedicate this piece to Mukhtar Mai and to all those willing to question tradition in hopes of progress and getting justice.

1. See generally Brian Bennett, *A Violation of Justice*, TIME ASIA MAGAZINE, July 8, 2002 [hereinafter *Violation of Justice*], available at <http://www.time.com/time/nation/article/0,8599,300692,00.html> (stating that the tribal council consisted of three village elders from each tribal clan); Owais Tohid, *Protests Over Pakistan Gang Rape*, BBC NEWS, July 3, 2002 [hereinafter *Protests Over Rape*], [http://news.bbc.co.uk/1/hi/world/south\\_asia/2089624.stm](http://news.bbc.co.uk/1/hi/world/south_asia/2089624.stm) (explaining that Mirwali is located in Pakistan’s southern province of Punjab, approximately six-hundred kilometers south west of Islamabad, Pakistan’s capital).

2. See *Protests Over Rape*, *supra* note 1 (reporting that the boy and his family belong to the Gujjar tribe, which locals consider inferior to the Mastoi tribe).

3. See Chiade O’Shea, *School Hope for Rape Victim*, BBC NEWS, Dec. 7, 2004 [hereinafter *School Hope*], [http://news.bbc.co.uk/2/hi/south\\_asia/4042941.stm](http://news.bbc.co.uk/2/hi/south_asia/4042941.stm) (stating that “[i]t was later revealed in a conventional court that the [twelve]-year-old had in fact been kidnapped and sexually assaulted by the same men who later made up his jury. His attackers were later convicted and imprisoned.”). See generally

before the tribal council to address the matter.<sup>4</sup> Worried about her father, the boy's elder sister attended the proceedings as well.

The council decided that the boy should marry the Mastoi woman and that, in exchange, a woman from the boy's family would marry someone from the Mastoi tribe.<sup>5</sup> Although the boy's father accepted the decision, villagers from the Mastoi tribe rejected it and formed their own council to determine whether the boy had dishonored their tribe.<sup>6</sup> The boy's sister appeared before the Mastoi council and apologized for her brother's alleged behavior; however, the Mastoi council ignored the apology and decided that its tribe could regain its lost honor only by dishonoring the boy's family.<sup>7</sup> In order to balance the twelve-year old boy's alleged affair with the Mastoi woman, the council ordered men of the Mastoi tribe to gang-rape the boy's sister, Mukhtar Mai.<sup>8</sup>

### I. JUNE-AUGUST 2002: THE RAPE AND THE TRIAL

Four men volunteered to carry out the punishment and gang-rape thirty-year-old Mukhtar Mai.<sup>9</sup> One of the men grabbed her and

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AMNESTY INTERNATIONAL, PAKISTAN: THE TRIBAL JUSTICE SYSTEM (2002) [hereinafter THE TRIBAL JUSTICE SYSTEM], [http://web.amnesty.org/library/pdf/ASA330242002\\_ENGLISH/\\$File/ASA3302402.pdf](http://web.amnesty.org/library/pdf/ASA330242002_ENGLISH/$File/ASA3302402.pdf) (explaining that after a public outcry, Punjab's governor set up an official enquiry, which confirmed that the men had made up the story of the affair);

4. See Khalid Tanveer, *Pakistani Rape Victim Seeks Protection*, ABC NEWS, Mar. 5, 2005 [hereinafter *Victim Seeks Protection*], <http://abcnews.go.com/International/wireStory?id=553489> (explaining that the village council had summoned the boy's father hours after some people came to the boy's house and accused him of the affair).

5. See *Violation of Justice*, *supra* note 1 (stating that the council made its decision after hearing "testimony"). The council stated that, in addition to the marriage, the Gujjar tribe would also have to offer the Mastoi tribe a parcel of land. *Id.*; see also Nilanjana S. Roy, *Battle of Honor*, TELEGRAPH, Mar. 13, 2005 [hereinafter *Battle of Honor*], [http://www.telegraphindia.com/1050313/asp/look/story\\_4481110.asp](http://www.telegraphindia.com/1050313/asp/look/story_4481110.asp) (adding that Mukhtar Mai also did not want to marry into the Mastoi tribe under such an agreement).

6. See *The Cancer of Tribalism*, KHILAFAH, July 4, 2002 [hereinafter *The Cancer of Tribalism*], <http://www.khilafah.com/home/category.php?DocumentID=4508&TagID=12> (explaining that even though the boy's father told the council that the boy was too young to have sex, the father still was willing to have his son marry the older woman if the council thought the affair had occurred). It is prestigious for a family to marry their daughter into a higher-ranking caste, while much shame or dishonor is brought if the daughter is married to an inferior caste level. *Id.*

7. See *Battle of Honor*, *supra* note 5 (reporting that the Mastoi men wanted an "eye for an eye" punishment).

8. See *Pakistan Rape Victim 'In Danger'*, BBC NEWS, Mar. 5, 2005 [hereinafter *Victim in Danger*], [http://news.bbc.co.uk/2/hi/south\\_asia/4322021.stm](http://news.bbc.co.uk/2/hi/south_asia/4322021.stm) (stating that the council ordered rape "to restore the honour of the clan").

9. See *Gang Rape Victim Narrates Ordeal*, REFLECTIONS, July 5, 2002 [hereinafter *Victim Narrates Ordeal*], [http://www.vreflect.com/julyaug/issue1\(a\).html](http://www.vreflect.com/julyaug/issue1(a).html) (explaining that despite reports that Mukhtar Mai was a teenager or in her early twenties, "Punjab police chief Malik Asif Hayat told the Supreme Court she was

forcefully took her to a hut.<sup>10</sup> Armed men of the Mastoi tribe restrained Mukhtar Mai's father and uncle as they tried to help her.<sup>11</sup> Her pleas to the tribal council to save her were futile—the four men gang-raped Mukhtar Mai for more than one hour,<sup>12</sup> yet none of the hundreds of villagers attempted to stop the crime.<sup>13</sup> After the men raped her, they stripped Mukhtar Mai of her clothing and threw her out of the hut.<sup>14</sup> As she walked naked through the village to her home,<sup>15</sup> her father draped her with a shawl.

The local police knew of the rape; however, they initially did nothing.<sup>16</sup> They only accepted an incident report a week after the gang-rape from Mukhtar Mai's father after a delegation of lawyers met the police and insisted on the registration of the complaint.<sup>17</sup> A few days later, news of the incident spread outside the village of Mirwali and it slowly began to receive national and worldwide attention.<sup>18</sup>

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actually a [thirty]-year-old divorcee.”).

10. See *Victim Seeks Protection*, *supra* note 4 (indicating that according to Mukhtar Mai, while the men grabbed her, she “cried and asked for help”).

11. See *Violation of Justice*, *supra* note 1 (reporting that some of the men forming the Mastoi council were armed with Kalashnikovs, rapid-fire Russian-made rifles).

12. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (stating that one of the four men was a member of the tribal council). But see *Violation of Justice*, *supra* note 1 (reporting that three men raped Mukhtar Mai while the fourth stood watching).

13. See *Victim Seeks Protection*, *supra* note 4 (providing a statement by Mukhtar Mai in which she described hearing some villagers laugh as the man was dragging her away). “[W]eeping there helplessly was only one man[,] my father.” *Id.*

14. See generally SUSTAINABLE DEV. POLICY INST., KNOW YOUR RIGHTS, [http://www.sdpi.org/know\\_your\\_rights/know%20you%20rights/Crimes%20against%20Women.htm](http://www.sdpi.org/know_your_rights/know%20you%20rights/Crimes%20against%20Women.htm) (last visited Feb. 3, 2006) (stating that under Pakistan Penal Code S.354A, if a perpetrator strips a woman naked in public during an assault on her, his punishment may be life imprisonment or death).

15. See generally THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (reporting a large occurrence of assaults on women in the form of public stripping and parading of them naked in southern Punjab and the upper Sindh region).

16. See *id.* (“Given the wide local participation, it must be assumed that local police—some of whom knew the real antecedents—were aware of the event [gang-rape] as it unfolded, if not directly present during the incident. However, they did nothing to stop it and to protect the victim.”); see also *Mukhtar Mai – History of a Rape Case*, BBC NEWS, June 28, 2005 [hereinafter *History of Rape Case*], [http://news.bbc.co.uk/1/hi/world/south\\_asia/4620065.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4620065.stm) (stating that the police held the twelve-year-old boy until after discovering that the Mastois had resolved the dispute by raping Mukhtar Mai).

17. See Press Release, Amnesty Int’l, Pakistan: Tribal Councils Must Stop Taking Law Into Their Own Hands (July 5, 2002) [hereinafter *Amnesty Press Release*], <http://www.amnesty.org.uk/news/press/13740.shtml>; see also THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (stating that Pakistan’s Supreme Court reprimanded the local police at a hearing on July 5, 2002, for taking so long to register the complaint).

18. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (reporting that while Mukhtar Mai and her family did not report the incident for fear of the rapists and their tribe, a local cleric reported the incident in the Friday paper and a journalist picked up the story from there). For other examples of news articles on the rape, see [Six] *Pakistanis Sentenced to Hang for Gang-Rape*, N.Y. TIMES, Sept. 1, 2002, §1, at 12;

Pakistan's Prime Minister General Pervez Musharraf ordered the arrest of the culprits,<sup>19</sup> and the Pakistani government issued a check to Mukhtar Mai for five-hundred thousand rupees.<sup>20</sup> The Chief Justice of the Pakistani Supreme Court publicly condemned the rape and, disappointed with the way authorities handled the matter, directed Punjab police to update the Supreme Court with the police's advancements in the case.<sup>21</sup>

By the middle of July 2002, nearly a month after the rape, the police found and arrested fourteen people involved in the crime, including the four rapists.<sup>22</sup> Recognizing the severity of the circumstances and wanting a swift resolution, the authorities sent the case to an anti-terrorism court, which ensures a speedy trial<sup>23</sup> and is empowered to hear heinous crimes, such as gang-rape.<sup>24</sup> The trial for

Beena Sarwar, *Brutality Cloaked as Tradition*, N.Y. TIMES, Aug. 6, 2002, at A15; Asim Tanveer, *Death Sentences for Gang Rape*, THE INDEPENDENT (London), Sept. 2, 2002, at 9.

19. See *Victim Seeks Protection*, *supra* note 4.

20. See *Victim Narrates Ordeal*, *supra* note 9 (noting that the amount is roughly eight-thousand, two hundred dollars); see also Chiade O'Shea, *The Rape Victim Who Fought Back*, BBC NEWS, Mar. 8, 2005 [hereinafter *Victim Who Fought Back*] (explaining that, according to the last census, the average monthly income in Pakistan was the equivalent of sixty-five dollars). See generally *Victim Narrates Ordeal*, *supra* note 9 (quoting Mukhtar Mai as telling Pakistan's Women's Development Minister Attiya Inayatullah, who gave her the check, "I would have committed suicide if the government had not come to my help."); *Victim School Hope*, *supra* note 3 (reporting that Mukhtar Mai has used the money she received from the government to build one school each for girls and boys).

21. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (arguing that the police's poor performance was demonstrated by the fact that the police did not include in its complaint the tribal council's involvement in the rape, the presence of the many armed men of the Mastoi tribe, or the fact that Mukhtar Mai was forced to walk naked through the village). The Chief Justice stated, "It is unbelievable that the IG (Inspector-General of Police), being the head of police, came to know about the facts of the case so late." *Id.*

22. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (reporting that, in addition to the four rapists, the police also arrested members of the tribal council as well as the three men who sodomized Mukhtar Mai's younger brother); see also *History of Rape Case*, *supra* note 16 (explaining that the men were charged simultaneously with violation of Anglo-Saxon laws, in place since colonial times, and Islamic laws). "Read together, the provisions of the . . . laws allow the courts to extend the crime of rape to all those who were present on the occasion and had, by an act of commission or omission, abetted the crime." *Id.*

23. See Aamer Ahmed Khan, *Pakistan's Justice System in Spotlight*, BBC NEWS, Mar. 3, 2005 [hereinafter *System in Spotlight*], [http://news.bbc.co.uk/2/hi/south\\_asia/4315491.stm](http://news.bbc.co.uk/2/hi/south_asia/4315491.stm) ("Pakistani law allows exceptionally serious crimes to be tried in anti-terrorism courts, which are mandated to speed up trial procedures to ensure rapid delivery of justice."); see also U.S. DEP'T OF STATE, PAKISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2004, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41743.htm> (noting that anti-terrorist courts must ordinarily decide cases within seven days).

24. See U.S. DEP'T OF STATE, PAKISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2003, Feb. 25, 2004, <http://www.state.gov/g/drl/rls/hrrpt/2003/27950.htm> (noting that the anti-terrorism court is empowered to try acts against the state, conspiracy, kidnapping and particular "heinous" crimes, such as gang-rape and child

the fourteen men began a week later, and lasted a total of three weeks.<sup>25</sup> Although most rape victims in Pakistan reportedly commit suicide after their ordeal or simply accept their fate,<sup>26</sup> Mukhtar Mai testified against the perpetrators, providing the court with the details of the rape.<sup>27</sup> In August 2002, the judge in the anti-terrorism court found six people guilty—the four rapists and two members of the tribal council who had ordered the rape—and sentenced them to death.<sup>28</sup> The men appealed the decision.<sup>29</sup>

## II. MARCH 2005: THE APPELLATE DECISIONS

In March 2005, more than two-and-a-half years after the trial court's decision, the Lahore High Court ("High Court"), serving as an appellate court, overturned the convictions of five of the six men<sup>30</sup> and commuted the sixth man's death sentence to life imprisonment.<sup>31</sup> The High Court cited insufficient evidence and faulty investigation as reasons for its decision to overturn the convictions and further stated that the prosecution failed to prove

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killings).

25. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (mentioning that the Supreme Court had directed the court to complete the trial in three weeks); see also *System in Spotlight*, *supra* note 23 (stating that the quickness of the trial won President Musharraf much acclaim).

26. See Zahid Hussain, *I Will Burn Myself Alive if Gang Rapists Go Free, Says Victim*, TIMES ONLINE, Apr. 29, 2005, <http://www.timesonline.co.uk/article/0,3-1589836,00.html> ("Thousands of women are raped each year in Pakistan and many commit suicide out of shame."); see also Nicholas D. Kristof, Op-Ed, *Sentenced To Be Raped*, N.Y. TIMES, Sept. 29, 2004, at A25 (providing an explanation by Mukhtar Mai's elder brother as to why raped women often commit suicide). "A girl who has been raped has no honorable place in the village. Nobody respects the girl, or her parents. There's a stigma, and the only way out is suicide." *Id.*

27. See *School Hope*, *supra* note 3 (reporting that Mukhtar Mai was suicidal after the rape but decided not to kill herself when more than two-hundred villagers voiced their support); see also *Pakistan Rape Acquittals Rejected*, BBC NEWS, June 28, 2005, [http://news.bbc.co.uk/2/hi/south\\_asia/4629457.stm](http://news.bbc.co.uk/2/hi/south_asia/4629457.stm) ("I had three choices. Either to commit suicide by jumping in a well or shed tears all my life like any other victim in such cases, or challenge the cruel feudal and tribal system and harsh attitudes of society.") (quoting Mukhtar Mai); *Victim Who Fought Back*, *supra* note 20 (providing a statement by Mukhtar Mai who said that the villagers' support showed her "that there were some who wanted to change the status quo").

28. See *Pakistan Rape Case Accused Freed*, BBC NEWS, Mar. 16, 2005 [hereinafter *Accused Freed*], [http://news.bbc.co.uk/1/hi/world/south\\_asia/4351507.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4351507.stm) (adding that the other eight men arrested in connection with the case were found not guilty).

29. See *History of Rape Case*, *supra* note 16 (explaining that while Mukhtar Mai was otherwise satisfied with the trial court's decision, she filed an appeal to the Lahore High Court against the appeal of the eight other men accused in her case).

30. See *Victim in Danger*, *supra* note 8 (stating that, other than the four rapists, the fifth man was a tribal elder who ordered the attack on Mukhtar Mai).

31. See *id.* (identifying the sixth man as a village elder).

that the tribal council had ordered the gang-rape.<sup>32</sup> Human rights and women's rights organizations around the world were shocked at the High Court's decision.<sup>33</sup> Within Pakistan, hundreds of men and women rallied with Mukhtar Mai in protest of the acquittals.<sup>34</sup> Despite danger to herself and her family, Mukhtar Mai declared that she would continue to fight and would appeal the case to the Supreme Court, the nation's highest court.<sup>35</sup> Both Mukhtar Mai and the Pakistani government filed appeals in the Supreme Court.<sup>36</sup>

However, before the Supreme Court could get involved, the Federal Shariat Court ("Shariat Court"),<sup>37</sup> another Pakistani appellate court unrelated to the High Court, made an uncommon intervention and suspended the High Court's decision.<sup>38</sup> The Shariat Court, an Islamic court comprised of eight Muslim judges, has exclusive jurisdiction to hear appeals from criminal court decisions on matters involving Hudood laws—laws that are specific to certain crimes including *zina*, which is unlawful sexual intercourse.<sup>39</sup> As Mukhtar

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32. See Tariq Birmani, [*Four*] *Accused in Mukhtar Mai Case Released*, DAWN THE INTERNET EDITION, Mar. 16, 2005, [hereinafter *Four Accused*], <http://www.buzztracker.org/2005/03/18/cache/495318.html> (noting that a detailed statement released by the High Court explained that "the prosecution could not prove that a [tribal council] had ordered 'gang-rape' of Mukhtar Mai.").

33. See *Throngs Rally in Pakistan on Rape Victim's Behalf*, MSNBC, Mar. 7, 2005 [hereinafter *Throngs Rally*], <http://www.msnbc.msn.com/id/7121177/> (reporting that thousands of women reacted to the High Court's decision by rallying in eastern Pakistan demanding justice); see also *Pakistan Queries Rape Acquittals*, BBC NEWS, Mar. 6, 2005 [hereinafter *Queries Rape Acquittals*], [http://news.bbc.co.uk/1/hi/world/south\\_asia/4323801.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4323801.stm) (explaining that several non-government organizations issued a joint statement in support of Mukhtar Mai); *Acquittals in Pakistan Gang Rape*, BBC NEWS, Mar. 3, 2005 [hereinafter *Acquittals in Gang Rape*], [http://news.bbc.co.uk/2/hi/south\\_asia/4314153.stm](http://news.bbc.co.uk/2/hi/south_asia/4314153.stm) (quoting defense attorney Mohammad Salim as saying, "[j]ustice has been done. The verdict of the anti-terrorism court in August 2002 was largely influenced by media hype and government pressure.").

34. See *Pakistan Rape Victim Leads March*, BBC NEWS, March 7, 2005 [hereinafter *Victim Leads March*], [http://news.bbc.co.uk/2/hi/south\\_asia/4325773.stm](http://news.bbc.co.uk/2/hi/south_asia/4325773.stm) (noting the presence of men at the march, which is "rare for such a cause in the highly conservative city of Multan," where the protest occurred); *Throngs Rally*, *supra* note 33 (stating that "thousands of women" participated in the rally).

35. See *Victim Leads March*, *supra* note 34 (quoting Mukhtar Mai as saying that despite the likelihood that the men will harm her if released, even with policemen protecting her, she will return to her village); see also *Acquittals in Gang Rape*, *supra* note 33 (describing Mukhtar Mai's determination to appeal the case to the highest authority to enforce her rights).

36. See *Queries Rape Acquittals*, *supra* note 33 (stating that Pakistan's Information Minister Sheikh Rashid Ahmed told BBC News about the government's decision to appeal the High Court's decision).

37. See Islamic Republic of Pakistan, Judiciary [hereinafter Islamic Republic of Pakistan], <http://www.pak.gov.pk/public/govt/judiciary.htm> (last visited Feb. 3, 2006) (stating that the Shariat Court has original and appellate jurisdiction and Pakistan's president appoints the eight judges).

38. See *History of a Rape Case*, *supra* note 16.

39. See *The Hudood Laws*, <http://www.pakistan.org/pakistan/legislation/>

Mai's rape fell under the category of *zina*, the Shariat Court argued that it was the only court that had jurisdiction.<sup>40</sup> The Shariat Court also stated that the Pakistani Constitution granted it the power to suspend any judgment of any criminal court until it made its decision on the case.<sup>41</sup> The Shariat Court, therefore, suspended the High Court's decision and ordered Mukhtar Mai and all of the fourteen men initially arrested in the case to attend a new hearing.<sup>42</sup>

Fearing a continued struggle between the competing jurisdictions of the High Court and the Shariat Court, the Supreme Court of Pakistan took over the case, ordering all files in the case to be sent to the Supreme Court.<sup>43</sup> However, it did not explicitly suspend the High Court's decision overturning the convictions of the five men.<sup>44</sup> A district and sessions judge ordered the release of the five men.<sup>45</sup>

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hudood.html (last visited Feb. 3, 2006) (discussing the establishment of Hudood laws in Pakistan and providing the text of the Offence of *Zina* Ordinance).

40. See Islamic Republic of Pakistan, *supra* note 37 ("The [Shariat] Court has exclusive jurisdiction to hear appeals from the decision of criminal courts under any law relating to enforcement of Hudood Law i.e. laws pertaining to offences to intoxication, theft, Zina (unlawful sexual intercourse) and Qazf (false imputation of Zina)."). "[The Shariat] Court may examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet." *Id.*; see also *Accused Freed*, *supra* note 28 ("Legislation allows the Shariat court to hear any criminal case that falls under Islamic laws called the Hudood laws. These cases include rape and adultery.").

41. See *Rape Ruling in Pakistan Suspended*, BBC NEWS, Mar. 11, 2005, [http://news.bbc.co.uk/2/hi/south\\_asia/4339927.stm](http://news.bbc.co.uk/2/hi/south_asia/4339927.stm); see also PAK. CONST. ch. 3A, pt VII, art. 203DD.

The [Shariat] Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

*Id.*

42. See *Accused Freed*, *supra* note 28.

43. See Islamic Republic of Pakistan, *supra* note 37 ("The Supreme Court has jurisdiction to hear and determine appeals from judgements [sic], decrees, final orders or sentences passed by a High Court, the Federal Shariat Court and the Services Appellate Tribunals."); see also *Supreme Court to Judge Rape Case*, BBC NEWS, Mar. 14, 2005, [http://news.bbc.co.uk/1/hi/world/south\\_asia/4348045.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4348045.stm) (noting that the Supreme Court Chief Justice stated that the Court would also address the issue of competing jurisdictions).

44. See *History of a Rape Case*, *supra* note 16.

45. See *Accused Freed*, *supra* note 28 ("Jail authorities said they were told by the judge that the Supreme Court had not suspended the High Court's judgment and would merely hear an appeal whenever it was filed"); *Rape-Victim Village Given Guards*, BBC NEWS, Mar. 16, 2005 [hereinafter *Village Given Guards*], [http://news.bbc.co.uk/1/hi/world/south\\_asia/4354225.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4354225.stm) (clarifying that the court had not released the acquitted man due to unrelated charges). However, the Supreme Court ordered their release. *Id.*

Shortly thereafter, by the end of March 2005, the acquitted rapists returned to their village, once again living near Mukhtar Mai.<sup>46</sup> The police warned the men to stay away from Mukhtar Mai and the government sent police officers to the village for her safety—two policewomen currently live with Mukhtar Mai, underscoring the continuing threats to her life.<sup>47</sup> Once again, despite dangers to herself and her family,<sup>48</sup> Mukhtar Mai continued to voice her opinion against the release of her rapists—she met with members of the Pakistani government, requesting that the police re-arrest the men until the Supreme Court issued its decision.<sup>49</sup> The government heard her pleas and the police re-arrested the four rapists,<sup>50</sup> who remain in custody pending the Supreme Court's decision.

### III. JUNE-JULY 2005: THE SUPREME COURT

On June 27, 2005, the Pakistani Supreme Court began a two-day long process of hearing the appeals in Mukhtar Mai's case. At the end of the two days, the Supreme Court overturned the High Court's decision, which acquitted the rapists and a tribal council member earlier in the year, and ordered that the police re-arrest all the men

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46. See *Village Given Guards*, *supra* note 45; see also Ron Moreau & Zahid Hussain, 'I Decided To Fight Back,' NEWSWEEK, Mar. 28, 2005, available at <http://www.msnbc.msn.com/id/7245230/site/newsweek> (describing Mukhtar Mai's reaction, after realizing the men were released, as filled with the same fear and insecurity she felt when she was raped).

47. See *Village Given Guards*, *supra* note 45 (stating that the police issued thirty police officers to the village); see also *Four Accused*, *supra* note 31 (explaining that the "police were keeping a watch on the freed persons to ensure that they did not leave their village.").

48. See *Victim Who Fought Back*, *supra* note 20 (quoting Mukhtar Mai at a press conference in Islamabad as saying, "[t]here is a danger to my own life and also to my family."); see also *Living in Fear*, Daily News, Mar. 6, 2005, <http://www.gulf-daily-news.com/printnews.asp?Article=106014> (describing Mukhtar Mai's fear not only for her own safety but that of her family).

49. See *Rape Victim Appeals to Musharraf*, BBC NEWS, Mar. 17, 2005, [http://news.bbc.co.uk/1/hi/world/south\\_asia/4357745.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4357745.stm) (reporting that Mukhtar Mai first wrote to the government requesting the re-arrest of her attackers under the Maintenance of Public Order Act and then repeated her request when meeting personally with Pakistan's interior minister).

50. See *Pakistan Rape-Case Men Rearrested*, BBC NEWS, Mar. 18, 2005, [http://news.bbc.co.uk/1/hi/world/south\\_asia/4361289.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4361289.stm) (stating that Pakistani Prime Minister Shaukat Aziz ordered the arrest under the Maintenance of Public Order Act); see also Allrefer.com, Pakistan – Emergency Provisions, <http://reference.allrefer.com/country-guide-study/pakistan/pakistan167.html> (last visited Feb. 3, 2006). The Maintenance of Public Order Act is an example of:

The British colonial constitutional provisions and penal codes [that] gave the authorities ample scope for overriding regular legal procedures in the case of persons suspected of political agitation or threats to the public order . . . . The Maintenance of Public Order Act allows detention without trial for three months, extendable to twelve months in some cases.

*Id.*

initially arrested in the case.<sup>51</sup> Although the Court did not set a date for the new hearing, it said that it would hear both sides at a future hearing.

Mukhtar Mai's case has brought Pakistan's judicial system and, more specifically, the many problems of the system, into the world's spotlight. The judicial system shares the spotlight with the nation's tribal councils, whose harsh decisions have come to light in recent years, particularly because of Mukhtar Mai's case. A close examination of the justice and tribal council systems is required to gain insight into why tribal councils are still prevalent throughout the nation.

#### A. *Glimpse into Pakistan's Judicial System*

At the head of Pakistan's judiciary structure is its Supreme Court, which can hear appeals from all lower appellate or special courts.<sup>52</sup> The lower appellate courts consist of the Federal Shariat Court,<sup>53</sup> four High Courts (one in each of Pakistan's four provinces),<sup>54</sup> as well as the Services Appellate Tribunals. At the trial level, the district of every province has a criminal court and a civil court.<sup>55</sup> In addition to these courts, Pakistan also has Special Courts and Tribunals, established to deal with very specific cases, such as one court that deals with bank offenses and one that deals with cases involving corrupt judges.<sup>56</sup> Tribal councils also serve as part of the official judiciary in some parts

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51. See *Pakistan Rape Victim 'Can Travel'*, BBC NEWS, June 29, 2005, [http://news.bbc.co.uk/2/hi/south\\_asia/4635017.stm](http://news.bbc.co.uk/2/hi/south_asia/4635017.stm) (explaining that the Chief Justice of the Supreme Court "ordered [fourteen] men—the five acquitted by the Lahore [High] court, a sixth man whose death sentence was commuted to life imprisonment by that court and another eight men acquitted at the original trial [held in August 2002]—be held in custody.").

52. See *Islamic Republic of Pakistan*, *supra* note 37 (explaining that the Pakistani president appoints the Chief Justice and the Court's thirteen other justices, in consultation with the Chief Justice).

53. See *id.*

54. See *id.*

At present, the Lahore High Court of the Punjab, the High Court of Sindh, the Peshawar High Court of NWFP and High Court of Balochistan consist of fifty, twenty-eight, fifteen and six Judges including the Chief Justice, respectively . . . . Each High Court supervises and controls all courts subordinate to it and any decision of a High Court binds all courts subordinate to it.

*Id.*

55. See *id.*

56. See *id.* (listing the following Special Courts and Tribunals: "Special Courts for Trial of Offences in Banks, Special Courts for Recovery of Bank Loans, Special courts under the Customs Act, Special Traffic Courts, Courts of Special Juges [sic] Anti-Corruption; Commercial Courts; Drug Courts; Labour Courts; Insurance Appellate Tribunal; Income Tax Appellate Tribunal and Services Tribunals.").

of Pakistan.<sup>57</sup>

Despite the existence of multiple courts, each with very specific jurisdictions, the system fails to provide for all its citizens sufficiently. The reasons for such failure must be evaluated collectively rather than separately. One problem within the system is the ongoing struggle to separate the jurisdiction of the High Court from that of the Federal Shariat Court, as Pakistani law is based on both Anglo-Saxon and Islamic law.<sup>58</sup> Mukhtar Mai's case is a token example of this struggle. The Lahore High Court had appellate jurisdiction to hear her case, but the Shariat Court also had jurisdiction over the matter because the case involved a crime under Islamic law. Furthermore, not only is the judiciary tasked with resolving conflicts between the two types of laws, the reliance on Anglo-Saxon laws creates a problem in and of itself. Because most witnesses testify in the vernacular and such testimonies are then recorded into English, the translation may lose some of the witnesses' actual testimonies.<sup>59</sup> Additionally, many who live in villages are illiterate and often sign their statements without being able to read what has been written.<sup>60</sup>

In addition to the language and literacy barriers, a lack of trust in the official system further complicates the relationship of the average Pakistani citizen with the nation's judicial system. Citizens are unable to depend on police officers, many of whom have the reputation of being corrupt.<sup>61</sup> Furthermore, Pakistan's judicial system suffers from a backlog of pending cases, causing the process to be very time-consuming.<sup>62</sup> For example, those convicted in 2002 in Mukhtar Mai's case appealed the decision immediately; however, the High Court did not hear the appeal for more than two years. Moreover, once a case does reach the courts, citizens have little faith in the courts because they often fail to punish perpetrators.<sup>63</sup>

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57. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3.

58. See *System in Spotlight*, *supra* note 23.

59. See *id.*

60. See *id.*

61. See *id.* (referring to a noted Pakistani criminal lawyer who commented that the police often come under pressure to get an acquittal and so create inconsistencies within their own investigations). "Such inconsistencies may include incorrect descriptions of the scene of the crime and the physical state of the victim, the number of witnesses and their relationship with the accused and so on." *Id.*

62. See Marie D. Castetter. Note, *Taking Law Into their Own Hands: Unofficial and Illegal Sanctions by the Pakistani Tribal Councils*, 13 IND. INT'L & COMP. L. REV. 543, 566 (2003) ("There is only one judge per every 85,000 persons, and on average every judge has some [four-hundred and fifty] cases pending.").

63. See *Queries Rape Acquittals*, *supra* note 33 (explaining that hundreds of women are victims of honor killings every year in Pakistan and yet the system rarely punishes the perpetrators).

*B. Tribal Councils Within Pakistan*

Tribal councils within Pakistan offer some refuge from the problems of the judiciary to those living in Pakistan's remote areas. However, Mukhtar Mai's rape has highlighted one of the biggest problems that Pakistan faces today: the role of the tribal councils within Pakistan's judiciary and the abuse of their power. Until Mukhtar Mai's case, the Pakistani government had largely ignored the harsh decisions and the illegal existence of tribal councils, which continue to serve as a facet of the judiciary system.

In some of Pakistan's remote areas and villages, such as Mirwali, justice can be a scarce commodity.<sup>64</sup> In such areas, which typically lack an official judicial structure, tribal councils provide an informal system of justice. While these councils may be beneficial for many Pakistani citizens living under their rule, the abusive nature of the tribal councils is becoming more widely known,<sup>65</sup> leading many human rights activists to characterize the existing tribal system as barbaric.<sup>66</sup>

Pakistan's Constitution mandates direct federal control in some tribal areas of the nation.<sup>67</sup> In other areas, including the province of Punjab where the gang-rape occurred,<sup>68</sup> Pakistan has formally abolished the councils.<sup>69</sup> Yet, in many of these areas, tribal councils

64. See *Victim Who Fought Back*, *supra* note 20.

65. See Mukhtar Mai, Criminal Justice [hereinafter Mukhtar Mai], <http://www.mukhtarmai.com/Nextpage.htm> (last visited Oct. 13, 2005) (stating that in the first half of 2004, more than one hundred and fifty women were raped at the order of tribal councils).

66. See *Victim Welcomes Verdict*, BBC NEWS, Sept. 1, 2002, [http://news.bbc.co.uk/1/hi/world/south\\_asia/2228845.stm](http://news.bbc.co.uk/1/hi/world/south_asia/2228845.stm) ("The chairman of the Human Rights Commission of Pakistan, Afrasiab Khattak, described the informal judicial system [of tribal councils] as feudal and barbaric."); see also *Protests Over Gang Rape*, *supra* note 1 (quoting human rights activist Rashid Rehman as saying, "[The rape at the order of the tribal council] is barbaric. It is like living in the dark ages.>").

67. See PAK. CONST. ch. 3, pt XII, art. 247(7) ("Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides"); see also THE TRIBAL JUSTICE SYSTEM, *supra* note 3.

The Constitution in Article 247(7) specifies that the jurisdiction of the higher judiciary, that is the provincial High Courts and the Supreme Court, does not extend to the designated Federally Administered Tribal Areas and the Provincially Administered Tribal Areas which have their own legal and judicial regime which incorporates some form of tribal adjudication.

*Id.*

68. See Castetter, *supra* note 62, at 546 ("Because the [tribal council] is not an official court and Punjab is not one of the federally recognized tribal areas subject to their own rule, [Mukhtar Mai's] rapists could not claim that their tribal law was sovereign, and they were, therefore, immune to prosecution.").

69. See Mukhtar Mai, *supra* note 65 (explaining that, in 1976, the System of Sardari (Abolition) Act formally abolished tribal heads). The Act's preamble states:

The system of Sardari, prevalent in certain parts of Pakistan, is the worst

continue to operate in violation of Pakistani law while Pakistan ignores their continued existence.

The need for the tribal council system can be attributed to various factors.<sup>70</sup> First, Pakistan's troubled judiciary offers a vacuum that tribal councils can fill. In contrast to the problems of the official judiciary system, Pakistan's tribal systems offer an informal, quick and usually trusted system of laws.<sup>71</sup> Tribal councils set the rules by which the people must live and serve as lawful bodies for the villagers, judging all conflicts.<sup>72</sup> A tribal council consists of elders from the village before which it sits.<sup>73</sup> Thus, tribal council members are respected not only for their position on the tribal council but also because they are the elders of the community. Furthermore, because tribal systems are deeply rooted in tradition,<sup>74</sup> the laws of the councils are passed down orally and are not codified.<sup>75</sup> This lack of structure provides quick access to justice because the council is within their village and before their own people. Additionally, unlike judges in Pakistan's official judicial system, a tribal head can initiate proceedings if he knows of a pending conflict or someone can call his attention to a conflict, rather than waiting for a party to file the case.

While the tribal head can decide upon the resolution alone, a major conflict may require the entire tribal council to convene, such

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remnant of the oppressive feudal and tribal system which, being derogatory to human dignity and freedom, is repugnant to the spirit of democracy and equality as enunciated by Islam and enshrined in the Constitution of the Islamic Republic of Pakistan and opposed to the economic advancement of the people.

*Id.*

70. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (quoting a tribal head telling Amnesty International that the tribal system cannot be eliminated by statute because it is more effective than the official system).

71. See Castetter, *supra* note 62, at 556 ("In contrast [to the federal court system], the panchavat system allows the individual to give a true account because there is trust among the locals as opposed to the federal justices who are mistrusted."). See generally Kimberly A. Klock, *Resolution of Domestic Disputes Through Extra-Judicial Mechanisms in the United States and Asia: Neighborhood Justice Centers. The Panchavat and the Mahalla*, 15 TEMP. INT'L & COMP. L.J. 275, 285 (2001) (discussing the tribal council systems in India and Uzbekistan).

72. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 ("[The tribal councils] deal with a range of issues, including conflicting claims to land and water, inheritance, alleged breaches of the 'honour' code and intra-tribal or inter-tribal killings.").

73. See *id.*

74. See Amnesty Press Release, *supra* note 17 (describing tribal councils as an institution that originated through mediation, with elders acting as problem solvers in local disputes).

75. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (explaining that the tribal council members often learn the system from their fathers, who were former members of the system); see also Amnesty Press Release, *supra* note 17 (stating that "[t]here are no uniform terms of reference for the council, and there is no legislation governing it.").

as in the case of Mukhtar Mai. The council usually convenes immediately and all parties in a case are invited to present their testimony to the council. As opposed to the lengthy appeals process in the judiciary system, once the council decides a matter, a party objecting to the decision can do so before the council as soon as the council has rendered its decision. The tribal council's purpose is to regain the balance lost by the inciting incident, to resolve disputes between families and to restore peace in the community.<sup>76</sup> Therefore, people who are ruled by the laws of the tribal council often trust and respect the council's decision.<sup>77</sup>

Despite the many positives that tribal councils may offer, apparent abuses of power have become known in recent years. Decisions have ordered the perpetration of crimes, such as gang-rapes and even murder, in the name of resolving disputes and/or restoring honor.<sup>78</sup> The reasons that give tribal councils an advantage over the judicial system are the same reasons that have led to its abuse of power and continued existence.

While it is true that a party may appeal a tribal council's decision immediately upon the rendering of such decision, tribal councils are usually the only representation of justice in such areas, so the party would appeal to the same tribal council. A tribal council would rarely change its own decision, thereby rendering the appeals process futile. Furthermore, the mindset of tribal people is a significant factor in encouraging the rule of tribal councils. Due to the tribal councils' historical role, many people affected by the councils do not question its existence or decisions. Therefore, the federal government is unable to enforce its power even in areas that are supposed to be under federal judicial control because tribal people are unwilling to relinquish control to the government. Even those adversely affected by a tribal council's decisions often accept the decision out of respect. Many others comply out of fear, believing the tribal councils to be too powerful and outside the realm of the official judiciary.<sup>79</sup> Some tribal

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76. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 ("Justice [according to the tribal system] is understood not in terms of punishment of the guilty leading to a process of remorse and eventual rehabilitation but strictly in terms of conciliation brought about by restoring a balance disturbed by an offence.")

77. See, e.g., *The Cancer of Tribalism*, *supra* note 6 (noting that even though the boy's father told the council that the boy was too young to have sex, the father still was willing to have his son marry the older woman if the council thought the affair had occurred).

78. See THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (noting a case where a man and a woman belonging to different ethnic backgrounds decided to marry against their parents' wishes where a tribal council "decided that both [the man and the woman] should be killed as they had defied the will of the girl's father and thereby dishonored the family.")

79. See *Victim Leads March*, *supra* note 34 ("[M]ost women who fall prey to

council members are in fact powerful leaders—not only within the tribal community itself, but also as parliamentarians or as people with links to the official government administration.<sup>80</sup> At times, tribal councils have held their proceedings on the premises of the official criminal justice system.<sup>81</sup>

The State rarely interferes with the tribal councils' decisions, regardless of how harmful the decisions may be, because it feels that it is better to leave the matters of tribal areas to tribal councils.<sup>82</sup> Yet Mukhtar Mai's case is demonstrative of the people's desire and need for change. In Mukhtar Mai's case, the tribal council itself became a perpetrator, abusing its power and seeking retribution in such a perverse fashion that Pakistan, thankfully, no longer could look away.

#### CONCLUSION

Mukhtar Mai has become known not only as a victim of gang-rape, but as an icon for the strong women of Pakistan. After more than three years of social humiliation, courtroom battles and fearing for her life, she now awaits the Supreme Court's hearing and decision. With every court's decision, Mukhtar Mai's ordeal has been lengthened. While a traditional tribal council made Mukhtar Mai a victim, Pakistan's judicial system continued to victimize her with unpredictable and unprecedented actions in her case. However, her faith in the system remains, and the hope is that Pakistan's Supreme Court will give her justice and establish Pakistan's place in the world as a strong supporter of justice and women's rights.<sup>83</sup>

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attacks designed to restore the slighted honour of a family, clan or tribe, accept their fate—believing that tribal or feudal leaders are too powerful to resist and that the police and judicial systems are stacked against them.”); *see also* *Protests Over Rape*, *supra* note 1 (adding that women fear not only being isolated as a “social outcast” but ruining their families' reputation and social standing).

80. *See* THE TRIBAL JUSTICE SYSTEM, *supra* note 3 (stating, in a footnote, that “[i]n the last National Assembly before its dissolution in October 1999, out of a total of 207 seats, 126 were reportedly held by feudal landlords or tribal leaders.”).

81. *See id.*

82. *See id.* (explaining that “[d]ecisions of [tribal heads] which lead to the infliction of severe physical harm are not usually criminally prosecuted by the state.”).

83. *See generally* *Victim Seeks Protection*, *supra* note 4.