

Key Legal Challenges in our Counter Terrorism Framework

PREVENTIVE DETENTION AND MILITARY COURTS

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Introduction

- Operations in Karachi and Balochistan
- Prosecutorial deficiencies
- Extension of military courts
- Framework for preventive detention
- Abuse of Force by the Rangers and FC

The Problem with the System

- September 20, 2008 attack on Marriott Hotel
- 54 people were killed and 250 were maimed
- Four people were arrested
- 05.05.2010, ATC's acquitted all four for lack of admissible evidence
- Large scale acquittals- symptomatic of a grave systemic weakness in the criminal justice system of Pakistan
- 2010 US State Department Report termed Pakistan's anti terrorism legal system as 'almost incapable of prosecuting suspected terrorists'

Shifting Priorities

- Low Rate of Acquittal
- Procedural delays
- Prosecutorial deficiencies
- Reliance on detention

Preventive Detention and Missing Persons

- Anti Terrorism Act, 1997: S. 11EEE and S. 11EEEE
- Maintenance of Public Order Ordinance, 1960
- Security of Pakistan Act, 1952
- Foreigners Act, 1946
- Actions (in Aid of Civil Power) Regulations, 2011

What is preventive detention?

Preventive detention is the deprivation of liberty without any specific criminal charges. It is to be considered an exceptional measure of control exercised by the State for security reasons or public order provided that the requisite criteria has been met.

Constitution also allows for preventive detention under the Article 10 framework. However, it imposes a list of conditions that have to be considered and met before depriving an individual of their liberty and violating their fundamental freedom under Article 9 of the Constitution

S. 11EEE, ATA

The Government if satisfied that with a view to prevent any person whose name is included in the list referred to section 11EE, it is necessary so to do, may, by order in writing, direct to arrest and detain, in such custody as may be specified, such person for such period as may be specified in the order, and Government if satisfied that for the aforesaid reasons it is necessary so to do, may, extend from time to time the period of such detention for a total period not exceeding twelve months.

S. 11E, ATA

S. 11E is a specific form of preventive detention for the purposes of inquiry into an alleged offence under the ATA.

The Government may, for a period not exceeding thirty days and after recording reasons thereof, issue order for the preventive detention of any person who has been concerned in any offence under this Act relating to national security and sectarianism or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned, for purposes of inquiry.

Actions (in Aid of Civil Power) Regulations, 2011

Limited to FATA and PATA

Under an Article 245 notification

‘The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.’

Long period of internment

Fundamental freedoms are unavailable

Oversight Boards

No succinct protection against torture (S. 15 only mentions it)

People deemed to have a nexus can also be interned



The image shows men detained and hooded by security forces. — Photo by Reuters

The story of 11 prisoners allegedly abducted by an intelligence agency from outside Adiala Jail over two years ago has been [coming up from time to time](#)[🔗]. Human rights organisations and activists have been calling them the “[Adiala 11](#)[🔗].” Four of these prisoners have already [expired under mysterious circumstances](#)[🔗] and the fate of others now depends on the Supreme Court.

International human rights organisation, [Amnesty International](#) has asked [Pakistani security agencies](#), particularly the police, to end all secret detention and reveal the fate of hundreds of ‘disappeared’ people, who are believed to have been abducted.

The organisation was reacting to a Supreme Court missing persons proceeding on Monday, when authorities failed to present two missing persons before the court.

Last week, four men were presented before the court under persistent judicial pressure. Despite SC’s orders to charge or release them, two others have not yet been presented.

“This year Pakistan’s courts have gained unprecedented access to individuals secretly detained by the country’s security authorities demonstrating the importance of a robust and genuinely independent justice system,” said Catherine Baber, Deputy-Direct for the Asia-Pacific at Amnesty International.

“If court orders can bring these disappeared people to light in a matter of days or weeks, the question remains – how many more are being held in intolerable conditions in secret detention centres across Pakistan?”

In February, seven men were brought before the Supreme Court in Islamabad looking severely emaciated, some with urine bags protruding from their trousers. After the brief appearance in court they were taken away and remain ‘missing’.

What is the *Adyalla 11* Case?

Manifestation of our problem of enforced disappearances and the intersection between the different laws that allow for detention.

MPOO in addition to the *ATA* and eventually detention under the *AACPR*

Dismal conditions of detainees

Clear use of torture

Exclusion of the Superior Courts

Habeas Corpus petitions

Cannot operate in FATA and PATA

Peshawar High Court: taken steps to assert jurisdiction

In 2012, the Court ordered the release of 1035 named male individuals (white detainees- not involved with the Taliban or other armed groups)

The Court also ordered that: 895 named individuals detained as 'grey' and 'black' detainees, be promptly charged and their cases brought to trial. While lawyers acting for these detainees believe that most of these men and boys have been released

21st Amendment

Premise for the amendment

Aftermath of the Peshawar Attacks

Knee jerk reaction?

Long-term solution

Extension with the 28th Amendment

Pakistan Army Act, 1952

Under S. 2(D) of the PAA, Military Courts have the authority to try persons who claim to or are known to belong to 'any terrorist group or organization using the name of religion or a sect' and carrying out acts of violence and terrorism including:

- Attacking military officers or installations;
- Kidnapping for ransom;
- Possessing, storing or transporting explosives, firearms, suicide jackets or other articles;
- Using or designing vehicles for terrorist acts;
- Acting in any way to 'over-awe the state' or the general public;
- Creating terror or insecurity in Pakistan;
- Attempting to commit any of the above listed acts within or outside Pakistan;
- Providing or receiving funding for any of the above-listed acts
- Waging war against the state

Procedure Followed by Military Courts

Apex Committees select cases of individuals to be referred to military courts and forward them to the Ministry of Interior

Criteria for selection is NOT publicly known

Under S. 85 and 87 of the PAA, a military court is composed of three to five officers of the armed forces

No requirement for the military officers to be legally trained

Judge Advocate General branch only has advisory powers but no decision making authority

Appellate jurisdiction is also with military officers; no legal training, subjected to the same chain of command

Military appellate tribunals have the power to reduce or enhance punishment

No further appeal in any civilian court except on the grounds of coram non iudice, mala fide and without jurisdiction

Grounds of appeal

1. Coram Non Judice: “not before a judge”

Outside the presence of a judge

Before a judge or court that is not a proper one that cannot take legal cognizance of the matter

Coram Non Judice is a fatal flaw germane to the very constitution of the judicial forum

2. Mala Fide: in bad faith

Actions taken maliciously; personal motives or collateral purposes not authorized by law

3. Without Jurisdiction

Fundamental legal flaw in the constitution of the forum

Said Zaman Khan v Federation of Pakistan

Victims of enforced disappearances subjected to secret trials

The procedure adopted denuded the requirements of a fair trial and due process

Contended that the convicts were kept in internment centres for years, no pre-trial proceedings were conducted, no summary of evidence was produced to the accused or presented to the court, there was no objective criteria employed, no illustration of the basis on which these cases were selected and that one victim was also a minor

It was held that while the grounds of appeal were available to the petitions, these grounds were to be given a very strict definition.

Fair trial and due process will not apply because the PAA is excluded from the application of Article 8

Military Courts: Compatibility with Human Rights and International Law

Deprivation of liberty must comply with the following general principles

(i) lawfulness

(ii) legitimacy

(iii) necessity and reasonableness of the detention

(iv) proportionality

(v) protection of human rights; particularly the right to personal security, against arbitrary detention and with the guarantee of effective judicial remedy

Duty of the State

It is the duty of the state to regulate which authorities may order deprivation of liberty and the conditions under which such orders may be given

States have to ensure strict control and clear chain of command over all officials responsible for detention, arrest and apprehension.

Obligation to ban prolonged incommunicado detention and prolonged solitary confinement

Ensure that the right of the detainee to communicate with the outside world, particularly family members or a lawyer.

An Affront to Human Rights?

Lack of an independent forum

Secret trials

Unavailability to appeal to civilian courts and the limited power of review given to superior courts

Enforced disappearances

Trial of children

The absence of a duly reasoned and written judgment

Imposition of death penalty without an independent trial

PPP's Recommendations

Military courts shall be presided over by one sessions judge or additional sessions judge with a military officer.

The sessions/additional sessions judge will be nominated by the chief justice of Pakistan.

Period will be for one year from starting date.

Right of judicial review by high courts under Article 199 of the Constitution.

High court shall decide case within 60 days.

Accused to be produced within 24 hours before the concerned court.

Accused to be supplied with grounds of arrest within 24 hours.

Accused shall have right to engage counsel of his choice.

Provisions of Qanoon-i-Shahadat 1984 shall apply.

The Twenty Eighth Amendment and Extension of Military Courts

Three points were incorporated in the twenty-eighth amendment

Disclosure of the arrest of the accused in twenty-four hours;
application of the law of evidence

The right to engage a lawyer during trial by the military courts

Security committee comprising parliamentary leaders which will monitor the performance of the military courts will be created.