The Case For Change

A Review of Pakistan’s Anti-Terrorism Act of 1997

October 2013

A Report by the Research Society of International Law, Pakistan
The Case for Change

A Review of Pakistan’s Anti-Terrorism Act of 1997

October 2013

A Report by the Research Society of International Law, Pakistan
ISLAMABAD DIVISION

Jamal Aziz  
LL.B (London), LL.M (UCL)

Muhammad Oves Anwar  
LL.B (London), LL.M (SOAS), LL.M (Vienna), D.U. (Montpellier)

Saad-ur-Rehman Khan  
LL.B (London), LL.M (Manchester) 

Abid Rizvi  
BA-LL.B (LUMS), LL.M (U.Penn) 

Aleena Zainab Alavi  
LL.B (London), LL.M (Warwick) 

Zainab Mustafa  
LL.B (London) 

LAHORE DIVISION

Ali Sultan  
J.D. (Virginia) 

Amna Warsi  
LL.M (Punjab) 

Ayasha Warsi  
LL.M (Punjab) 

Moghees Khan  
LL.B (London), LL.M (Warwick) 

Mishael Qureshi  
LL.B (Lond.), LL.M (Sussex) 

INTERNS

Muhammad Bin Majid  
Muhammad Abdul Ghani 
Awais Ahmad Khan Ghauri
## CONTENTS

SUMMARY OF RECOMMENDATIONS ........................................................................................................ IX

CHAPTER ONE ........................................................................................................................................... 7

TERRORISM IN THE PAKISTANI CONTEXT .......................................................................................... 7

1.1 TRENDS IN TERRORISM .................................................................................................................. 7

1.2 THE ANATOMY OF TERRORISM IN PAKISTAN ............................................................................. 8

1.3 THE CONTEXT OF TERRORISM IN PAKISTAN ............................................................................. 11

1.3.1 Military dictatorship under General Zia-ul-Haq ........................................................................... 11

1.3.2 Legitimization of Zia’s Military Rule .......................................................................................... 11

1.3.3 The Soviet Invasion of Afghanistan .......................................................................................... 12

1.3.4 The U.S. Invasion of Afghanistan ............................................................................................ 13

1.4 HISTORICAL LEGAL RESPONSES TO TERRORISM IN PAKISTAN ............................................. 15

1.4.1 1972 – 1977 ................................................................................................................................. 15

1.4.2 1988 – 1999 ................................................................................................................................. 16

1.4.3 1999 – 2001 ................................................................................................................................. 20

1.4.4 2001 – Today ............................................................................................................................... 22

1.5 THE STATISTICS OF TERRORIST ATTACKS IN PAKISTAN ....................................................... 28

CHAPTER TWO ........................................................................................................................................... 31

DELINEATING THE BOUNDARIES OF TERRORISM: ............................................................................. 31

DIFFICULTIES PERTAINING TO THE SCOPE OF THE ANTI-TERRORISM ACT, 1997 .................. 31

2.1 INTRODUCTION .............................................................................................................................. 31

2.2 TRIGGERING THE APPLICABILITY OF THE ANTI-TERRORISM ACT: LEGAL REQUIREMENTS 33

2.2.1 Explanation of ‘Scheduled Offence’ ............................................................................................ 33

2.3 PRINCIPAL DEFECTS RELATING TO SCHEDULED OFFENCES UNDER THE ANTI-TERRORISM ACT ....................................................................................................................... 40

2.3.1 THE DEFINITION OF “TERRORISM” UNDER SECTION 6, ANTI-TERRORISM ACT .......... 40

2.3.2 THE THIRD SCHEDULE TO THE ANTI-TERRORISM ACT, 1997 ......................................... 98

2.3.3 THE PREAMBLE TO THE ANTI-TERRORISM ACT, 1997 ....................................................... 107

2.3.4 THE LACK OF EXPLANATORY NOTES & POLICY GUIDELINES ........................................ 110

CHAPTER THREE .................................................................................................................................... 115

SPECIAL POLICE POWERS UNDER THE ATA 1997 ........................................................................ 115

3.1 INTRODUCTION ............................................................................................................................. 115

3.2 SPECIAL POLICE POWERS UNDER THE ATA ............................................................................. 116
3.2.1 The Calling in of Armed Forces and Civil Armed Forces ........................................ 116
3.2.2 ATA Powers to Employ Force, Arrest, and Search .................................................. 117
3.2.3 Use of Force ............................................................................................................. 118
3.2.4 Powers of Arrest ..................................................................................................... 124
3.2.5 Enter and Search ..................................................................................................... 125
3.2.6 Chapter IX and Sec. 132 of the Cr.P.C ..................................................................... 126
3.2.7 Power to Enter and Search Connected with Sec. 8 of the ATA .............................. 127
3.2.8 Application of the Cr.P.C. to all searches and arrests made under the ATA .......... 128
3.3 JOINT INVESTIGATION TEAMS ............................................................................ 130
3.4 POWER TO CALL INFORMATION ......................................................................... 133
3.5 CORDONS FOR TERRORIST INVESTIGATION ......................................................... 137
3.6 REMAND .................................................................................................................. 139
3.7 CONFESSION BEFORE A POLICE OFFICER .......................................................... 142
3.8 POLICE POWERS TO PROHIBIT THE DISPOSAL OF PROPERTY PENDING INVESTIGATION ... 144
3.9 DUTY TO DISCLOSE INFORMATION TO THE POLICE ........................................ 146
CHAPTER FOUR ........................................................................................................... 149
PROSCRIBED ORGANIZATIONS AND PREVENTIVE DETENTION ..................... 149
4.1 INTRODUCTION ........................................................................................................ 149
4.2 TERRORIST ORGANIZATIONS .............................................................................. 149
4.3 POWER OF THE GOVERNMENT TO PROSCRIBE ORGANIZATIONS ..................... 150
4.4 THE RIGHT OF REVIEW AGAINST PROSCRIPTION ............................................... 153
4.5 SUBSEQUENT RIGHT OF APPEAL AGAINST PROSCRIPTION AFTER 3 YEARS ........ 154
4.6 MEASURES AGAINST PROSCRIBED ORGANIZATIONS ....................................... 156
4.6 THE OFFENCE OF MEMBERSHIP OF A PROSCRIBED ORGANIZATION .............. 158
4.7 DEMONSTRATING AFFILIATION WITH A PROSCRIBED ORGANIZATION ........... 163
4.8 RESTRICTIONS IMPOSED UPON PERSONS SUSPECTED OF TERRORIST INVOLVEMENT ...... 164
4.9 POWERS TO ARREST AND DETAIN INDIVIDUALS LINKED TO PROSCRIBED ORGANIZATIONS OR ORGANIZATIONS UNDER OBSERVATION ....................................... 174
4.9.1 Preventive Detention for Inquiry – Section 11-EEEE ............................................... 178
CHAPTER FIVE ............................................................................................................... 182
MONEY LAUNDERING AND TERRORIST FINANCING ........................................... 182
5.1 INTRODUCTION ........................................................................................................ 182
5.2 INTERNATIONAL FRAMEWORK FOR MONEY LAUNDERING AND TERRORIST FINANCING .. 183
5.3 DOMESTIC LEGAL FRAMEWORK FOR ANTI-MONEY LAUNDERING ........................ 185
CHAPTER SIX

RELIGIOUSLY-MOTIVATED VIOLENCE IN THE PAKISTANI CONTEXT

6.1 PREAMBULATORY TEXT

6.2 DEFINITIONAL CLARITY

6.3 THE DEFINITION OF TERRORISM

6.4 HATE SPEECH AND THE INCITEMENT OF INTER-COMMUNAL HATRED

6.4.1 Section 6 of the ATA

6.4.2 Section 8 of the ATA

6.4.3 Section 10 of the ATA

6.4.4 Section 11 of the ATA

CHAPTER SEVEN

ANTI-TERRORISM COURTS: POWERS AND CASE MANAGEMENT

7.1 INTRODUCTION

7.2 THE NATURE OF SPECIAL COURTS

7.3 POWERS OF THE ANTI-TERRORISM COURTS

7.4 PRINCIPAL DEFECTS PERTAINING TO THE POWER OF ANTI-TERRORISM COURTS UNDER THE ANTI-TERRORISM ACT, 1997


7.6 CONCLUSION

CHAPTER EIGHT

PROTECTING WITNESSES IN TERRORISM TRIALS

DIFFICULTIES PERTAINING TO WITNESS PROTECTION MEASURES UNDER THE ANTI-TERRORISM ACT, 1997

8.1 WITNESS PROTECTION: THE LEGAL POSITION IN PAKISTAN

A) The Criminal Procedure Code (Cr.P.C) and the Witness

B) The Anti-Terrorism Act and Witness Protection

GUIDELINES FOR WITNESS PROTECTION PROCEDURES TO BE ADOPTED BY THE ANTI-TERRORISM COURTS

RECOMMENDATIONS FOR ADDITIONAL WITNESS PROTECTION PROCEDURES DURING TRIAL

GUIDELINES FOR ENHANCED POLICE PROTECTION FOR THE WITNESS

CHAPTER NINE

JUVENILE OFFENDERS

9.1 INTRODUCTION
9.2 JURISPRUDENCE PERTAINING TO JUVENILE OFFENDERS ...................................269
9.2.1 Case law favoring jurisdiction of juvenile courts..................................................270
9.2.2 Case law favoring jurisdiction of the ATC’s .........................................................272
9.3 CONCLUSION ...........................................................................................................275

CHAPTER TEN ..............................................................................................................277
ANALYSIS OF THE FIFTH SCHEDULE TO THE ATA..................................................277

10.1 TACKLING GLOBAL TERRORISM: INSERTION OF THE FIFTH SCHEDULE VIDE ACT NO. XIII OF 2013 .................................................................................................277
10.2 EN-LISTED CONVENTIONS AND PROTOCOL .........................................................279
10.3 NATURE OF CONVENTIONS ....................................................................................280
10.4 SOME OF THE COMMON SALIENT FEATURES OF CONVENTIONS IN FIFTH SCHEDULE ......281
10.5 IMPLEMENTATION OF INTERNATIONAL CONVENTIONS RELATED TO TERRORISM IN PAKISTAN ................................................................................................................283
10.6 SOME LEGAL COMMENTS ON FIFTH SCHEDULE ..................................................284
10.7 CONCLUSION: .........................................................................................................286
About the Research Society of International Law, Pakistan

Founded in 1993, the Research Society of International Law is a research and policy institution whose mission is to conduct research into the intersection between international law and the Pakistani legal context. RSIL aims to inform policy formulation on a national level through its efforts. The Society is a non-partisan and apolitical organization, dedicated to examining the critical issues of law – international as well as domestic – with the intention of informing discourse on issues of national importance and effecting positive change in the domestic legal space.

To this end, RSIL engages in academic research, policy analysis and an approach of engagement with policy-makers and stakeholders in the domestic and international politico-legal contexts in order to better articulate meaningful and insightful national positions on these matters.

RSIL is staffed by a team of dedicated researchers and practitioners with a broad spectrum of specializations within international law, whose expertise covers the major policy areas and significant issues arising out of the intersection between the international and domestic legal spaces. The team contributes to the domestic legal policy discourse by conducting research and analysis into the challenges faced, both domestic as well as international, which arise out of the operation of the law.
PRESIDENT’S MESSAGE

My vision for establishing the Research Society of International Law was to create a body of dedicated researchers actively engaged in formulating legal responses to contemporary challenges affecting Pakistan. My focus remained international law, yet with the progress of time, it became apparent to me that as a legal think tank, our focus would have to significantly expand to domestic laws that relate to international conventions and treaties that Pakistan had ratified. As a non-political think tank, our purpose is to analyze state-specific issues from a strictly academic and legal viewpoint.

The inadequate response of Pakistan’s criminal justice system to the menace of terrorism led me to set up a dedicated team of researchers within RSIL whose mandate was to find solutions to combating terrorism within the Constitutional framework. Over the past two years, this team has focused on assessing the existing legal and administrative framework relating to countering terrorism in Pakistan. This Report is one of the many milestones in this endeavor.

The past several months have witnessed the development of a significant momentum to devise a comprehensive anti-terrorism policy, a crucial component of which is the overhauling of the Anti-Terrorism Act of 1997. To this end, it is hoped that this Report will serve as a catalyst for further debate and provide indigenous solutions to policymakers.

I would like to acknowledge the efforts of the RSIL team involved in the research and drafting of this comprehensive Report. Their hard work and dedication under strict timelines are appreciated.

Ahmer Bilal Soofi

President, RSIL
Advocate Supreme Court of Pakistan
Former Caretaker Federal Law Minister

Islamabad, Pakistan
1 October, 2013
Chapter Two: Delineating the boundaries of terrorism - Difficulties pertaining to the scope of the Anti-Terrorism Act, 1997.

Recommendation 1: ATA- Section 6(1)(b)- RSIL recommends that the words “the use or threat is designed to” should be replaced with “the use or threat is made with the intention of” in order to clarify the requirement of intent.

Recommendation 2: ATA-Section 6(1)(b)- RSIL recommends that explanatory notes should accompany this clause, further underscoring the inclusion of mens rea as an integral element in the offence of terrorism.

Recommendation 3: ATA-Section 6(1)(b)- RSIL recommends that the words “or create a sense of fear or insecurity in society” should be omitted from the text of clause (b) to limit the application of the ATA. The terminology is too vague and ambiguous to serve as an effective filter.

Recommendation 4: ATA-Section 6(1)(c)- RSIL recommends that the word ‘or’ contained between sub-sections 1(b) and 1(c) should be replaced with the word ‘and’.

Recommendation 5: ATA-Section 6(1)(c)- RSIL recommends that the legislative intent behind sub-section 1(c) should be clearly defined in explanatory notes which clarify the role of motive in differentiating terrorism from other kinds of serious violence which also generate fear.

Recommendation 6: ATA-Section 6(1)(c)- RSIL recommends that the amendments inserted by the Anti-Terrorism (Second Amdt.) Act, 2013 should be removed from sub-section 1(c).
**Recommendation 7: ATA-Section 6(1)(c)**- RSIL recommends that the insertion of causes additional to religious, sectarian or ethnic may be considered to be incorporated within sub-section 1(c) to better reflect the multifaceted nature of terrorism in Pakistan today.

**Recommendation 8: ATA-Section 6(1)(c)**- RSIL recommends that Section 6(3) of the ATA should be modified so as to:-
   i) replace sub-section 1(b) with sub-section 1(c), so that the motive/purpose element continues to underpin a terrorism offence;
   ii) the scope of Section 6(3) should also be reduced to only those actions falling under sub-section (2) which involve the use of explosives and not to actions involving firearms or any other weapon.

**Recommendation 9: ATA-Section 6(2)(a)**- RSIL recommends that the wording in Section 6(2)(a) may be amended by removing the words ‘involves the doing of anything that causes death’ and inserting the words ‘causes a person’s death’.

**Recommendation 10: ATA-Section 6(2)(b)**- RSIL recommends that in order to simplify the provision:-
   (i) the word ‘involves’ may be replaced with the word ‘causes’
   (ii) the sub-section should not refer to three different concepts (grievous violence, grievous bodily injury or grievous harm) and should instead refer only to either bodily injury or physical harm to a person
   (iii) the word ‘grievous’ may be replaced with the word ‘serious’.

**Recommendation 11: ATA-Section 6(2)(a) & Section 6(2)(b)**- RSIL recommends that both sub-sections may be merged into one sub-section, which covers death and serious bodily harm. Hence the sub-section would read as follows: “Causes death or serious bodily/physical harm to a person”.

**Recommendation 12: ATA-Section 6(2)(c)**- RSIL recommends that the 2013 Amendment to this sub-section should be omitted altogether as it serves no purpose and actually may undermine the provision.
Recommendation 13: ATA-Section 6(2)(c)- RSIL recommends that if the legislative intent is to reduce the ambit of this sub-section to cover only attacks on government premises, official installations, schools, hospitals and offices, then the sub-section should be drafted in a more restrictive manner, by excluding reference to ‘any other public or private property’. Further, the sub-section should omit any reference to the damage of property by ransacking, looting or arson.

Recommendation 14: ATA-Section 6(2)(c)- RSIL recommends that the words ‘involves grievous damage to property’ may be replaced by ‘destruction of, or serious damage to property’.

Recommendation 15: ATA-Section 6(2)(ee)- RSIL recommends that the 2013 Amendment to Section 6(2)(ee) should be deleted. The possession of explosives without lawful justification should be made a strict liability offence requiring no proof of mens rea and stipulate higher penalties for larger quantities. Accordingly, it should be made a separate offence under the ATA with no accompanying requirement of showing intent or purpose under S. 6(1)(b) and (c), as is currently the case.

Recommendation 16: ATA-Section 6(2)(ee)-RSIL recommends that the words ‘including bomb blast’ should be omitted from sub-section 2(ee). The sub-section may accordingly read: “Involves the use of explosives by any device”.

Recommendation 17: ATA-Section 6(2)(f)-RSIL recommends that the incitement of religious/sectarian or ethnic hatred and contempt may potentially be removed from the definition of terrorism under Section 6 and instead constitute a separate offence under the Act with its own determinative criteria. In this regard, Section 11X(3) may be suitably amended.

Recommendation 18: ATA-Section 6(2)(g)- RSIL recommends that if Section 6(2)(g) is to be retained then the mens rea element included in the offence is redundant and should be removed. The link to Section 6(1)(b) would comprehensively attach the mens rea requirement without confusing the actus rea of the offence.
Recommendation 19: ATA- Section 6(2)(g)- RSIL recommends that as the aim of the sub-section is presumably to suppress entities from establishing alternative judicial structures capable of meting out punishments, it may be prudent to reorient this sub-section by targeting those who establish such alternate judicial structures that undermine the writ of the State.

Recommendation 20: ATA-Section 6(2)(h)- RSIL recommends that sub-section 2(h) of Section 6 should be omitted altogether from the ATA as it relates to acts or situations which are already adequately covered by a wide range of provisions within the Act.

Recommendation 21: ATA-Sub-section 6(2)(i)-RSIL recommends that the words, “or is designed to frighten the general public and thereby prevent them from coming out and carrying out their lawful trade and daily business, and disrupts civic life” should be removed from this sub-section.

Recommendation 22: ATA-Section 6(2)(i)- RSIL recommends that the sub-section should be modified to include serious risks to the health or safety of the public or a section of the public. This is because ‘safety’ usually refers to issues having an immediate impact whereas ‘health’ relates to physical and mental wellbeing and thus may also include the long-term consequences of an act.

Recommendation 23: ATA-Section 6(2)(j)- RSIL recommends that sub-section 2(j) of Section 6 should be omitted altogether from the ATA as it relates to acts or situations which are already adequately covered by a wide range of provisions within the Act.

Recommendation 24: ATA-Section 6(2)(l)- RSIL recommends that the ambit of this sub-section should be broadened by removing the specific references to ‘communication systems or public utility service’ and replacing these instead with broader reference to an electronic system or an essential infrastructure facility.

Recommendation 25: ATA-Section 6(2)(l)- RSIL recommends that additionally or alternatively, reliance may be placed on the concept of ‘critical infrastructure’, i.e. those material assets, systems or services which, if destroyed, damaged or disrupted through physical, cyber or other means would risk national security, endanger public health or
safety, threaten economic security, jeopardize the continuity of government, lower public confidence, or bring the nation into disrepute.

**Recommendation 26: ATA-Section 6(2)(p)**- RSIL recommends the omission of this subsection from the list of actions under Section 6(2). The provision is exceptionally broadly worded, and may potentially constitute a violation of fundamental rights under the Constitution, such as freedom of speech and the freedom to profess religion and to manage religious institutions. Such activities can effectively be regulated by a statutory framework outside the ATA. If however, these activities have to be included within the ATA framework, then they should be accommodated, after suitable amendment, within the existing provisions of the ATA outside of Section 6, especially those provisions dealing with hate speech.

**Recommendation 27: ATA- Section 6(6)**- RSIL recommends that Section 6(6) of the ATA should be amended by omitting the words ‘or any other provision of this Act.’ The amended section would accordingly read as follows: “A person who commits an offence under this section shall be guilty of an act of terrorism.”

**Recommendation 28: ATA-Clause 4(i), Third Schedule**- RSIL recommends that Clause 4(i) of the Third Schedule, relating to abduction or kidnapping for ransom, may be omitted altogether from the Schedule. The offence can adequately be blended within the existing provisions of the ATA. This can be achieved through the following methods:

(i) the offence of kidnapping can be accommodated within Section 6(2)(e), as it specifically includes this offence within the range of actions which may constitute terrorism;

(ii) specific reference may be made in Section 11(H), ATA (which relates to fundraising) for those abductions or kidnappings carried out by terrorist organizations for the purpose of generating funds for terrorism.

**Recommendation 29: ATA-Clauses 4(ii) and 4(iii), Third Schedule**- RSIL recommends:

1. that Clauses 4(ii) and 4(iii) may be omitted altogether from the Third Schedule, since the situations covered under these clauses are already catered for by the ATA. Attacks on places of worship by the use of firearms and/or explosives, and attacks on courts premises are actions which would fall within the scope of Section 6(2);
2. that if the legislative intent is to make such offences strict liability offences, then the words “use of firearms and explosives by any device, including bomb blast” should be removed from these clauses, which would resolve the statutory ambiguity, and also remove the confusion vis-à-vis the applicability of Section 6(3) and Section 6(1)(b) and (c) in such cases. However, Section 6(2) (h) would require suitable amendment if this course is adopted.

**Recommendation 30: ATA-Preamble-** RSIL recommends that the word ‘heinous’ be removed from the preamble so that the language cannot be misconstrued to include ordinary criminal offences which are heinous in nature.

**Recommendation 31: ATA-Preamble-** RSIL recommends that the preamble should ideally also state that the Act contains special law and should not be applied to ordinary criminal offences for sentencing purposes.

**Recommendation 32: ATA-Explanatory Notes-** RSIL recommends that comprehensive explanatory notes be added to the Act, particularly to S.6(1)(b), S.6(1)(c), and S.6(2).

**Recommendation 33: ATA-Explanatory Notes-** RSIL recommends that an alternative option could be the publishing of detailed explanatory notes separate to the Act akin to the explanatory notes published for the Anti-Terrorism Act 2006 (UK).

**Recommendation 34: ATA-Explanatory Notes-** RSIL recommends that the purpose of these explanatory notes should be restricted to clarify any ambiguity in the statutory provision, and it should not be used for adding to the statute.

**Recommendation 35: ATA-Explanatory Notes-** RSIL recommends that an alternative approach that may be used as an aid to interpreting the Anti-Terrorism Act, 1997 can be the incorporation of a ‘policy guidelines’ or a ‘policy objectives’ section within the Act which will allow the judiciary to interpret the law in regard to its context, its general purpose, and to carry out the legislative policy.
Chapter Three: Special Police Powers under the ATA

Recommendation 36: ATA-Sections 5(2)(i)- RSIL recommends that the words, ‘when fired upon’, should be removed from the Section 5(2)(i).

Recommendation 37: ATA-Sections 5(1) and 5(2)(i)-RSIL recommends that the limitation on the police, armed forces, and civil armed forces to use force to prevent acts of terrorism must be modified in line with the provisions of Sections 96-106 of the PPC and the case law developed under it dealing with the ‘Right to Private Defence’. These include but are not limited to the following:

a) The right to use force may arise when there is a reasonable apprehension that death or grievous hurt will be the consequence of an individual’s act,

b) The reasonable apprehension of harm may apply to the police officer himself or members of the public as well (strangers),

c) Deadly force be used only as a last resort,

d) The use of force must be necessary to obviate the threat,

e) The use of force must be proportionate and not excessive in any way,

f) The courts must remain the final arbiters of what is deemed.

Recommendation 38: ATA-Section 19A-RSIL recommends that a requirement should be incorporated to conduct searches in the presence of witnesses unless no credible witness is available.

Recommendation 39: ATA-Section 19A-RSIL recommends that the ATA may allow other evidence of a search to be admissible that enhance the credibility of the search. This may include video recordings or photographs.

Recommendation 40: ATA-Section 19- RSIL recommends that a special cadre of ‘Terrorism Investigators’ be established in the provinces. The ATA may not be the ideal vehicle for such Police restructuring but any redrafting of the ATA must make room for the deputation of such special investigators to terrorism investigations.
**Recommendation 41: ATA-Section 19**- RSIL recommends that the ATA mandate that all members of the JIT must submit a complete report as part of the ‘challan’ submitted to the Prosecutor and the ATC Judge.

**Recommendation 42: ATA-Section 19**- RSIL recommends that a regular review meeting between senior members or those in operational command positions of the intelligence agencies, police, and other law enforcement bodies, be instituted to go over all cooperation and intelligence sharing conducted through JITs. This may be arranged under the auspices of the National Counter Terrorism Authority.

**Recommendation 43: ATA-Section 19**- RSIL recommends that standing JITs or Integrated Task Forces be instituted to target and take down specific terrorist organizations or groups. Their aim should be to prevent acts of terrorism from taking place and in this regard should utilize the powers granted for surveillance and intercepts under the Investigation for Fair Trial Act (IFTA) 2013.

**Recommendation 44: ATA-Section 21EE**- RSIL recommends that investigation of terrorist offences involving surveillance or intercepts that come under the purview of the IFTA 2013 should be conducted under the IFTA’s framework.

**Recommendation 45: ATA-Section 21EE**- RSIL recommends that where circumstances do not allow for the time consuming procedure to obtain a High Court warrant under the IFTA, the ATA should provide for a special emergency mechanism. This mechanism would allow investigators or the JIT to directly request a warrant for surveillance or intercept from a High Court Judge. The warrant would be for a more limited period than warrants under the IFTA.

**Recommendation 46: ATA-Section 21EE**- RSIL recommends that stronger mechanisms need to be established to ensure confidential information is not divulged to unauthorized persons or leaked to the public.

**Recommendation 47: ATA-Sections 21-A and 21-B**- RSIL recommends that the concept of Cordons be expanded to allow for the designation of ‘Special Operations Areas’. This would grant legal cover for more thorough counter-terrorism sweeps in sensitive areas of urban centers.
Recommendation 48: ATA-Sections 21-A and 21-B-RSIL recommends that the power to designate a Special Operations Area should be granted to members of the armed forces and civil armed forces deployed under Section 4 of the ATA in addition to the Police. This would be a logical step as these forces are often involved in such operations.

Recommendation 49: ATA-Sections 21A and 21B-RSIL recommends that the designation for Special Operations Area may be of two categories. Category one would allow all the powers currently available under Section 21-B of the ATA. This designation may be made by the police, armed forces or civil armed forces directly. Category two would be measures to prohibit entry or exit from the designated area or to impose targeted curfews in the area. Category two measures would have to be authorized by the Provincial Home Secretary.

Recommendation 50: ATA-Section 21E-RSIL recommends that the total extendable duration of remand must be shortened. It cannot be equivalent to the maximum duration of preventive detention permitted under the ATA.

Recommendation 51: ATA-Section 21E-RSIL recommends that any extension of remand beyond 30 days must be based on strong criteria and cogent evidence.

Recommendation 52: ATA-Section 21E- RSIL recommends that if an individual is remanded into the custody of any entity other than the Police, he shall be required to be examined by a medical professional every week. Any evidence of torture would cancel that entities right to hold him and he would be transferred back to Police custody.

Recommendation 53: ATA-Section 21H-RSIL recommends that confessions before a Police Officer must be made admissible only if a Magistrate is not available to record the confession. Reasons are to be furnished as to why a Magistrate could not record the statement. A Magistrate may record the confessional statement of the accused while he is in Police custody at the Police Station.

Recommendation 54: ATA-Section 11EEEEEE-RSIL recommends that the Police must be required to approach the appropriate authority to replace their temporary order prohibiting the
disposal of property as soon as practicable. The appropriate authority should be defined as the Anti-Terrorism Court.

**Recommendation 55**: ATA-Section 11EEEEE- RSIL recommends that alternatively a Police order prohibiting the disposal of property should be made to lapse after 10 days.

**Recommendation 56**: ATA-Section 11L- RSIL recommends that the duty to disclose information must be given a sanction if it is to be operationalized. The penalty may be imprisonment up to 2 years or a fine or both. This would equate non-disclosure under Sec. 11-L to non-compliance of a Police order to furnish information under Sec. 21-EE.

**Chapter Four : Proscribed Organizations and Preventive Detention**

**Recommendation 57**: ATA-Section 11B-RSIL recommends that requirements or criteria should either be inserted into the language of the ATA to hone its standard for proscription. Alternatively such guidelines may be issued as standalone rules by the Federal Government.

**Recommendation 58**: ATA-Section 11B-RSIL recommends that it may also be feasible to attach these guidelines for proscription to the ATA itself by adding a new Schedule. This would certainly serve the ends of justice and transparency.

**Recommendation 59**: ATA-Section 11C- RSIL recommends that the role of the Review Committee (which reviews the aggrieved organization’s application for de-proscription) should be explicitly mentioned in the Section, and the procedure to evaluate the applications by the Committee should also be incorporated.

**Recommendation 60**: ATA-Section 11C- RSIL recommends that the process through which the Federal Government establishes the Committee should also be expounded in Section 11C.

**Recommendation 61**: ATA-Section 11C- RSIL recommends that Section 11C should mention the officials comprising the Review Committee who should be above a specific grade (stipulated in the section) from different governmental departments who can be part of the Review Committee.
Recommendation 62: ATA-Section 11D-RSIL recommends that restrictions placed by this section be amended so as to shift the standard from ‘suspicion’ to the constitutional standard of ‘reasonableness’.

Recommendation 63: ATA-Section 11EE-RSIL recommends that a similar amendment be made as the one described above, i.e. that the standard for application of the section be shifted from ‘suspicion’ to ‘reasonableness’.

Recommendation 64: ATA-Section 11EE-RSIL recommends that the restrictions in Section 11EE(2)(d) be removed and replaced with restrictions which are more versatile and less specific. For reference, such amendments could mirror the control order regime effected by the Prevention of Terrorism Act of 2005 of the UK term, informed by the preconditions for the application of such restrictions provided by the Terrorism Prevention and Investigation Measures Act of 2011 of the UK.

Recommendation 65: ATA-Section 11E-RSIL recommends that Section 11-E (measures taken against proscribed organizations) may be amended to include a right of appeal for organizations which carry out considerable charity work. If the appeal is granted, this would sever the social welfare operations of such organizations from their terrorism-related ones, and enable the organization to carry on its charity work contingent upon meeting certain conditions:

(i) The organization would owe a duty of disclosure to communicate the organization’s sources of funding, the addresses of its offices, and the names of any other organizations which provide support to it. The organization should also disclose financial information, helping to ensure financial transparency.

(ii) In order to ensure that the premises which the organization uses that are allegedly being retained for charitable purposes, are, in fact being used for such purposes, the section may also empower law enforcement agencies with the authority to inspect said premises.

(iii) If the duty of disclosure is not complied with in any way, this should ideally result in an effective revocation of the organization’s right to carry on charitable work subject to the right of appeal.
Recommendation 66: ATA-Section 11EEE- RSIL recommends that a transparent mechanism needs to be established for authorizing preventive detention of individuals listed in the Fourth Schedule.

Recommendation 67: ATA-Section 11EEE- RSIL recommends that decisions on detention should be based on recent information of involvement in terrorist activities and not on the information on which the original designation was made to include the individual’s name in the Fourth Schedule.

Recommendation 68: ATA-Section 11-EEE- RSIL recommends that the mechanism to impose an order for preventive detention under this section should be made more transparent and evidential requirements should be outlined in the Act.

Recommendation 69: ATA-Section 11-EEE- RSIL recommends that safeguards protecting the individual from torture and abuse need to be strengthened in the ATA and other rights available need to be outlined as well.

Recommendation 70: ATA-Section 11F-RSIL recommends that sub-section 3(b) of Section 11F needs to be amended in order to distinguish between private and public meetings. If the accused is able to prove that he had no reasonable cause to believe that the private meeting would be to support a proscribed organization or further its activities, it would be a valid defence.

Recommendation 71: ATA-Section 11F-RSIL recommends that the penalty for membership of a terrorist organization needs to be increased to create an effective deterrent.

Recommendation 72: ATA-Section 11F-RSIL recommends that a right of defence should be added to the section which would state that if the accused took all reasonable steps to cease to be a member of a proscribed organization as soon as practicable after the person knew the organization was a terrorist organization, it would be a valid defence. Furthermore, if the organization was not proscribed on the last (or only) occasion on which the accused became a member or began to profess to be a member, and has not taken part in the activities of the organization at any time while it was proscribed should also suffice as a defence.
Recommendation 73: ATA-Section 11F-RSIL recommends that a list of proscribed organizations should be added to the First Schedule of the Act, in addition to it being published in the Gazette of Pakistan, as that information is usually not privy to the general public. The date on which an organization is proscribed should also be mentioned alongside. This will ensure transparency and increase general awareness of which organizations are carrying out terrorist activities.

Recommendation 74: ATA-Section 11G-RSIL recommends that police officers, not below the rank of an SHO, should be given the power to arrest an individual if he wears an item of clothing, or carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization, without a warrant. However, there should be a time limit within which the accused should be produced before a court, for example 48 hours.

Recommendation 75: ATA-Sections 11U-RSIL recommends that as there is no provision for assessing applications for de-proscription under Section 11U, it would be plausible to forward Section 11U applications to the standing committee established under Section 11C as well.

❖ Chapter Five: Money Laundering/ Terrorist Financing

Recommendation 76: ATA-RSIL recommends that a sustained and proactive initiative be conducted towards training investigatory and prosecutorial officials to investigate and prosecute offences pertaining to terrorist financing as independent offences. This is recommended because there is a general lack of awareness on the part of investigatory and prosecutorial officials to consider prosecuting money laundering as an autonomous offense. This is a broader point, informing the behavior of officials of the criminal justice system.

Recommendation 77: ATA-Section 11D-RSIL recommends that Section 11D be amended to include “Where an observation order is passed against an organization, the Federal Government may designate an officer of the Government by notification in the official Gazette, or direct any other person without delay to freeze, seize, or detain any money,
property, funds or economic resources of the subject organization throughout the observation period.”

**Recommendation 78: ATA-RSIL** recommends that new sections may be added to the ATA to create a new category of ‘restricted persons’, granting the Federal Government the powers to probe and check the assets and finances of such persons as well as their immediate family and associates.

**Recommendation 79: ATA-Section 110-RSIL** recommends that Section 110 be amended to enable the Federal Government to freeze, seize or detain any money, property, funds or economic resources for a period of thirty days if there are reasonable grounds for the Federal Government to believe that:

(i) It is a terrorist property; or

(ii) It is property of a person included in the Fourth Schedule.

✶ **Chapter Six: Religiously Motivated Violence**

**Recommendation 80: ATA– Preamble and associated text– RSIL** recommends that the preamble and its associated text be amended to broaden the scope of the Act to forms of terrorism beyond “sectarian violence”.

**Recommendation 81: ATA – Section 2(u) – RSIL** recommends that the term “sectarian” be removed and replaced with the term “religiously motivated”, which term is to be defined as: “pertaining to, devoted to, peculiar to, or one which promotes the interest of a religion, or religions, or a sect of a religion, or sects of a religion in a bigoted or prejudicial manner.”

**Recommendation 82: ATA – Section 2(v) – RSIL** recommends that the term “sectarian hatred” be removed and replaced with the term “religious hatred”, which term is to be defined as: “hatred against a group of persons defined by reference to religion, religious sect, religious persuasion, or religious belief.”

**Recommendation 83: ATA – Section 6 – RSIL** recommends that the current phrasing of S6 – which overemphasizes ‘sectarian’ forms of terrorism – be amended to include expressions of extremist violence between communities other than sects.

**Recommendation 84: ATA – Section 8 – RSIL** recommends that the term ‘sectarian’ as used in this section be replaced with the broader term ‘religious, ethnic or sectarian hatred’,
and a new provision be added to the section which protects peaceful, non-inimical expressions of religious opinions.

**Recommendation 85: ATA – Section 11(2) –** RSIL recommends that this section be amended to specify the particular governmental institution responsible for handling and storing the forfeited materials, and provide clarity on the maintenance and reproduction of these materials in court should such be necessary.

**Chapter Seven: Court Procedures and Powers under the ATA, 1997**

**Recommendation 86: ATA-Section 19(7)-** RSIL recommends that the text of Section 19(7) should be amended to include a minimum timeline of three months. Cases which cannot be concluded under the proposed minimum timeframe should then follow the same rules existing under section 19(7).

**Recommendation 87: ATA-Section 19(7)-** RSIL recommends that the Government issue a formal notification instructing all Public Prosecutors to ensure speedy trials and appear before the ATC on all hearings. The notification should also stipulate that any other work on their part shall be regarded as ancillary and that the primary focus shall remain the terrorism trial, stating penalties for failure to comply with the notification.

**Recommendation 88: ATA-Section 19(8)-** RSIL recommends that as the application of section 19(8) of the ATA is seriously being underutilized, judges should place more emphasis on the section and its implementation, which entails enforcing strict criteria before the commencement of the trial for the defense counsel and ensuring strict adherence/attendance by way of penalties.

**Recommendation 89: ATA-Section 15-** RSIL recommends that an internal system should be put in place for high-profile terrorism trials:

(i) which shall be based on a criterion vis-à-vis the accused’s status, identity, designation before being indicted, association with Pakistan, service rendered, and the nature of the crime. A committee should be established which shall determine whether the case is one which requires immediate attention on a priority basis and the steps which must be taken.
(ii) if the committee deems the case a priority case, it should consider making use of section 15 of the Anti-Terrorism Act, 1997. This will ensure a fully undisclosed location to the accused which means lesser media attention and lesser public attraction leading to violent behavior outside the court premises.

(iii) it should be noted that the committee may agree on certain terms based on the ATC judge’s prior commitments towards the existing backlog of cases before him. This may include the manner in which such a trial moves forward keeping in mind the latter commitments of judges.

**Recommendation 90: ATA-General case management by ATCs**

RSIL recommends that:

(i) a ‘pre-trial hearing’ procedure should formally be initiated before the commencement of a terrorism trial, which entails that all parties privy to the case—the prosecutor and defense counsel—would discuss the nature of the crime before a judge and determine whether it falls within the scope and ambit of the ATA. This will act as a filtering mechanism to reduce the backlog of cases pending before the ATCs.

(ii) ATCs form a procedure whereby after the submission of the ‘challan’ by the Public Prosecutor (PP) to an ATC Judge, the latter orders for a pre-trial hearing. This hearing should be attended by the PP, defense lawyer and presided over by the judge to whom the initial challan was submitted.

(iii) the Government should appoint more Judges and Judicial Officers as this would mean less responsibility for existing judges. Appointing more judicial officers would mean an organized structure at the lower level, something which is currently being managed by ATC judges themselves.

(iv) the Government could also increase the retirement age of judges presently sitting in ATCs in all provinces. This would result in sitting judges spending more time in a place where they already have a certain amount of experience and know-how regarding the procedures and general environment.

**Chapter Eight: Witness Protection**

**Recommendation 91: Operationalizing Section 21, ATA - General**

RSIL recommends that in order to provide effective protection to witnesses in terrorism cases, various measures
need to be taken by the different institutions of the State at the various stages of a terrorism case so that comprehensive protection can be provided to witnesses in a streamlined and holistic manner. Some of these measures may be provided for in the ATA itself, either by an amendment in Section 21 and the use of a separate Schedule. Other measures may be implemented through the mechanism of statutory rules, issued under Section 35 of the Act. Further, guidelines for witness protection procedures in the Anti-Terrorism Courts may take the form of High Court Rules, issued by the Chief Justice of the provincial High Courts in accordance with Article 202 of the Constitution. Mechanisms providing for the enhanced police protection of witnesses may also be introduced in high profile cases of terrorism.

Recommendation 92: Section 21(1), ATA – RSIL recommends that Section 21(1) of the ATA must be operationalized by setting forth procedural mechanisms which grant ATA Judges the ability to withhold witness identity from the accused and make orders for the physical security of the witness.

(a) These procedural mechanisms are set forth in Annex I of section eight of this Report and introduce the concept of an Identity Protection Order, which may apply at both the investigation stage as well as the trial stage. During the investigation stage, such an order would prevent the identity of the witness from being revealed until the investigation is completed with the forwarding of the police report to the Judge under Section 173, Cr.P.C. Accordingly, the true identity of the threatened witness will not be mentioned in any document prepared or any statement recorded during the course of investigation. This includes, but is not limited to, documents prepared or statements recorded under Sections 161 and 164 of the Code, the case diary, the police report or charge sheet etc.

(b) Annex I also sets forth the procedure (including due process requirements) for an Identity Protection Order at the trial stage in terrorism cases. The effect of such an order by the court would prevent the true identity of an endangered witness from being mentioned in any proceedings or in any document produced before the ATA court or any appellate court in relation to the case. This includes the documents which are required to be supplied to the accused under Section 241-A and 265-C of the Code and the judgment and Order Sheet.
(c) Once an Identity Protection Order for the duration of the trial has been passed by the ATA court, further measures can then be undertaken, with the permission of the court, during the trial which screen the identity of the witness, including the use of shielded testimony and examination of the witness through modern methods such as video conferencing. These measures are aimed at reducing the potential for intimidation as well as mitigating any psychological trauma that the witness may suffer due to direct contact with the accused. Procedure for the implementation of an enhanced form of such screening is also outlined.

(d) The procedural mechanisms set out in Annex I may be implemented by the Federal Government issuing rules under the ATA. The Federal Government would also then be obliged to apportion funds to ensure that such witness protection measures were implemented.

Recommendation 93: ATA-Section 21(1)- RSIL recommends that Section 21(1) may further be strengthened by the adoption of softer measures which are primarily aimed at making the testifying process simpler and more conducive to witnesses. Such additional measures, implementable at the trial stage, may be introduced through the mechanism of rules established by the Federal Government under the ATA.

(a) Annex II to section eight of this Report sets out recommendations for additional witness protection procedures during ATC trials with the objective of creating a witness-friendly court experience, which will go a long way in securing greater witness participation in terrorism trials.

(b) These recommendations also give courts the option of imposing a prohibition on the accused from contacting a witness. It is further proposed that if any contact does take place in violation of such a Court ordered prohibition, then a presumption of Criminal Intimidation under Section 503 of the PPC would be raised. It would then be up to the accused to show that such contact was innocent and did not intimidate the witness on a balance of probability. This approach can be taken further. A decision by the court that the individual did criminally intimidate the witness would make the accused forfeit his right to cross-examine him – a well-entrenched principle of American jurisprudence known as ‘forfeiture by wrongdoing’. This doctrine is based on the
equitable principle that the accused should not benefit from his wrongdoing. If he has attempted to intimidate a witness to procure the witness’s unavailability at trial, then he must not be allowed to benefit from this. He would lose his right to confront his accuser and should be denied the right to cross-examine the witness when he does testify. American jurisprudence is wider than this and would also cover situations where the accused has successfully prevented the witness from testifying at trial. In such situations the doctrine would allow for the admissibility of hearsay evidence relating to the intimidated witness.

**Recommendation 94: Section 21(2), ATA –** RSIL recommends the use of the list of measures outlined in Annex III to section eight of this Report which provide guidance to law enforcement officials to ensure enhanced protection of witnesses. These measures bring a comprehensive approach to witness protection. If implemented they can significantly counter the culture of witness intimidation and encourage witnesses to come forth to give testimony in the most difficult cases. As witnesses have often proven to be the weakest link in the prosecution’s case, strengthening their ability to perform will go a long way in improving the conviction rate in Pakistan. These measures would also be implemented through Rules notified under the ATA by the Federal Government. The Federal Government in this regard would also have to apportion funds to ensure implementation.

**Chapter Nine: Juvenile Offenders**

**Recommendation 95: ATA**- Keeping in mind the inconsistency in judicial approach when dealing with the issue of jurisdiction, RSIL recommends that the ATA should explicitly state that ATCs hold jurisdiction for trying juvenile offenders when it comes to offences under the ATA.

**Recommendation 96: ATA-S 32**- RSIL recommends that Section 32 of the Act could explicitly state that the ATA has an overriding effect over the Juvenile Justice Systems Ordinance, 2000 and the Control of Narcotic Substances Act, if any offence under the ATA has been committed by a juvenile offender.
Recommendation 97: ATA-ATC power-RSIL recommends that if ATCs do retain jurisdiction for trying juvenile offenders if they commit an offence under ATA, surrounding circumstances should be taken into account by an ATC judge. Any mitigating circumstance should not be ignored. As explicitly stated by case law, the sentences of minors have been mitigated in certain cases and this could be re-enforced by being placed on a statutory footing.
INTRODUCTION

The Research Society of International Law, Pakistan (RSIL) has been conducting research in the field of counter-terrorism for the past decade. In January 2012, RSIL began an extensive analysis of Pakistan’s anti-terror legal and administrative framework. Our findings led to a detailed report outlining various areas for administrative reform and solutions within the Anti-Terrorism Act 1997’s legal framework. While these recommendations were aimed at providing immediate solutions to critical issues plaguing the anti-terror criminal justice process, a more thorough response was deemed imperative.

Through this report RSIL hopes to provide this response. The Report aims to comprehensively provide workable solutions to enhance all aspects of the anti-terror criminal justice process. With the severity of the threat in Pakistan the need to balance ATA special powers with human rights concerns was deemed paramount. As it currently exists, the ATA does not always find an acceptable balance and the judiciary has repeatedly raised this concern in various judgments since 1997. The Report attempts to address much of the judiciaries concerns. While the Report aims to minimize the encroachment on fundamental rights it does keep ground realities in sight when reviewing the Anti-terrorism Act and proposing recommendations for reform. This has required us to delve into considerable detail to fully inform the reader regarding the justification for some of our proposals made in this report.

The Report is a complete review of the Anti-Terrorism Act of 1997 (ATA) and has exhaustively examined the major themes present in the ATA. The Report is structured on chapters that begin with a description of the specific legal provisions relevant to a particular theme of the ATA, it is then followed by discussion on the potential legislative defects of that provision and finally by recommendations.

The RSIL research team has examined each relevant chapter of the ATA through several layers of analysis. Firstly, the provisions are analyzed in relation to the reception they receive from the judiciary. This aspect of our research was informed by a previous study conducted by RSIL which analyzed and summarized over 800 reported judgments of the superior judiciary of Pakistan relating to terrorism. Secondly, special powers granted to the police, armed forces, civil armed forces, anti-terrorism courts, and the Federal and Provincial
Governments have been analyzed in relation to the ordinary criminal procedure contained in the Criminal Procedure Code of Pakistan (Act V of 1898). Thirdly, where relevant, the ATA was compared to related criminal legislation in Pakistan and the Constitution of Pakistan. Fourthly, an examination of the ATA was made in relation to anti-terror laws of other common law jurisdictions.

Chapter One of the Report discusses terrorism with specific reference to Pakistan’s experience. It notes that terrorism has been a pervasive menace in the region for over the past forty years; recently however, the nature and scope of the threat has changed dramatically, representing a truly existential threat to the security and well-being of the State as a whole. Metastasizing from a spate of isolated incidents to a nation-wide menace, contemporary terrorism in Pakistan is a much-changed beast from the phenomenon which first gave rise to the ATA. This chapter of the Report, therefore, seeks to chart the evolution of extremist violence in Pakistan, discussing the trends evinced in Pakistani terrorism, embedding the phenomenon within the country’s politico-historical context and following the evolution of the domestic legal responses to extremist activity.

Chapter Two of this Report attempts to address a critical flaw in the ATA regime in Pakistan under which the distinction between an ordinary crime and an act of terrorism has been blurred over time due to erratic and unstable jurisprudence and consistent legislative tinkering with Section 6 and the Third Schedule to the ATA. This chapter begins with a detailed overview of the legal requirements which trigger the applicability of the ATA. A major part of this chapter pertains to the judicial interpretation of terrorism under Section 6 of the Act. RSIL’s analysis of the reported judgments of the Appellate Courts vis-à-vis the ATA reveals that the interpretation of ‘terrorism’ remains the most contentious issue in terrorism trials. We find that inconsistent and unstable jurisprudence of the superior courts on this issue and a lack of reliance on the doctrine of binding precedent have exacerbated the confusion regarding the application of the anti-terrorism special law. This is followed by an exhaustive analysis of the principal legislative defects relating to Scheduled Offences under the Act as well as the defects relating to the preamble of the ATA. Specific recommendations are provided that attempt to overcome these shortcomings of the Act.

Chapter Three of the Report examines Special Police Powers provided under the Anti-Terrorism Act of Pakistan. It looks at the powers afforded to the police as well as the armed forces and civil armed forces called in action in aid of civil power under Section 4 of the
ATA. This goes on to discuss the specific powers granted in relation to use force, arrest, search and seize during terrorism investigations. It looks at police powers to call for information and discusses the potential nexus between the ATA and the Investigation for Fair Trial Act 2013 dealing with electronic surveillance and intercepts. The chapter further discusses the concept of Police Cordons for terrorism investigation and proposes the expansion of the concept to provide a more preventive mechanism for counter-terrorism sweeps in urban areas. Finally, it reviews the unique evidentiary power to allow for confessions to be made before an officer of the Police. This chapter provides recommendations to overhaul the investigatory mechanisms provided for in the ATA and also aims to establish room for a more preventive mechanism to address terrorism.

Chapter Four of the Report looks at Proscribed Organizations and Preventive Detention. The primary threat of extremist activity in Pakistan comes from militant groups; these groups are currently engaged in attacks intended to disrupt and destabilize the government and impose their own conceptions of governance upon the country. Often, these groups are highly organized and as such, the domestic criminal justice system needs to respond not only to individual members thereof but to the group as an entity in itself. This chapter of the report, therefore, discusses the framework under the ATA catering to curtailing the actions of these organizations, and seeks to highlight deficiencies in the current model. This chapter also discusses tools provided by the ATA to law enforcement agencies to proactively intervene and engage the threat of terrorism, and seeks to provide cogent, meaningful recommendations for change.

Chapter Five of the Report deals with Money Laundering and Terrorist Financing. This chapter critically evaluates the existing domestic legal regimes of Money Laundering (ML) and Terrorist Financing (CFT) in the ATA in light of Pakistan's international obligations to suppress money laundering and terror financing. Although relevant ML and CFT provisions have been extensively revised of late to address most of FATF's concerns, some crucial gaps still need to be addressed. Specifically, a more unambiguous and coherent legal framework needs to be instituted for identifying and freezing assets of individual terrorists as well as organizations that are engaged in terrorism but have not been proscribed. Moreover, it is essential to improve the implementation of these provisions to reverse the existing track record of hardly any successful prosecutions under the ATA's ML/CFT provisions.
Chapter Six delves into the area of Religiously-Motivated Violence. While terrorism in the Pakistani context is far from a monolithic, one-dimensional phenomenon much of the contemporary extremist violence is embedded in harshly polemical discourse between the various religious denominations residing within the country. Pakistan provides an interesting socio-cultural context for review: it is at once both religiously diverse and, at the same time, possesses a significant Muslim majority. This diversity, however, has provided extremist elements with plenty of material for their violent rhetoric and, in a similar vein as the Nazi vilification of the German Jewish population, has made easy targets of members of religious minorities. It is within this particular socio-cultural context that the ATA operates, and this chapter of the report seeks to navigate the particular provisions of the ATA pertaining to criminal acts conducted along communal lines.

Chapter Seven of this report deals with the powers granted to Anti-Terrorism Courts (ATCs) under the ATA. The chapter provides an overview regarding the inherent powers ATCs possess in relation to terrorism trials and highlights various sections under the ATA which are currently being underutilized. Recommendations are further suggested for each defective section vis-à-vis their potential implementation. In addition, the chapter also discusses several mechanisms to improve the existing court management structure with the aim of significantly reducing the everlasting backlog of unnecessary cases before ATCs.

Chapter Eight analyses the ATA in relation to ensuring greater protection for Witnesses. It examines the threats to witnesses and the inordinate reliance that the criminal justice process in Pakistan has on ocular evidence. The chapter provides various recommendations to provide comprehensive protection to witnesses through the vehicle of Federal rule making under the ATA addressed to Police Officials or other entities.

Chapter Nine of the report examines the issue of jurisdiction that arises when a juvenile commits a terrorist act, as defined under the ATA. The chapter discusses whether a juvenile court established under the Juvenile Justice Systems Ordinance, 2000 or an Anti-Terrorism Court, established under the ATA should try the offence. It further delineates the different analytic pursuits adopted by the Courts on the subject, and proposes recommendations on how to eliminate any inconsistencies in judicial approach, by proposing which Court should have the jurisdiction to try juvenile offenders for committing acts of terrorism under the ATA.

Chapter Ten delves into an analysis of the Fifth Schedule of the ATA which deals with International Conventions outlawing specific acts of terrorism. The discussion revolves
around Pakistan’s obligations to ensure the criminalization of offences outlined in International Conventions and what role the ATA plays in ensuring this.

This Report evaluates the anti-terrorism legal framework in Pakistan in force as of 1 October, 2013. The Government of Pakistan is currently considering several legislative responses to counter the increasing wave of terrorism across the country in recent months. According to news sources, the federal cabinet has approved several amendments to the Anti-Terrorism Act, 1997. However, these amendments have yet to come into force at the time of the writing of this Report.
CHAPTER ONE

TERRORISM IN THE PAKISTANI CONTEXT

1.1 TRENDS IN TERRORISM

Terrorism is currently the most pervasive and pernicious threat to the stability and well-being of Pakistan and its people. While terrorism has been present in the region since at least the 1970s the contemporary form it has taken, and the sophistication with which it is being propagated in the country, have left Pakistani society reeling. Lamentably, Pakistan’s criminal justice system remains incapable of adequately responding to terrorist threats. This section aims to identify, in broad strokes, the primary forms of terrorism currently prevalent in the country and to provide a brief overview of their historical genesis and evolution. It is important, therefore, to note at the outset that terrorism in the context of Pakistan is not a monolithic entity or ideology with clearly-defined characteristics or causes. Instead, in its multifaceted self, terrorism infuriatingly defies definition; what is clear, however, is that terrorism in Pakistan is a complex phenomenon and it is hoped that this section will provide some insight into its complexities, with the further hope that such may prove useful in developing effective counter-terrorism responses.
1.2 **THE ANATOMY OF TERRORISM IN PAKISTAN**

A historical and progressive analysis of terrorism in Pakistan must first be prefaced by asserting the fact that, contrary to popular conception, its roots do not lie in poverty, illiteracy or unemployment. In fact, if one were to analyze the statistical data it becomes clear that the majority of terrorist acts have been committed in the provincial and the federal capitals – areas associated with higher literacy rates and lower poverty and unemployment rates relative to the national standards.¹ Instead, terrorism in the Pakistani context originates out of pre-existing inter-communitarian conflicts, a fact that is corroborated by data on terrorist attacks occurring outside these metropolitan areas. Such attacks are most prevalent in Southern Punjab, Swat and Dera Ismail Khan in Khyber Pakhtunkhwa [KPK], the Federally Administered Tribal Areas [FATA] and Central Baluchistan.

These underlying conflicts have given rise to four broad ‘types’ of terrorism: sectarian, racial nationalism, ethno-linguistic, and religious. The conflict between sects – particularly between the Deobandi Sunni and Shi’a – predates the formation of the country. Today, the Deobandis allege that the Shi’as are not Muslims. This is in spite of the fact that the founding center for Deobandi religious thought, the Darul-Aloom Deoband recognizes the Shi’a as a sect of Islam with a few exceptions. The Shi’a of Pakistan, constituting about ten to twenty percent of the Muslim population of the country,² in response to the Deobandi claims, contend that those exceptions do not apply to the vast majority of the Shi’a population of Pakistan.

Despite economic and infrastructural progress in other parts of the country, the province of Baluchistan has remained underdeveloped. The province is the largest in the country in terms of area but the smallest in terms of population. It is currently underrepresented in the civil bureaucracy and the military – two bastions of political power within the country. Furthermore, its significant mineral reserves are under the control of the Federal Government – allegedly without any of the proceeds thereof being distributed to Baluchistan itself, fueling resentment at the lack of provincial autonomy. This underlying resentment within the province has provoked a secessionist movement within the province, advocating for the split from the broader nation along ethno-racial lines.

---

Ethno-linguistic violence has been most prevalent in the port city of Karachi, where *muhajirs*, primarily Urdu-speaking refugees from India who settled in the city following the partition with India coexist uneasily with significant populations of Afghan refugees – many of whom fled the Soviet invasion in the 1980s\(^3\) – as well as the native Sindhi population. There has, however, been a great deal of ambiguity surrounding the desired goals of the *muhajir* community ranging from demands for a separate state or province to complete control of the city Governments of Karachi and Hyderabad – cities with significant *muhajir* populations.

Religious terrorism in Pakistan is not a monolithic entity but a multifaceted and complex beast. In addition to the religious militants in Pakistan, whose expressed desire is to enforce *Sharia* – the only real commonality amongst the various militant groups operating in Pakistani territory –there is also the smaller-scale violence as evinced in the 2009 Gojra riots\(^4\) and the March 2013 attacks on a Christian neighborhood in Lahore.\(^5\) The latter forms of violence are, however, more expressions of communal violence, erupting out of preexisting tensions between minority groups in Pakistan and the Muslim majority and with little of the political nature of ‘default’ terrorism. By contrast, the attacks conducted by the religious militants are manifestly political in nature, with their goals being the destabilization of the Government and a replacement of the national legal system with an authoritarian interpretation of the *Sharia*.\(^6\)

Understanding the geopolitics of terrorism in Pakistan is critical to an analysis of the broader trends of terrorism in the country. Southern Punjab has seen continuous conflict between the various sects of Islam. Swat and FATA regions are wracked by the broader religiously-motivated violence in the country. Central Baluchistan is currently in the throes of a secessionist conflict. Karachi’s changing demographics have given rise to ethno-linguistic conflicts which have, in turn, metastasized into acts of terror.

In sum, terrorism in Pakistan originates in areas suffering from preexisting conflicts along sectarian, religious, linguistic, or ethnic lines. The provincial and federal capitals and other

\(^3\) PLD 2011 Supreme Court 997


major urban centers experience terrorism as a ‘spillover’ or ‘blowback’ from the conflict-ridden regions, often as a means of inflicting terror in a more dramatic, didactic, or strategic manner.  

---

1.3 **The Context of Terrorism in Pakistan**

The complex history of Pakistan and its diverse population provides the backdrop for the genesis and evolution of terrorism in the country. An examination and appreciation of the history of the country in the context of terrorism is therefore necessary for a viable counter-terrorism discourse. Terrorism in Pakistan has broadly emerged out of the confluence of five primary factors, which have informed its growth and evolution and have intersected with politico-legal developments in the country over the course of years.

1.3.1 **Military dictatorship under General Zia-ul-Haq**

In 1977, General Zia-ul-Haq seized power by toppling the democratically-elected Prime Minister Zulfiqar Ali Bhutto. Zia had Bhutto arrested and subsequently judicially executed in 1979. Bhutto’s execution precipitated the formation of the terrorist group, Al-Zulfikar, which was responsible for a series of terrorist incidents including the 1981 hijacking of Pakistan International Airlines flight PK-236. To break Bhutto’s influence in Sindh, which was his province of residence and his power-base, Zia encouraged the formation of the *Muhajir Qaumi Movement*—later the *Muttahida Qaumi Movement* [MQM]—a language-based party of the *muhajir* refugees from India who had settled in Karachi and the other urban areas of Sindh following the partition of India. Today, violence by and against the MQM is arguably responsible for almost 90% of terrorism in the cities of Karachi and Hyderabad and 40% nationwide.

1.3.2 **Legitimization of Zia’s Military Rule**

In an attempt to legitimize his rule and create his own constituency, Zia enacted a series of religiously-colored laws in the country. In addition to the infamous *Hudood* Ordinances, one of the laws promulgated was a tax law titled the *Zakat* and *Usher* Ordinance of 1980.

---

Emboldened by the Revolution of 1979 in neighboring Iran, the Shi’a community of Pakistan demanded that they be exempted from the new tax law as it had been formulated along Sunni jurisprudential lines and that the Government enforce Shi’a norms in personal-law matters. To counter the burgeoning Shi’a politico-legal presence within the country – and given the fact that Bhutto was himself a Shi’a⁹ – Zia provided assistance to the Sipah-e-Sahaba Pakistan [SSP], an anti-Shi’a Deobandi-affiliated extremist organization.¹⁰ The SSP, in turn, gave rise to militant splinter groups, the most dangerous and notorious of which is the Lashkar-e-Jhangvi [LeJ]. As of 2010, almost thirty percent of terrorism in Pakistan could be traced back to the SSP or its subgroups, or to similar Shi’a groups such as the Sipah-e-Muhammad [SMP].

1.3.3 The Soviet Invasion of Afghanistan

In response to the Soviet invasion of Afghanistan in 1979, the U.S. and Saudi Arabia – fearing the spread of communism and projections of Soviet power in the region – invested almost six billion dollars in the region in order to organize, train, and arm fighters against the Soviets. Couched in the rhetoric of jihad or a ‘righteous struggle,’ thousands of Muslims were brought to Afghanistan and Pakistan with the intention of resisting the Soviets. The influx of money and the employment of religious vernacular to justify the rise in militarism enabled the mullahs [Islamic religious scholars] in both Pakistan and Afghanistan to exert temporal power and establish madrassas [seminary schools] as sanctuaries of ‘jihad culture’ inculcating a vitriolic and xenophobic interpretation of Islam in the attendees and glorifying Kalashnikov as a badge of honor within the society by appealing to historical associations of masculinity and tribal culture.¹¹

---


1.3.4 The U.S. Invasion of Afghanistan

In October 2001, the U.S.-led coalition invaded Afghanistan in response to the 9/11 terrorist attacks. Pakistan’s involvement in the campaign as a U.S. ally antagonized the Arab mujahedeen and the Taliban groups in the country. This antagonism underpins contemporary terrorism in KPK, FATA and Punjab, a situation further aggravated by drone attacks conducted by the U.S. within Pakistani territory. It has been noted that these strikes are counter-productive, serving to further radicalize the people living in the targeted regions. Additionally, following the Northern Alliance’s political ascendancy in Afghanistan with U.S. assistance, India has been attempting to contribute to the unrest in Baluchistan. Furthermore, the U.S.’ arming of the Afghan security forces has inadvertently resulted in a subsequent arming of the mujahideen, with the weapons used against the Pakistan Army during its operations in the Swat region found to have allegedly been stolen from arms supplied to Afghan military personnel.

Significantly, terrorism in Pakistan has been cyclical in nature. Over the past forty years, Pakistan has experienced at least four distinct cycles of terrorism: between 1974 and 1978, terrorism in Pakistan was largely committed by foreigners against foreign targets within the country; between 1979 and 1986, most terrorist incidents were politically motivated – centered around the ethno-linguistically diverse port city of Karachi; between 1987 and 2003, and peaking in 1995, it was primarily sectarian and linguistic in nature; and from 2004 to date, the most virulent period, it has largely been religiously-motivated violence directed against the state and its infrastructure.

It has been argued that the ‘boom and bust’ pattern of terrorism in Pakistan lies in the process by which it develops: once preexisting conflicts metastasize into terrorism, state institutions take time to mobilize to confront the threat. Meanwhile, terrorist activities peak following which, either due to state action or internal exhaustion of the terrorist organizations, the terrorism

---

violence subsides, only to return at a later time.\textsuperscript{16} Such a cyclical conception of terrorism means that attempts at establishing a counter-terrorist discourse must take into account extraneous factors and be sensitive to the shifting nature of terrorism.

1.4 **Historical Legal Responses to Terrorism in Pakistan**

Over the course of the country’s life, antiterrorism legislation in Pakistan has evolved to suit the need of the hour. Often promulgated in response to spike in terrorist acts, such legislation has generally been bedeviled by lacunae. This legal evolution can be divided into four broad periods, wherein the antiterrorism laws of the country have taken on distinct forms.

1.4.1 1972 – 1977

During this period, the state faced opposition in the form of several nationalist secessionist movements primarily in the then-North West Frontier Province [now KPK] and Baluchistan. In an attempt at suppressing these movements and curbing the attendant violence, the Government of Zulfiqar Ali Bhutto enacted a series of legislations referring to criminals as ‘terrorists’ for the first time in Pakistan’s jurisprudential lexicon and establishing a series of specialized courts to try ‘scheduled offences’ which included all the offences under the Arms Act of 1878, the West Pakistan Arms Ordinance 1965, the Railway Act of 1890, the Telegraph Act of 1885, the 1937 Act, the 1908 Act, and the Anti-National Activities Act of 1974. Initially enacted as an ordinance, the law was subsequently approved by parliament and effected as the Suppression of Terrorist Activities (Special Courts) Act of 1975 [STA].

The STA was promulgated to prevent acts of sabotage, subversion and terrorism conducted within the country and applied to the entirety of the nation. Over the passage of time, the definition of ‘terrorist acts’ and the list of scheduled offences were expanded in the STA. The Act gave immense powers to the special courts as they could pass any sentence authorized by law and enjoyed all the powers of the High Court to punish any person who disobeyed, abused and interfered in the court’s orders. It also provided that an accused had the right to an appeal before the High Court within thirty days of the award of sentence by a special court where a bench of at least two judges had to adjudicate the case within three months. It provided that if the accused appeared before the court once, the remaining trial could proceed even in his absence; in the case of an absconding accused, a proclamation was required to be published in three national daily newspapers.
As the primary piece of antiterrorism legislation until the promulgation of the Anti-Terrorism Act of 1997 [ATA], the STA saw repeated amendments with successive governments amending it to tailor it to emerging threats of terrorism. General Zia remarkably however just made two minor amendments to the STA, one of which, promulgated in 1984, limited the jurisdiction of the special courts only to the scheduled offences.

1.4.2 1988 – 1999

During Benazir Bhutto’s first tenure as the Prime Minister, mass riots erupted in Hyderabad and Karachi and terrorists tried to target the Parliament. In this period, the Government’s efforts to address the law and order situation included broadening the definition of the term ‘offences’ in the STA by including offences from the Pakistan Arms Ordinance of 1965 and Section 124-A of the Pakistan Penal Code [which pertains to the offence of ‘sedition’ ] to scheduled offenses. Amidst the worsening law and order situation, the President dismissed the elected Government within two years and called fresh elections.

In October 1990, Nawaz Sharif was elected Prime Minister for the first time. At the time, sectarian and ethnic violence was rife throughout the country with Karachi being a major hotbed of terrorist violence. The phenomenon of ‘target killings’ began to proliferate. Such killings were, in essence, a form of assassination where individuals – often professionals or pillars of the community – of the various sects were targeted in order to ‘set an example’ and to cow other members of the targeted sect. Karachi, Hyderabad and other parts of Sindh were hardest hit by this new wave of violence with the MQM attempting to destabilize the Government.

The Government responded by employing a variety of methods in its attempts to curb the violence in Sindh, including prolonged periods of curfew in addition to upgrading and introducing various laws including the Special Courts for Speedy Trial Ordinance of 1987, the Terrorist-Affected Areas (Special Courts) Ordinance of 1990, and the Terrorist-Affected Areas (Special Courts) Act 1992.

The pervasive violence in Sindh and in parts of Punjab during early to mid-1990s was exacerbated by the fact that though law enforcement agencies made numerous arrests, convictions were rare due to failures on the part of the investigatory agencies to present
sufficient evidence against the accused. Therefore, in order to provide law enforcement agencies with a new tool in their fight against terror, Sharif’s second Government promulgated the Anti-Terrorism Act of 1997 [ATA], establishing a series of specialized antiterrorism courts [ATCs] to expeditiously try and convict those accused of terrorism and imposing the death penalty as a punishment for the crime of terrorism.

The ATA extended the aid of the military and civilian armed forces – the latter including the Frontier Constabulary, the Frontier Crops, the Pakistan Coast Guards and the Rangers – to provincial Governments in their efforts to curb terrorist violence; these military and paramilitary forces were empowered to employ any amount of force necessary against terrorists, including those powers previously only within the purview of the civilian law enforcement agencies. The ATA enabled law enforcement officials to arrest any person and enter and search any premises without a warrant, and permitted military and civilian armed forces personnel to enter any premises should they have reasonable grounds to suspect the presence of terrorists or the commission of terrorist activities. Furthermore, the Act shielded the civilian and military forces from prosecution so long as the culpable actions they had committed were done so in a good faith attempt at carrying out their duties under the Act.

To address the need for expeditious resolution and successful convictions of accused terrorists, the ATA required the investigatory authorities to complete their investigations within seven days with an imprisonment of two years levied against investigating officers whose investigations were found to be deficient. The Act enabled the ATCs to try those accused under the ATA in absentia provided that the accused was provided legal representation. Those convicted under the ATA, whose actions resulted in the deaths of others, were condemned to death with imprisonment for other offenses ranging from a minimum of seven years to life imprisonment as well as pecuniary punishments. Those found guilty of spreading sectarian hatred faced a seven-year prison term in addition to a possible fine.

In line with the Government of the day’s desire to take a tougher stance on terrorism, the ATCs were empowered to punish those convicted with the maximum penalty, making it mandatory for the ATC judges to record in writing their underlying decisions should they award a lesser punishment. The ATA enabled the Government to include or omit offences as time progressed and to prepare rules for the fulfillment of the Act via a notification in the Federal Gazette. Those arrested for committing offences under the ATA could only be tried
by the ATCs and the ATA also enabled the Federal Government to declare any association unlawful, thereby rendering membership in such organizations equivalent to an act of terrorism under the law.

In 1998, the Supreme Court of Pakistan deliberated upon the ATA in *Mehram Ali v. the Federation of Pakistan*, providing the Government with a strong impetus for amending the ATA. In *Mehram Ali*, the Supreme Court determined certain provisions of the ATA to be unconstitutional and ordered changes in the Act, focusing on three points in particular:

1. That the judges of the ATCs should have fixed and established tenures;
2. That the ATCs would be subject to the same or similar procedural rules as the courts of ordinary jurisdiction, including rules of evidence and procedure; and
3. That the appeals of the decisions of the ATCs would lie before the relevant constitutionally mandated regular courts.

In response to the Supreme Court’s decision and criticisms raised by the country’s civil society, the Government amended the ATA by way of the Anti-Terrorism (Amendment) Ordinance of 1998. The Ordinance fixed the tenure of office for judges of the ATCs and curtailed the powers of officers of the military and civilian armed forces, now requiring them to justify in writing their reason for suspecting a person or premises before taking any action. The Ordinance also limited the ATCs’ powers to try an absconding accused, stipulating that before trying an accused in absentia the court must first publish a proclamation in at least three national daily newspapers, as well as appoint legal representation for the accused. The Ordinance further provided that those accused of committing offences under the ATA whose appeal was pending before an appellate tribunal could file an appeal in a High Court, and an appeal against a High Court judgment in the Supreme Court.

The Ordinance went on to radically change the definition of ‘terrorism,’ expanding the ambit of the term and incorporating several – ostensibly unrelated – offences within the definition, and thus within the jurisdiction of the ATCs. Additionally, the Ordinance qualified the heretofore expansive powers of police officials to enter and search premises specifically in the context of searching for written or recorded materials of an incendiary or inflammatory nature. It also incorporated the offence of contempt of court of the ATCs into the ATA.

---

expanding upon the traditional conception of the offence in Pakistani jurisprudence to incorporate acts which ‘scandalized’ the ATCs or interfered in their functioning.

The Ordinance provided more legal safeguards for the accused and protected the independence of the judges of the ATCs, thereby limiting the ability of these courts to be used to achieve political ends; it also established the provincial High Courts as the courts of appeal for ATC judgments. Nonetheless, soon after its promulgation, the deteriorating law and order situation in Karachi including the rise of ethnically-motivated killings as well as the murder of the former governor of Sindh Hakim Muhammad Said led the Government to impose a state of emergency in the province of Sindh in October 1998.

Thereafter, the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance [PAFO] was promulgated to provide a legal justification for sending the military to ensure peace in a province. Under the PAFO, civilians could be tried in military courts rather than in the ATCs. A new offense, ‘civil commotion,’ was introduced which was punishable with seven years of imprisonment and defined as:

“[the] creation of internal disturbances in violation of law or intended to violate law, commencement or continuation of illegal strikes, go-slows, lock-outs, and vehicle snatching or lifting, damage to or destruction of state or private property, random firing to create panic, charging bhatta, acts of criminals trespass [illegal qabza – i.e. illegal appropriation of property], distribution, publishing or pasting of a handbill or making graffiti, or wall-chalking intended to create unrest or fear or create a threat to the security or law and order.”

PAFO was met with severe criticism in the media and from human rights organizations, the political opposition and legal practitioners.

In Liaquat Hussain vs. the Federation of Pakistan,18 the Supreme Court dismissed the conditions under which the Government had established such rules, declaring that no civilian could be tried by a military tribunal. The Court also decided that the ATCs should only try one case at a time. Following the Court’s decision, the Government revoked the PAFO in April 1999 but retained the offense of ‘civil commotion’ in the ATA by way of an ordinance. During 1999, several amendments were made to the ATA, including an expanded definition of the term ‘terrorist act.’ The 1999 ordinance also denied those accused tried in absentia the

18Liaquat Hussain vs. the Federation of Pakistan [1999] PLD 1999 SC 504
right to consult or be defended by a legal practitioner of his choice. All terrorist cases before military tribunals were transferred to the ATCs and it was provided that offences under the Pakistan Arms Ordinance of 1965 would be punishable under the ATA.

These amendments also delineated the procedure by which cases could be transferred to the ATCs from the courts of ordinary jurisdiction and enabled the Federal Government or the Provincial Governments on the direction of the Federal Government to establish ATCs at the seats of the provincial High Courts, with a serving High Court judge acting in the capacity of an ATC judge thus enabling these ATCs to take *suo moto* cognizance of cases.

1.4.3 1999 – 2001

After seizing power in 1999, General Pervez Musharraf enacted the Provisional Constitution Order Nos. 1 and 9 of 1999 [PCOs 1 and 9]. In 2000, Musharraf amended sections 18 and 25 of the Anti-Terrorism Ordinance, 1999 by way of an Ordinance, inserting new provisions such as “abetment of offence; concealing of design to commit an offence; criminal conspiracy to commit a crime punishable by death or with imprisonment of more than two years (Section 120-B); waging or attempting to wage war against Pakistan; conspiracy to commit certain offences against the state; collecting arms with the intent to wage war; concealment with the intent to facilitate waging of war; kidnapping; being one of the five or more persons assembled for the purpose of committing dacoity; and conspiracy to commit hijacking.” The 2000 Ordinance also established two special courts which served to provide appellate tribunals for decisions of the ATCs and which were authorized to transfer any case within a province. This Ordinance was used to charge the deposed Prime Minister Nawaz Sharif with endangering the lives of aircraft passengers including Musharraf who was, at the time, the Chief of the Army Staff, and with the hijacking of the said aircraft. An ATC in Karachi sentenced Sharif to life imprisonment in April 2000 who thenceforth went into exile in Saudi Arabia after paying a fine of more than Rs. 20 million.

The rise in sectarian violence within Pakistan coupled with international isolation due to the country’s historical ties with the Taliban regime in Afghanistan, prompted Musharraf to revise the state’s national security policy. In this regard, the Anti-Terrorism (Amendment)
Ordinance of 2001 was promulgated. The Ordinance declared that any organization ‘concerned with terrorism’ was a terrorist organization, i.e. one which:

(i) Commits or participates in acts of terrorism;
(ii) prepares for terrorism;
(iii) promotes or encourages terrorism;
(iv) supports and assists any organization concerned with terrorism;
(v) patronizes and assists in the incitement of hatred and contempt on religious, sectarian or ethnic lines that stir up disorder;
(vi) fails to expel from its ranks or ostracize those who commit acts of terrorism and presents them as heroic persons; or
(vii) is otherwise concerned in terrorism.

This focus on terrorist organizations extended to enabling the Federal Government to ban any organization if it had reason to believe that:

(i) an organization was involved in terrorism;
(ii) operated under the same name as an organization listed in the First Schedule or operated under a different name; or
(iii) the First Schedule was amended by the Federal Government in any way to enforce proscription.

The Ordinance did, however, extend safeguards to organizations which felt they had been unjustly proscribed, providing a right of review to them whereby they could respond to the orders banning them within thirty days by submitting a written application for review to the Federal Government, which in turn was required to decide the matter within ninety days after hearing the applicant. If a review application was refused, the organization could file a further appeal to the pertinent provincial High Court within thirty days after the Federal Government’s refusal.

The Ordinance authorized the Federal Government to keep any organization or person under observation for six months if it believed that any act of an organization or person fell within the definition of terrorism; this period could be extended even further following a hearing for the proscribed organization. In the event that an organization was proscribed, the Federal Government was authorized to seal its office, freeze its accounts and impound all its literature, posters and banners, and other electronic or digital material. The Federal
Government was further empowered to ban the publication, printing or distribution of any press statements, press conference or public utterances by or on behalf of or in support of the organization in question.

The Ordinance provided that any person committing or linked to a terrorist act, whether in Pakistan or elsewhere, was liable to seven years of imprisonment and confiscation of all his assets within and outside Pakistan. It further imposed a maximum of six months imprisonment as well as fine on any person convicted of an offence under the ATA who printed, published or disseminated any material which provoked religious, sectarian or ethnic hatred or valorized a person convicted for committing a terrorist act as well as upon any person or organization involved in terrorism.

Additionally, the Ordinance enabled officials of the Federal Government to create cordoned areas for investigation. In this regard, for the purposes of terrorist investigations, a deputy superintendent of police could declare any area a cordoned area for a maximum of fourteen days, a period which could be further extended. Within these cordoned areas, a uniformed police official was empowered to order any person to leave the area or to leave any premises completely or partially declared a cordoned area. Uniformed police officials could also arrest or search any person reasonably suspected of involvement in terrorism. The Ordinance also delineated penalties for other preparatory offences including providing training in the use of weapons or other skills for use in committing acts of terrorism. The promulgation of the Ordinance repealed the STA and the ATA of 1997, replacing the latter with the framework established by the Ordinance [though the Act retained its original name and title]. Following its promulgation, the Government moved to ban the Sipah-e-Muhammed and the Lashkar-e-Jhangvi, two organizations involved in sectarian violence and the commission of acts of terror.

1.4.4 2001 – Today

Prior to 9/11 in 2001, the Anti-terrorism (Amendment) Ordinance of 2001 was promulgated, which clarified several terms in the Act including the term ‘child’ which was specified to refer to individuals who were below the age of eighteen at the time of the commission of the offence for which they were being tried. It also expanded the definition of ‘terrorism,’
subsuming several other – ostensibly unrelated – offences within the definition; this had the unfortunate consequence of the ATCs exercising jurisdiction over offences which otherwise fell within the ambit of the courts of ordinary jurisdiction. It also extended the scope of the offences under the Act to include those terrorist actions which caused ‘grievous’ injury to persons or harm to property, distinct from the earlier conception which did not specify ‘harm’ as being sufficient to constitute a terrorist act.

Given Pakistan’s complex geostrategic environment, the country faced various internal and external security threats in the aftermath of 9/11 which exacerbated the threat of domestic terrorism. To respond to these new developments, Pakistan implemented a series of antiterrorism measures, establishing at least eleven new courts in KPK [then termed the NWFP] and four in Sindh between September and October 2001 for the express purpose of providing additional legal infrastructure to tackle domestic terrorism. A further forty one ATCs were established throughout the country by the end of the year. Additionally, the Anti-Terrorism (Amendment) Ordinance of 2002 was promulgated in January of 2002 with an eye towards expediting terrorism trials which were pending at the time.

The Ordinance included a ‘military person’ as one of the three members of the ATC in order to ensure an expeditious trial, and following its promulgation, all previous cases were transferred to the new courts. It was aimed at targeting terrorist networks and ensuring stiff penalties including the death sentence but did provide a right of appeal to the accused.

Following significant criticism from human rights organizations, the Ordinance was amended after ten months and a new law – the Anti-Terrorism (Amendment) Ordinance of 2002 – was promulgated in November 2002.

In addition to several minor changes, the Ordinance of 2002 incorporated some new provisions, one of which authorized the Federal and Provincial Governments to detain a person under observation upon receiving information that he or she was an activist or office-bearer of, or associated with a terrorist organization. If such a person was found to have links to a terrorist organization or to sectarianism, the Government could notify his name in a list under the Ordinance’s Fourth Schedule. The accused could, however, be released after presenting one or more sureties to confirm his virtuousness before a district police officer. If the accused failed to present such a surety, then he or she was to be presented before a court within twenty-four hours, and the court was empowered to order his or her detention until the required sureties were presented. Any person whose name was included in the Fourth
Schedule could appeal to the Federal or Provincial Government within thirty days and, after hearing his or her case, the Government was required to decide on affording him an opportunity to appeal within thirty days. The Ordinance also enabled the government to order the arrest and detention of any person whose name was included in the list for a period defined in the order, which could be extended from time to time but could not exceed twelve months.

Following the promulgation of this Ordinance, the Government banned several militant organizations based in Pakistan, including the *Hizbut Tehreer*, and the *Millat-e-Islamia Pakistan* and *Islami Tehreek Pakistan* – the latter two being splinter groups of the SSP and the SMP respectively.19 The ban was crucial to vindicating Pakistan’s position internationally as a major ally in the war against terror. President Musharraf attempted to curb the network of militant organizations operating within the country by way of the Ordinance, declaring that his government would take all possible measures against the banned organizations if they did not stop their activities. The ordinance was subsequently amended once again with the promulgation of the Anti-Terrorism (Amendment) Ordinance of 2004 in November 2004.

The Ordinance of 2004 enhanced the penalties for those convicted of assisting in the commission of terrorist acts, increasing the maximum punishment for those found guilty of such assistance from fourteen years to life imprisonment. The Ordinance did provide a right of appeal to the respective High Court within thirty days of the ATC’s order. Furthermore, if an individual were acquitted by the ATC in any case based upon a complaint and the High Court, on an application made to it by the complainant in this regard, granted special leave to appeal the acquittal, the complainant may lodge an appeal with the High Court within thirty days challenging the acquittal before the High Court. With the enhancement of the penalties for aiding terrorists and the capacity granted to complainants to appeal an acquittal by the ATCs, the Government sought to effect a legal regime which was ‘tougher’ on terrorist offenders.

In 2005, Musharraf-led Government enacted the Anti-Terrorism (Second Amendment) Act of 2005, increasing the maximum punishments of offences under the ATA with imprisonment periods of six months extended to two years, periods of one and three years both extended to five years, periods of five and seven years extended to ten years, periods of fourteen years

---

extended to life imprisonment and periods not exceeding fourteen years to not exceeding life imprisonment. Additionally, the Act of 2005 prevented ATCs from granting more than two consecutive adjournments during trial. If the defense counsel did not appear after two consecutive adjournments the court would instead appoint a state counsel.

Under the Act, each High Court would constitute a special bench comprising of at least two judges for hearing of appeals originating from ATCs. This appellate bench was also prevented from granting more than two consecutive adjournments. The Act authorized the impounding of passports of any accused for a period specified by the court and further provided that the ATCs, to the exclusion of any other court, enjoyed jurisdiction in cases pertaining to abduction or kidnapping for ransom; the use of firearms or other explosives in mosques, imam' bargahs, churches, temples or any other place of worship; and firing or use of explosives within court premises.

In 2007, Pakistan experienced a severe deterioration in its internal security and law and order situation. Violence related to religious extremism became more pronounced and militancy and Talibanization became alarmingly prevalent across the country. Certain areas such as the Federally and Provincially Administered Tribal Areas as well as parts of KPK [then termed the NWFP], were hit hardest. To counter this new and rising wave of radicalism, the Government launched military operations in the Tribal Areas in an effort to bring about a peaceful return to the rule of law. This endeavor was, however, not as successful as intended, with over seventy suicide bombing attacks occurring throughout the country in 2007 alone as a blowback to the state’s use of force. Since then, the country has faced a steady and growing drumbeat of terrorist attacks targeting the state’s infrastructure and its personnel including members of armed forces and law enforcement agencies. Musharraf also announced the holding of general elections, to be held on the 18th of February, 2008 – which lead to the eventual restoration of more democratic political setup in the country.

In 2008, democracy once again returned to Pakistan. However, the run-up to the elections was marred by terrorist violence including assassination of leading contender and twice former Prime Minister Benazir Bhutto in the garrison city of Rawalpindi. The incoming Asif Ali Zardari-led PPP Government came into power at a time when terrorism was on the rise; in this context the Government promulgated a series of amendments to the ATA, recognizing the current nature of terrorist phenomena in Pakistan and attempting to amend the ATA to better cope with the threat.
The Anti-Terrorism (Amendment) Ordinance of 2010 (I of 2010), was promulgated which amended section 6 of the ATA. This section defines the term ‘terrorism’ and thus constitutes a core element of the ATA, providing definition in the domestic legal context of an otherwise nebulous and ill-defined phenomenon. The Amendment extended the definition to incorporate acts which sought to ‘intimidate and terrorize’ the “public, social sectors, business community” as well as preparatory acts and attacks upon “civilians, government officials, installations, security forces or law enforcement agencies.” This definition served to highlight governmental recognition of the changing face of terrorism; while in the 90’s terrorism was largely an expression of sectarian violence, following the GWoT and the rise in domestic militancy the focus of extremist violence had shifted from inter-sectorial conflict to attacks on the governmental mechanisms themselves in an effort to destabilize the democratically-elected regime.

In 2013 two amendments to the ATA were promulgated by way of presidential ordinances. The first, the Anti-Terrorism (Amendment) Act of 2013 (XIII of 2013) incorporated several terms into the list of legal definitions provided in the Act. Given the fact that the ATA extended jurisdiction over cases involving kidnapping for ransom, as well as forms of property offences such as extortion, definitional clarity is a necessity; in this regard the amendment incorporates definitions for the terms “money” and “property” as well as incorporating references to assets in their various forms. As a specialized law the terms used in the ATA refer specifically to the operation of the act itself and incorporating these terms into the act provides clarity when discussing these, otherwise property-related and monetary offences, in the context of terrorism and terrorist financing. The Amendment also effected other changes in the Act, extending the government’s power of forfeiture of the assets of proscribed organizations – previously limited to its money alone – and providing the procedure whereby a proscribed organization’s assets could be frozen or seized. Section 6 of the ATA was also amended by the Ordinance, broadening the scope of terrorist activities to include attacks on citizens and government officials of foreign countries, as well as members of international organizations. The intent behind this change was to extend the jurisdiction of the ATAs to attacks on such targets – which were often at higher risks of extremist activity.20

Subsequently, the Anti-Terrorism (Second Amendment) Act of 2013 (XX of 2013) was promulgated, which incorporated several key protections into the Act as well as refined the Act’s application. With regards to section 6 the Amendment clarified that the ATA would not apply to ‘democratic and religious rallies’ or to “a peaceful demonstration in accordance with law.” This was a point of contention as, prior to the promulgation of this Amendment there were concerns that the ATA could be employed as a means of suppressing political opposition. The Amendment also expanded the definition of section 6 of the ATA, encompassing attacks on governmental institutions and criminalizing the possession of explosive substances without lawful justification. This last is pertinent as it incorporates, into the section itself, the protections of a ‘lawful justification,’ preventing individuals whose legitimate professions involve the use of explosives from being tried under the ATA. The Amendment also criminalized vigilante justice, bringing such expressions of violence within the jurisdictions of the ATCs given the high visibility these crimes have had prior to the promulgation of this Ordinance.\(^{21}\)

The Amendment also expanded the restrictions placed on the operation of proscribed organizations and their office bearers, restricting the latters’ international travel and denying them arms licenses. It also expanded the admissible forms of evidence in ATC trials, incorporating electronic forms of surveillance and setting down stronger rules regarding the maintenance and disposal of evidence collected over the course of terrorism investigations and trials before an ATC.\(^{22}\)


1.5 The Statistics of Terrorist Attacks in Pakistan

The graph above depicts the trends of terrorist activity in Pakistan over time. When viewed in light of the historical narrative of the country, it is interesting to note the correspondence of peaks in terrorist activity with major political events; the Afghan Jihad of the late 80s produced the first, tangible phenomena of terrorism in Pakistan, with a spike in domestic terrorist activity corresponding to the cessation of that conflict in the early 90s. The distinct peak during the mid-to-late 90’s corresponds to the flare-up of sectarian violence in Karachi, exacerbated in part by the influx of refugees from neighboring Afghanistan. The interim period between the violence in Karachi and the U.S.-led invasion of Iraq was a lull period with regards to domestic terrorism but following 2004, which also corresponds to the beginning of the U.S. drone strikes in Pakistan, the country has experienced a dramatic increase in terrorist activity.


The above graph plots the trends of target types over time and clearly illustrates how private citizens are the hardest hit by terrorism. It is also significant to note that since 2004 there has been a steady rise in attacks on governmental institutions, with the sectarian violence characteristic of the 90s being supplanted by attempts at attacking and destabilizing the governance and administrative mechanisms of the country.

The bar chart below presents the same data in greater detail, clearly illustrating that the majority of attacks have targeted private citizens, with governmental targets coming at a distant second. The correspondence between the rise in civilian and governmental targets since 2004 indicates a shift in terrorist ideologies and goals, with the focus moving away from sectarian violence towards a broader attack on the integrity of the state. This is further reinforced by the also-significant number of terrorist attacks upon businesses and the civilian law enforcement agencies as represented in the chart below.

CHAPTER TWO


2.1 INTRODUCTION

The menace of terrorism is particularly relevant in Pakistan’s context. To effectively deal with incidents of terrorism, the Anti-Terrorism Act (“ATA”) was enacted in 1997 which laid down a legal framework and established specialized Anti-Terrorist Courts (“ATC”). Since then, the ATA has been extensively modified through several amendments that have attempted to deal with the sudden rise of terrorist activity across Pakistan.

The purpose behind the enactment of this Federal statute was to provide a legal mechanism through which acts of terrorism could be dealt with effectively. In this regard, it was envisaged that the ATC’s, established under Section 13 of the ATA, would provide a forum for the speedy trial of terrorist offences where cases would be dispensed with within a period of seven (7) days (S.19(7) ATA). Special powers were also conferred on law enforcement agencies so as to enable them to effectively investigate acts of terrorism.

Unfortunately, the prosecution of terrorist offences in Pakistan over the past 15 years has left much to be desired. The ATC’s have been entrusted with thousands of cases which have taken many months or even years to conclude. The conviction rates have been alarmingly low, which has led to a perception that the system is simply unable to prosecute terrorists.

An analysis of the major reported judgments relating to the ATA from 1998-2013 reveals that a large majority of cases registered under the ATA were not acts of terrorism per se. Rather, the cases registered appeared to be ordinary criminal offences which bore no indication of terrorist intent nor appeared to share any nexus with the ATA. For example,

---

27 The Research Society of International Law conducted an extensive analysis of all the major reported judgments of the Supreme Court of Pakistan and Provincial High Courts relating to the Anti-Terrorism Act, 1997 covering the period 1998-2013. Nearly 800 judgments were examined during this exercise. This Report borrows heavily on the findings of our case law study.
**PLD 2003 Supreme Court 224** involved a homicide which had taken place in a deserted location in which the victim had been sprinkled in petrol and then set alight. The body of the deceased according to the medical report had been completely charred. The Peshawar High Court had held that the ATC had no jurisdiction to try the case since the facts indicated that the act was the result of personal enmity bearing no nexus with the ATA. However, the Supreme Court on appeal held that where an act having taken place in a barbaric and gruesome manner had created fear and insecurity, it would certainly come within the purview of the ATA. When the charred body of the deceased was brought for funeral rites in the locality of his residence, it would have certainly caused shock, fear and insecurity among the people of the vicinity on seeing the barbaric and callous manner in which the human body had been mutilated.

The reported jurisprudence under the ATA is replete with similar examples, where offences falling under the ambit of the Pakistan Penal Code were dragged within the boundaries of the ATA. In **PLD 2002 Supreme Court 841** the apex court held that the murder of four persons in broad daylight on a busy road near the District Courts, Lahore had “created a sense of fear and insecurity in society” and therefore fell within the jurisdiction of the ATC’s. The Lahore High Court was stated to have erred by “only” focusing of the element of personal enmity between the parties and not taking into account the terrorizing effect the occurrence had had on the people at large and especially in the surrounding locality. Similar decisions were reported in **PLD 2003 SC 704, PLD 2004 SC 917, 2002 SCMR 1225, PLD 2003 SCMR 1323,** and **PLD 2003 SCMR 1934.**

Even more disturbingly, ATA jurisprudence contains hundreds of ordinary criminal cases where it is simply unclear as to why the case was even brought within the ambit of the ATA in the first place. Such cases feature no discussion on the jurisdiction of the ATC under Section 12 of the ATA. Furthermore, the applicability of the ATA to the case is not examined and no reference made to Section 6 or the Third Schedule. Consequently, the distinction between an ordinary crime and an act of terrorism has been blurred.

The blurring of this distinction has a two-fold impact. Firstly, it means that a special law with a specialized legal mechanism is being used to try offences triable under the ordinary law.

---

An illustrative list of such cases include the following reported judgments: 2010 PCrLJ 1892; 2002 YLR 2283; 2010 GBLR 550; 2011 YLR 674; 2004 MLD 1075.
criminal law (the Pakistan Penal Code, 1860), resulting in an abuse of process and compromising fair trial guarantees. At the same time, a failure to clearly demarcate the scope and ambit of the ATA has placed a considerable strain on this arm of the criminal justice process which has serious implications for resource allocation amongst the police and ATCs. With meager resources, such overburdening of the system has debilitating effects for real terrorism cases.  

2.2 TRIGGERING THE APPLICABILITY OF THE ANTI-TERRORISM ACT: LEGAL REQUIREMENTS

To fall within the purview of the Anti-Terrorism Act, the offence in question must be classified as a ‘Scheduled Offence’. This classification then triggers the jurisdiction of the Anti-Terrorism Court, as provided under Section 12(1) of the Act:

12. Jurisdiction of Anti-terrorism Court. – (1) Notwithstanding anything contained in the Code or in any other law, a scheduled offence committed in an area in a Province or the Islamabad Capital Territory shall be triable only by the Anti-terrorism Court exercising territorial jurisdiction in relation to such area...[Emphasis Added]

2.2.1 Explanation of ‘Scheduled Offence’

According to Section 2(t), a “Scheduled Offence” means an offence as set out in the Third Schedule to the ATA.

The Third Schedule to the ATA contains four clauses, each of which provides a route through which an offence may be classified as a Scheduled Offence. The text of each clause will be examined below, followed by an analysis of its principal defects, if any.

1. Any act of terrorism within the meaning of this Act including those offences which may be added or amended in accordance with the provisions of section 34 of this Act.

The first clause of the Third Schedule brings within the ambit of the ATA, **any act of terrorism within the meaning of this Act**. Section 2(x) of the Act provides that “terrorism” or “act of terrorism” has the meaning as assigned to it in Section 6.

Accordingly, any offence which comes within the meaning of “terrorism” as defined under Section 6 of the ATA would be an offence triable under the Act. The text of Section 6, as amended, is reproduced below:

30

6. **Terrorism.**—(1) In this Act, “terrorism” means the use or threat of action where:-

(a) the action falls within the meaning of sub-section (2); and
(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect 31 [or a foreign government or population or an international organization] or create a sense of fear or insecurity in society; or
(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause 32 [or intimidating and terrorizing the public, social sector, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies:]

2 [Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.]

(2) An “action” shall fall within the meaning of sub-section (1), if it:-

(a) involves the doing of any thing that causes death;
(b) involves grievous violence against a person or grievous bodily injury or harm to a person;

30 Subs. by the Anti-terrorism (Amdt.) Ordinance, 2001 (39 of 2001), s. 5, for section 6, which was previously amended by various enactments.

31 Ins. by the Anti-terrorism (Amdt.) Act, 2013 (XIII of 2013), s. 3.

32 Added by the Anti-terrorism (Second Amdt.) Act, 2013 (XX of 2013), s. 2.
(c) involves grievous damage to property \(^2\) [including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson or by any others means;]

(d) involves the doing of anything that is likely to cause death or endangers person’s life;

(e) involves kidnapping for ransom, hostage-taking or hijacking;

\(^{33}\) (ee) involves use of explosive by any device including bomb blast \(^{34}\) [or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive];

(f) incites hatred and contempt on religious, sectarian or ethnic basis to strip up violence or cause internal disturbance;

\(^2\) (g) involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land;

(h) involves firing on religious congregation, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;

(i) creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;

(j) involves the burning of vehicles or any other serious form of arson;

(k) involves extortion of money (“bhatta”) or property;

(l) is designed to seriously interfere with or seriously disrupt a communication system or public utility service;

\(^{33}\) Ins. by the Act No. II of 2005, s. 2.

\(^{34}\) Added, subs. & omitted by the Anti-terrorism (Second Amdt.) Act, 2013 (XX of 2013), s. 2.
(m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties; 2*

(n) involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant;

(o) involves in acts as part of armed resistance by groups or individuals against law enforcement agencies; or

(p) involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments.]

(3) The use or threat of use of any action falling within sub-section (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not sub-section (1) (c) is satisfied.

(3A) Notwithstanding anything contained in sub-section (1), an action in violation of a convention specified in the Fifth Schedule shall be an act of terrorism under this Act.

(4) In this section “action” includes an act or a series of acts.

(5) In this Act, terrorism includes any act done for the benefit of a proscribed organization.

(6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

(7) In this Act, a “terrorist” means:-

(a) 2[an individual] who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation, 2[facilitation, funding] or instigation of acts of terrorism;

(b) 2[an individual] who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation, 2[facilitation, funding] or instigation of acts of terrorism, shall also be included in the meaning given in clause (a) above.]

35 Added. by the Anti-terrorism (Second Amdt.) Act, 2013 (XX of 2013) s. 2.
36 Subs. & ins. by the Anti-terrorism (Amdt.) Act, 2013 (XIII of 2013), s. 3.
2. Any other offence punishable under this Act.

As seen above, the Anti-Terrorism Act defines what constitutes "terrorism" or "an act of terrorism" via Section 6 of the Act. Section 7 is the penal section for the act of terrorism and stipulates the sentence to be awarded to those convicted of offences under Section 6.

However, in addition to Section 6, the ATA also creates various other offences which are scattered across its provisions. For the purposes of jurisdiction, these offences also constitute a Scheduled Offence and are exclusively triable by the Anti-Terrorism Courts. A list of these offences along with their respective punishments is provided in the table below:

<table>
<thead>
<tr>
<th>Serial #</th>
<th>Actions/ Offences Involving</th>
<th>Section Defining the Offence</th>
<th>Section Describing Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Acts intended to, or likely to stir up sectarian hatred.</td>
<td>S.8</td>
<td>S.9 – Imprisonment up to 5 years and a fine.</td>
</tr>
<tr>
<td>2</td>
<td>Violation of order of Provincial or Federal Government or terms of Security Bond.</td>
<td>S.11EE(4)</td>
<td>S.11EE(4) – Imprisonment up to 3 years, or a fine, or both.</td>
</tr>
<tr>
<td>3</td>
<td>Contravention of order prohibiting disposal of property, under S.11EEEEE(1).</td>
<td>S.11EEEEE(2)</td>
<td>S.11EEEEE(2) – Rigorous imprisonment up to 2 years, or a fine, or both.</td>
</tr>
<tr>
<td>4</td>
<td>Membership of a proscribed organization.</td>
<td>S.11F(1)</td>
<td>S.11F(2) – Imprisonment up to Six months and a fine.</td>
</tr>
<tr>
<td>5</td>
<td>Solicitation for support, support and promotion of a proscribed organization.</td>
<td>S.11F(3-5)</td>
<td>S.11F(6) – Imprisonment up to 5 years but not less than 1 year, and a fine.</td>
</tr>
<tr>
<td>6</td>
<td>Carrying, wearing or displaying the uniform or flag or symbol of a proscribed organization.</td>
<td>S.11G(1)</td>
<td>S.11G(2) – Imprisonment up to 5 years, or a fine, or both.</td>
</tr>
<tr>
<td>7</td>
<td>Raising or providing funds to a proscribed organization.</td>
<td>S.11H</td>
<td>S.11N – Imprisonment up to 10 years, but not less than 5 years, and a fine.</td>
</tr>
<tr>
<td>8</td>
<td>Use or possession of money or other property for the purposes of terrorism.</td>
<td>S.11I</td>
<td>S.11N – Imprisonment up to 10 years, but not less than 5 years, and a fine.</td>
</tr>
<tr>
<td>9</td>
<td>Participation in funding or arranging finances for the purposes of terrorism.</td>
<td>S.11J</td>
<td>S.11N – Imprisonment up to 10 years, but not less than 5 years, and a fine.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>10</strong></td>
<td>Laundering money or property linked to terrorism.</td>
<td>(S.11K)</td>
<td></td>
</tr>
<tr>
<td><strong>11</strong></td>
<td>Non-disclosure of suspicion or belief of commission of an offence under this act to the Police.</td>
<td>(S.11L)</td>
<td></td>
</tr>
<tr>
<td><strong>12</strong></td>
<td>Directing terrorist activities.</td>
<td>(S.11V(1))</td>
<td></td>
</tr>
<tr>
<td><strong>13</strong></td>
<td>Projection of a convicted terrorist or a terrorist activity.</td>
<td>(S.11W(1))</td>
<td></td>
</tr>
<tr>
<td><strong>14</strong></td>
<td>Creation of civil commotion by threat or use of force.</td>
<td>(S.11X(1))</td>
<td></td>
</tr>
<tr>
<td><strong>15</strong></td>
<td>Addressing a gathering to incite religious, sectarian or ethnic hatred</td>
<td>(S.11X(3))</td>
<td></td>
</tr>
<tr>
<td><strong>16</strong></td>
<td>Interference with the evidence or material relevant to terrorist investigation.</td>
<td>(S.21A(6))</td>
<td></td>
</tr>
<tr>
<td><strong>17</strong></td>
<td>Imparting unauthorized training in the use or making of firearms, explosives, chemical, biological or other weapons.</td>
<td>(S.21C(1))</td>
<td></td>
</tr>
<tr>
<td><strong>18</strong></td>
<td>Imparting unauthorized training in the use or making of firearms, explosives, chemical, biological or other weapons to a child.</td>
<td>(S.21C(2))</td>
<td></td>
</tr>
<tr>
<td><strong>19</strong></td>
<td>Receiving or encouraging another to receive training in use or making of explosives or weapons.</td>
<td>(S.21C(3))</td>
<td></td>
</tr>
<tr>
<td><strong>20</strong></td>
<td>Child receiving or encouraging another to receive training in use or making of explosives or weapons.</td>
<td>(S.21C(4))</td>
<td></td>
</tr>
<tr>
<td><strong>21</strong></td>
<td>Receiving, or imparting to an adult or child, training for terrorist activities.</td>
<td>(S.21C(7)(a), S.21C(7)(b)) and (S.21C(7)(d))</td>
<td></td>
</tr>
<tr>
<td><strong>22</strong></td>
<td>Child providing or receiving terrorist training.</td>
<td>(S.21C(7)(e-f))</td>
<td></td>
</tr>
<tr>
<td><strong>23</strong></td>
<td>Contravention for an order for provision</td>
<td>(S.21EE(3))</td>
<td></td>
</tr>
</tbody>
</table>

\(S.11N\) – Imprisonment up to 10 years, but not less than 5 years, and a fine.

\(S.11V(2)\) – Imprisonment for Life and confiscation of assets.

\(S.11W(2)\) – Imprisonment up to 5 years and a fine.

\(S.11X(2)\) – Imprisonment up to 10 years but not less than 5 years and compensation determined by the court.

\(S.11X(3)\) – Imprisonment up to 10 years but not less than 5 years, or a fine, or both.

\(S.21A(7)\) – Imprisonment up to 2 years but not less than Six months and a fine.

\(S.21C(6)\) – Imprisonment up to 10 years, or a fine, or both.

\(S.21C(2)\) – Imprisonment for a minimum of 10 years, and a fine.

\(S.21C(6)\) – Imprisonment up to 10 years, or a fine, or both.

\(S.21C(5)\) – Imprisonment up to 5 years but not less than Six months.

\(S.21C(7)(e-f)\) – Imprisonment up to 5 years but not less than Six months.

\(S.21EE(3)\) – Imprisonment up
of information, under S.21EE(1). to 2 years, or a fine up to Rs. 1Lac, or both.

25 Aiding or abetting any offence under this Act. S.21I S.21I – Maximum punishment prescribed for the offence that has been aided or abetted.

26 Harboring a person who commits an offence under this Act. S.21J(1) S.21J(2) – Punishment as prescribed in S.216 and S.216A of the Pakistan Penal code [Rigorous imprisonment up to 7 years and a fine].

27 Absconding by an accused under this Act. S.21L S.21L – Imprisonment up to 10 years but not less than 5 years, or a fine, or both.

28 Defective investigation. S.27 S.27 – Imprisonment up to 2 years, or a fine, or both.

29 Contempt of court. S.37 S.37 – Imprisonment up to Six months and a fine.

3. Any attempt to commit, or any aid or abetment of, or any conspiracy to commit, any of the aforesaid offences.

Clause 3 of the Third Schedule is a preventive provision and includes within the scope of the Scheduled Offence any attempt to commit or any conspiracy to commit, any of the offences provided under the ATA, including aiding and abetting of such offences. This includes the offence of terrorism under Section 6 as well as all the other offences scattered across the Act (listed above).

4. Without prejudice to the generality or the above paragraphs, the Anti-terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely:-

(i) Abduction or kidnapping for ransom;
(ii) use of fire arms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; or
(iii) firing or use of explosive by any device, including bomb blast in the court premises.]
The final clause of the Third Schedule was inserted by an amendment to the ATA in 2005 and greatly widens the ambit of the Act. The principal significance of this clause is that it provides exclusive jurisdiction to the ATC to try all offences involves abduction or kidnapping for ransom, without specifying any qualifying criteria or requiring any link to terrorism. The repercussions of this on the case load of the ATC’s along with other defects will be discussed in further detail below.

To recap, for a case to fall within the ambit of the ATA, the offence in question must first be classified as a “Scheduled Offence”, i.e. it must satisfy any of the four clauses listed under the Third Schedule to the Act. Accordingly, any act which satisfies the requirements of Section 6, or any of the other offences listed in the Act, will trigger the jurisdiction of the ATC. This includes any attempt or conspiracy to commit such offences, as well as aid and abetment. Further, any case involving abduction or kidnapping for ransom or which relates to the actions provided under Clauses 4(ii) or (iii) or the Third Schedule also constitutes a Scheduled Offence and falls within the ambit of the ATA.

2.3 Principal Defects Relating to Scheduled Offences under the Anti-Terrorism Act

Section 2.2 of this report identified the current parameters of the ATA by laying down the framework under which cases fall within the ambit of the special regime of the Act. This section provides an analysis of the principal legislative defects pertaining to the various routes by which an offence is classified as a Scheduled Offence under the Act

2.3.1 The Definition of “Terrorism” under Section 6, Anti-Terrorism Act

As seen above, a plain reading of the Act reveals that Section 6 provides only one of the several routes by which an offence may be classified as a Scheduled Offence. Nevertheless, Section 6 forms the cornerstone of the ATA and is the lynchpin around which the rest of the Act revolves. This is not surprising, since a legal definition of terrorism is necessary to

provide a reference whereby the mechanisms of a special law can be triggered. ATA jurisprudence of the Supreme Court and High Courts illustrates that the courts usually approach questions of jurisdiction solely by reference to the applicability of Section 6 to the case at hand.

As discussed previously, ATA case law and statistics relating to the types of cases heard by the ATC indicated that in Pakistan, the distinction between an ordinary crime and an act of terrorism has blurred over time. Section 6 of the ATA is largely responsible for this anomaly. One of the most often heard criticisms of Pakistan’s Anti-Terrorism laws is that they are too broad and all-encompassing and lack adequate determinative criteria. The definition of terrorism, as it currently stands, is riddled with legislative defects and lacunas. Further, inconsistent and unstable jurisprudence has compounded the problem and muddled the applicability of the special law. An overview of the judicial interpretation of Section 6 is provided below that highlights the various approaches undertaken by the superior courts towards this contentious issue. This will be followed by an analysis of the legislative defects and lacunas of Section 6.

2.3.1.1 Judicial Interpretation of “Terrorism” under the Anti-Terrorism Act

Our studies reveal that a singular confusion exists amongst the superior courts in Pakistan as to the precise scope and requirements of terrorism as defined under Section 6. In deciding whether a particular act constitutes terrorism or not, the judiciary appears to be sharply divided on the criteria or test that would determine such a classification. Two principal views emerge from the extensive jurisprudence on this point, both of which stand in stark contradiction to each other.

According to the first view, the real test to determine whether a particular act is terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act. Consequently, proponents of this view interpret Section 6 of the Act as providing a clearly defined mens rea and actus reus. It is only when the actus reus specified under Section 6(2) is accompanied by the requisite mens rea provided for in Section 6(1)(b) or (c) that an action can be termed as ‘terrorism’. This interpretation of Section 6, which for the purposes of this report we categorize as the “mens rea based approach”,
represents a modified version of the principle of ‘nexus’ carved out by the Honorable Supreme Court of Pakistan in the seminal Mehram Ali judgment. However, as will be seen further below, there are subtle differences between the mens rea based approach and the principle of nexus. Nevertheless, their objective is similar, in that both views seek to limit the ambit of the ATA by emphasizing on the distinction between ordinary crimes and acts of terrorism and ensuring that only the latter falls within the scope of the Act.

The alternative interpretation to terrorism adopted by the superior courts in Pakistan focuses on the gravity of the offence and its effect upon the general populace. This includes the potential or likely effect of an action. According to this view, the striking of terror is sine qua non for attracting the provisions of the ATA and this can only be determined by examining the nature, gravity and heinousness of the alleged offence and its impact or cumulative effect on society or a group of persons. Hence, the actus reus is in itself considered to be determinative of whether an act constitutes terrorism or not and the role of mens rea is excluded or is at best, irrelevant. For ease of reference, this interpretation of Section 6 is categorized as the “action based approach” for the purposes of this report.

- The Mens rea based approach to Terrorism

One of the earliest reported judgments under the ATA to make specific reference to the requirement of mens rea is founded in 1999 P Cr. LJ 929 Lahore. The case involved the abduction of a married woman and had originally been heard before the ATC. The petitioner’s initial application challenging the jurisdiction of the ATC was dismissed on the basis that Section 365 PPC was included in the Schedule to the ATA and by virtue of Section 12, the ATC had jurisdiction to take cognizance of the matter. In response, the petitioners filed a Constitutional Petition before the High Court. In allowing the petition, the Lahore High Court held that a distinction between a terrorist act and a run-of-the-mill crime has to be maintained, because otherwise, as would presently be seen, it would violate the intention of the Legislature.

Doing an act or thing by using explosives or the display of fire-arms or deterring public servants from the performance of their duties are offences under various penal statutes. But

---

when these acts are coupled with the *mens rea*, intention, aim or objectives embodied in the definition of Section 6, an ordinary penal offence becomes a terrorist act. The operative factor of the predicated offence would thus be the particular intention, *mens rea*, or aim of the perpetrator of the crime.

The Lahore High Court also made reference to the Indian Supreme Court decision in *Hitendra Vishnu Thakur and others vs. the State of Maharashtra* (1994) 4 SCC 602 regarding the jurisdiction of the Courts under TADA 1987 whereby the Court held that, “When the law visits a person with serious penal consequences, extra care must be taken to ensure that those whom the Legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law”.

Following this decision, ATA jurisprudence entered an unstable period. On the one hand, prominent Supreme Court judgments favored the action based approach that focused on the cumulative fall-out or impact of an offence as the determinative criteria under Section 6. At the same time, other Supreme Court cases relied on the principle of ‘nexus’ to limit the scope of the ATA, specifically by deeming personal enmity cases as falling within the jurisdiction of the ordinary penal law.

However, *Mazhar vs. The State* (PLD 2003 Lahore 267) appears to be the first reported judgment which expressly referred to the change of legislative intent brought about by the Anti-Terrorism (Amendment) Ordinance, 2001 (Ordinance No. XXXIX of 2001) under which the term ‘terrorist act’ under Section 6 was substituted and replaced with the word ‘terrorism’. It was held that the jurisdiction of the Court under the ATA is determinable not with reference to any schedule of offences but with reference to *mens rea* and the *actus reus* specified in the amended Section 6. Therefore, the actions specified in section 6(2) can be tried by the Court under the ATA only if they are committed with the intentions specified in clauses (b) or (c) of subsection (1) of Section 6.

In *2004 P Cr. LJ 210 Lahore*, the Lahore High Court held that the 2001 Amendment Ordinance had brought about a “sea change and drastic metamorphosis in the definition of terrorism”. The emphasis now was no longer on the effect of an action but on the “design” or the “purpose” behind that action. Reliance was placed on *Mazhar vs. The State*. 

---

43
In *Ahmed Shah and another vs. The State* (2003 YLR 1977 Karachi) a robbery was committed in public as a result of which two children were injured. The Sindh High Court held that the ATC lacked jurisdiction to hear the case since the necessary intention under Section 6 was missing in the present case. The perpetrators had intended to commit a simple offence of robbery but once they were caught in the act, firing ensued as a result of which the children were injured. The lack of intent to commit an act of terrorism therefore precluded the application of the ATA.

The *mens rea* based approach was crystallized by a seminal judgment of the Lahore High Court in *Basharat Ali vs. Special Judge, Anti-Terrorism Court II, Gujranwala* (PLD 2004 Lahore 199). This judgment remains one of the most comprehensive and sophisticated judgments delivered till date under the ATA and merits detailed attention.

The case involved an assault carried out by one group of persons against another furtherance of an on-going private enmity in which four persons were murdered and eight others injured. After completion of the investigation a Challan was submitted in the said case before the Anti-Terrorism Court-II, Gujranwala constituted under the Anti-Terrorism Act, 1997 for holding a trial. An application was submitted by the petitioner and another before the learned trial Court under section 23 of the Anti-Terrorism Act, 1997 seeking transfer of the case to a Court of ordinary jurisdiction claiming that the case did not involve ‘terrorism’ as defined in section 6 of the Anti-Terrorism Act, 1997 but that application was dismissed by the ATC Judge. This order was challenged by the petitioner before the Lahore High Court.

In his judgment, Justice Asif Saeed Khan Khosa emphasized on the shift in legislative intent that was reflected in the 2001 Amendment Ordinance whereby the word ‘terrorism’ replaced ‘terrorist act’ under Section 6. Key extracts from the judgment are provided below:

- Terror and terrorism are concepts quite distinct from each other and the quintessence of the two notions is not difficult to distil. Terror as a manifestation of fright, dread, fear or insecurity is a consequential effect created by an act that may not necessarily be motivated to create such an effect whereas terrorism is an activity *designed* to create such an effect of terror. **The critical difference between the two is the design and purpose understood in the criminal jurisprudence as *mens rea***. In the case of terror the act; or the *actus reus*, is not motivated to create fear and insecurity in the
society at large but the same is actuated with desire to commit a private crime against targeted individuals; etc. and the fear and insecurity created by the act in the society at large is only an unintended consequence or a fall out thereof whereas in the case of terrorism the main purpose is creation of fear and insecurity in the society at large and the actual victims are, by and large, not the real targets. Every crime, no matter what its magnitude or extent, creates some sort of fear and insecurity in some section of the society but every felony or misdemeanor cannot be branded or termed as terrorism. Thus, the real test to determine whether a particular act is terrorism or not is the motivation, object design or purpose behind the act and not the consequential effect created by such act.

- Under the original definition of ‘terrorist act’ under the ATA 1997 and its schedule, the emphasis appeared to be on the gravity of the offence and its effect upon the general populace rather than on the actual motivation behind the act. Through the Anti-Terrorism (Second Amendment) Ordinance, 1999 (Ordinance No. XIII of 1999), Section 6 was amended. Through this amendment the focus on the effect of the action was extended to a potential or likely effect besides the actual effect of the action and the focal point still remained the effect of the action rather than the incentive or inspiration behind the same.

- It appears that subsequently the Legislature did not feel convinced of the aptness or correctness of the original definition and resultantly the erstwhile definition of a ‘terrorist act’ contained in section 6 of the Anti-Terrorism Act, 1997 was repealed and a totally fresh and new definition of ‘terrorism’ was introduced through an amended section 6 of the Anti-Terrorism Act, 1997 and this was accomplished through the Anti-Terrorism (Amendment) Ordinance, 2001 (Ordinance No. XXXIX of 2001) promulgated on 15-8-2001. The Legislature had probably realized by then that an effect of an act may not always be a correct indicator of the nature of such an act as every crime, especially of violence against person or property, does create some sense of fear and insecurity in some section of the society and a definition of terrorism based upon the magnitude or potential of an effect created or intended to be created or having a potential of creating would necessarily require a premature, speculative and imaginary quantification of the effect so as to determine the nature of the act in order to decide about the jurisdiction of a criminal Court to try such an
That surely was an unsure test and the result of such a premature, speculative and presumptive test could vary from Court to Court and from Judge to Judge reminding a legal scholar of the Star Chamber and the early days of a Court of Equity in England where equity was said to vary with the size of the Chancellor's foot.

The earlier emphasis on the speculative effect of the act has now given way to a clearly defined mens rea and actus reus. The amended section 6(1)(b) now specifies the 'design' and section 6(1)(c) earmarks the 'purpose' which should be the motivation for the act and the actus reus has been clearly mentioned in section 6(2)(a) to (n).

Therefore, now it is only when the actus reus specified in section 6(2) is accompanied by the requisite mens rea provided for in section 6(1)(b) or (c) that an action can be termed as 'terrorism'.

Through this amendment the Legislature seems to have finally appreciated that mere shock, horror, dread or disgust created or likely to be created in the society does not transform a private crime into terrorism but terrorism 'ism' is a totally different concept which denotes commission of a crime with the object and purpose of destabilizing the society or Government with a view to achieve objectives which are political in the extended sense of the word.

This metamorphosis in the anti-terrorism law in our country has brought about a sea change in the whole concept as we have understood it in the past and it is, therefore, or paramount importance for all concerned to understand this conceptual modification and transformation in its true perspective. In view of this conceptual transformation even the interpretations of a 'terrorist act' or 'terrorism' rendered by our Courts in the past on the basis of the earlier law may, it is observed with great respect, require revisiting and reinterpretation so as to be in line with the newly introduced definition and concept of terrorism.

Adverting to the case-law on the subject we may straightaway observe with profound respect that, barring a few exceptions, the judgments rendered on the subject thus far by the Hon'ble Supreme Court of Pakistan appear to be heavily influenced by the erstwhile definition of a 'terrorist act' contained in the original Act and even the new
definition of ‘terrorism' contained in the amended Act has, by and large, been looked at with the same mindset. [The Court then referred to several previous judgments of the Supreme Court on this issue.]

- One cannot help noticing that all the cases referred to in the last paragraph pertained to offences committed for private purposes with no motivation to destabilize the society at large but they were all adjudged to be cases of terrorist acts or terrorism on the basis of a presumptive and speculative quantification of the effect that the relevant actions could have created in the society. In all such cases, it is observed with great deference, the change brought about by the new definition of ‘terrorism with its resultant shifting of focus from the effect of the action to the design or purpose behind the action had not been noticed and all those cases had been decided on the basis and on the yardstick of the principles provided for by the earlier definition of a ‘terrorist act'. **In the above mentioned cases the gravity of the offence with its resultant actual intended or potential effect on the people at large was considered as the measure for determining whether the act constituted terrorism or not. Such an approach, it may be observed with great veneration, may not be wholesome as it may ultimately result in every case of a serious offence landing in a Special Court and thereby rendering the ordinary Courts substantially redundant.**

- We understand, and we observe so with all the respect at our command, that in the above mentioned cases the Hon’ble Supreme Court of Pakistan had, wittingly or otherwise, detracted or moved away from the principle of nexus so painstakingly carved out by itself in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445)… **However, it appears that in the last few years the said principle has either been side tracked or placed on the back burner in our country and the law is not only being stretched in a different direction but the same is also often being misapplied and misused by the police and the subordinate Courts. An appropriate and correct restatement of the relevant law for its proper application is, therefore, not only necessary but also a crying need so that the relevant law may be saved from being derailed from its real objectives.**

- Even a petty theft in a house in a street is likely to create a sense of insecurity in the people living in that street, a rape of a young girl is bound to send jitters in every
family having young girls living in the relevant locality, a murder in the vicinity surely creates a grave sense of fear in the inhabitants of the area, a bloodbath in furtherance of an on-going feud shocks the society, as a whole, a massive fraud in a bank may send shockwaves throughout the banking and financial sectors and an offence committed against a member of any profession may render the other members of that profession feeling vulnerable and insecure. **But all such offences are ordinary crimes distinguishable from terrorism because for the former the motivation is personal and private whereas for the latter the purpose has to be to destabilize the society at large.**

On appeal to the Supreme Court of Pakistan, this decision was unfortunately **overruled** (in stern language) by the Supreme Court in **PLD 2005 Supreme Court 530** and the case was sent back to the ATC Court. The Supreme Court even went to the extent of stating that the Lahore High Court had used ‘derogatory and contemptuous language’ and warned that ‘care and caution must be observed while offering comments on any judgment’ delivered by the Supreme Court in order to avoid the possibility of ‘**suo motu** action by the Supreme Judicial Council and initiation of proceedings under contempt laws’.

However, subsequently the Supreme Court in **Bashir Ahmad vs. Muhammad Siddique and other (PLD 2009 Supreme Court 11)** upheld the decision of the Lahore High Court in **Basharat Ali** by explicitly referring to its interpretation of ‘terrorism’ in determining the jurisdiction of the ATA Court. The issue was further clarified in **Tariq Hakim vs. the State (YLR 2011 19 Lahore)** wherein in the Lahore High Court stated that:

> “The case law cited by the learned counsel for the complainant in PLD 2005 Supreme Court 530 can no longer be relied upon as the said view was changed by the apex Court in PLD 2009 Supreme Court 11...which is binding on this Court under Article 189 of the Constitution being latest in the field”.

Other prominent cases which explicitly relied on the **mens rea** based approach in interpreting terrorism under Section 6 include **Muhammad Hanif vs. The State (2003 PLD Peshawar 164), PLD 2005 Karachi 344, 2008 MLD 840, Huzoor Bux vs. The State (PLD 2008 Karachi 487)** and **Muhammad Rasool and another vs. The State (PLD 2012 Baluchistan 122)**.
Nevertheless, the status of the *mens rea* based approach remains in doubt today following the decision in *Nazeer Ahmed and others vs. Nooruddin and others* (2012 SCMR 517) which unequivocally favored the action based approach and which has subsequently been relied on by several High Court decisions in 2013. These will be discussed further below.

**Limiting the Ambit of the ATA by the Principle of ‘Nexus’**

As stated above, the *mens rea* based approach represents a modified and more sophisticated variation of the principle of nexus laid down by the Supreme Court in the seminal *Mehram Ali* case. Our case studies reveal that the *Mehram Ali* judgment enjoys an exalted status in ATA jurisprudence and remains the most often quoted decision by the Courts when deciding cases under the Act. This is perhaps due to the fact that this judgment was the first major enunciation of the relevant law by the Supreme Court and was heard by a five member Bench.

In *Mehram Ali*, one of the arguments raised by the petitioners was that the power given under Section 34 the Act to the Government to amend the [Third] Schedule was being abused inasmuch as offences were being included which had no *nexus to the object of the Act*. In response, the Court stated as follows:

“*However, it may be observed that the offences mentioned in the Schedule should have nexus with the object of the Act and the offences covered by sections 6, 7 and 8 thereof. It may be stated that section 6 defines terrorist acts, section 7 provides punishment for such acts, and section 8 prohibits acts intended or likely to stir up sectarian hatred mentioned in clauses (a) to (d) thereof. If an offence included in the Schedule has no nexus with the above sections, in that event notification including such an offence to that extent will be ultra vires.*”

---

40 PLD 1998 Supreme Court 1445.
41 Under Pakistani and Indian jurisprudence, decisions rendered by large Benches of the Supreme Court hold particular significance, since there is robust legal authority for the principle that a decision of a larger Bench prevails where there are two conflicting decisions of the Supreme Court. [1997 SCMR 1368 (Supreme Court of Pakistan)][AIR 1976 SC 2547 (Supreme Court of India)].
It was further argued by the petitioners that a perusal of the [Third] Schedule (as it existed then) indicated that if the victim of a murder case under section 302, P.P.C. was a member of police, armed forces or civil armed forces or a public servant, the accused of such a case would be triable under the ATA even if the murder had taken place on account of personal enmity and had nothing to do with the discharge of his official functions and duties. In response, the Supreme Court observed:

“It will suffice to observe that if a Government servant or any other employee of the Government functionaries is murdered because he belongs to the above service and that there was no enmity or plausible reason for commission of the above offence, such a killing is an act of terrorism within the ambit of the Act and can lawfully be included in the Schedule, but if the murder is committed solely on account of personal enmity, such a murder will have no nexus with the above provisions of the Act and will not be triable under the Act.” [Emphasis Added]

The principle of nexus therefore had a two-fold effect. Firstly, it prevented the Government from abusing its powers under Section 34 by including offences which had no link with terrorism or sectarian hatred in the Third Schedule. Secondly, and perhaps more significantly, it removed cases of personal enmity from the ambit of the ATA. Hence, the principle of nexus bears resemblance to the mens rea based approach since it is similarly delimiting in nature and seeks to confine the reach of the special law to cases which actually merit its application. In the Basharat Ali case, the Lahore High Court made several references to Mehram Ali and stated that it would be ‘safer and consistent’ to revert to this principle.

The following cases illustrate how the principle of nexus has at times proven useful in removing cases of personal enmity from the ambit of the ATA:

- **Noor Khan vs. Judge, Special Court Sargodha [2001 P Cr. LJ 581]**

  “We are of the view that the case does not involve the element of terrorism and has no nexus with the object of the above Act and the offences mentioned in sections 6, 7 and 8 of the above Act, as it is a simple case of murder due to previous murder enmity and it cannot be said that the same was committed in a manner which struck terror or created a sense of fear and insecurity in the people or in the section of people except
the ordinary sense of insecurity which is created at the time of commission of every crime..."

- **Mohabbat Ali vs. The State [2007 SCMR 142]**

  “It is also necessary to examine that the ingredients of alleged offence has any nexus with the object of the case as contemplated under sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said Act is to be seen.”

- **Pervaiz Iqbal vs. Special Judge, ATC No. III [2013 YLR 92 Lahore]**

  “In Mehram Ali's case (PLD 1998 SC 1445) it has been observed by the Hon'ble Supreme Court of Pakistan that nexus has to be shown between the act done and the objective or design by which the said offence was committed, to formulate an opinion whether or not such offence could be termed an act of terrorism. In the absence of such linkage it cannot be held that the offence, committed in the background of personal enmity or vendetta, transmitting a wave of terror or fright or horror was necessarily an act of terrorism.”


Curiously however, the statement of the Court that offences mentioned in the Schedule should have a nexus with Sections 6, 7 and 8 of the Act has subsequently been often quoted by the Courts when interpreting terrorism itself under Section 6. Rather than focusing on whether the requisite mens rea and/or actus reus of Section 6 has been fulfilled or not, the Courts have at times simply seen whether an offence has any ‘nexus’ with the object of the Act and Section 6, 7 and 8 to determine the question of terrorism. For example, in 2005 P Cr. LJ 963 Lahore, involved an attempted murder near the District Courts. The court held that since this was a “public place”, the incident of firing must have created panic and insecurity in the minds of the people present. The feeling of insecurity would be particularly severe amongst the members of the legal profession since the firing took place near the District Courts. And since the attention of the media “must have engaged”, the public at large must have felt the same feelings. Thus the object had a nexus with Sections 6.7 and 8 of the
ATA especially with a bare reading of sub-clauses (b), (d), (h) and (i) of subsection 2 of Section 6.

Similarly, in PLD 2003 SC 704 an advocate had been abducted for ransom and subsequently murdered by the victim’s next door neighbor. The Supreme Court observed that “condition precedent for applicability of ATA is that offences mentioned in the Schedule should have nexus with the objects mentioned in sections 6, 7 and 8 of the ATA. If sense of fear, insecurity in the people at large or any section of the people or disturbance of harmony amongst different sections of the people is created, above quoted subsection will be attracted...It is the cumulative, effect of all the attending circumstances which provide tangible guidelines to determine the applicability or otherwise of said subsection. Under the circumstances, the case was rightly assigned to Anti-Terrorism Court for trial."

Such an interpretation of the principle of nexus detracts from the context in which it was applied in Mehram Ali, which related to which offences could be added to the Third Schedule and not when interpreting Section 6 itself.

❖ The Action based approach to Terrorism

The action based approach is the alternative major interpretation to terrorism adopted by the superior courts in Pakistan. This interpretation places little, if any, importance on the role of mens rea in terrorism cases, with the actus reus in itself being determinative of whether an act constitutes terrorism or not.

Between 2002 and 2003 a number of decisions by the Supreme Court of Pakistan favored the effect or cumulative fall-out of an act as the determinative criteria for identifying terrorism. This included the likely effect of an action by judging its tendency to create a sense of fear or insecurity in the general public or a section thereof. Accordingly, apparently ordinary cases of homicide or robbery were by this interpretation brought within the ambit of the Act by focusing on their brutal nature and shock factor.⁴²

"We have to see the psychological impact created upon the minds of the people. It is also not necessary that the said act must have taken place within the view of general public so as to bring it within the encompass of the Act. Even an act having taken place in a barbaric and gruesome manner, if it had created fear and insecurity, would certainly come within the purview of the Act. Reference in this regard is made to the case of Mst. Raheela Nasreen v. the State and another 2002 SCMR 908 wherein the husband was killed by a Batman in connivance with his wife inside the house. However, the case was tried by the Special Court constituted under the Act as this act of the Batman, being a trusted person employed by an army officer though committed inside the house, was likely to strike terror leading to the feelings of insecurity among the army officers in spite of the fact that they had not seen the incident." [Emphasis Added]

"13. In general terms a fright, dread or an apprehension in the mind of a person induced by an horrible act of a person or causing fear and terror to the people is terrorism...The act of abduction of the deceased and Dr. Javed Umer from an open place on gun point and subsequent murder of Dr. Muhammad Adam for the reason that patient could not get desired result by the treatment given by him, would create unrest, panic and terror against the doctors who are discharging very sacred duty in the medical field."

"If [a] sense of fear, insecurity in the people at large or any section of the people or disturbance of harmony amongst different sections of the people is created, [Section 6] will be attracted. It is the cumulative, effect of all the attending circumstances which provide tangible guidelines to determine the applicability or otherwise of said subsection. It is noted that about 300/400 people gathered at the house of the complainant and they would have destroyed the house of the appellant, if the police would not have intervened. Lawyer community was also annoyed over the murder of a member of their community and had passed a resolution in this regard. Under the circumstances, the case was rightly assigned to Anti-Terrorism Court for trial."
These interpretations of Section 6 by the Supreme Court were subsequently relied by the Provincial High Courts in a number of cases when interpreting the ‘new’ definition of terrorism under the 2001 Amendment Ordinance.43

It was seen above that the Lahore High Court in the Basharat Ali case attempted to reverse the tide by forcefully arguing in favor of a mens rea based approach when interpreting terrorism under Section 6 and explicitly criticized the above quoted Supreme Court judgments for detracting from the principle of nexus carved out in Mehram Ali. On appeal to the Supreme Court however, the decision was forcefully overruled in PLD 2005 Supreme Court 530. Just as the Lahore High Court’s decision crystallized the mens rea based approach, the Supreme Court’s verdict forms the cornerstone of the action based approach and therefore merits attention. Relevant extracts are provided below:

- [Section 6] does not revolve around the word “designed to” as used in section 6(1)(b) of the Act or mens rea but the key word, in our opinion is "action" on the basis whereof it can be adjudged as to whether the alleged offence falls within the scope of section 6 of the Act. The significance and the import of word "action" cannot be minimized and requires interpretation in a broader prospective which aspect of the matter has been ignored by the learned High Court and the scholarly interpretation as made in the judgment impugned has no nexus with the provisions as contained in section 6 of the Act, the ground realities, objects and reasons, the dictums laid down by this Court and is also not inconsonance with the well-entrenched principles of interpretation of criminal statutes.

- In construing an Act of Parliament the Court always has to ascertain the intention of the legislature from the language of the whole enactment, and it sometimes becomes necessary to do a certain amount of violence to the language in which a particular passage is couched in order to give effect to the intention to be gathered from the enactment as a whole. Where the meaning of words used in a statute is plain [however] it is not the duty of the Courts to busy themselves with supposed intentions of the Legislature in framing the statute.

43 See PLD 2004 Peshawar 175 and 2004 YLR 704 Karachi.
While commenting on the significance of the Preamble in determining the intention of the legislature, the Court observed:

- The preamble of a statute has been said to be a good means of finding out its meaning and intent and, as it were, a key to the understanding of it. The study of preamble to a piece of legislation provides a clue to arrive at the intention of the law-maker. **The preamble, however, cannot either restrict or extend the enacting parts when the language is not open to doubt.**

The role of *mens rea* in terrorism cases under the ATA was comprehensively reviewed by the Court.

- It may not be out of place to mention here that if an offender intentionally commits an offence and consequences beyond his immediate purpose result, it is for the Trial Court to examine and determine how for the offender can be held to have the knowledge that he was likely by such act to cause the actual result which cannot be adjudged by the High Court while exercising its Constitutional jurisdiction. **The learned High Court has ignored that Section 6 of the Act creates a statutory offence and hence the question of knowledge or *mens rea* is immaterial "if in any case the legislature has omitted to proscribe a particular mental condition, the presumption is that the omission is intentional. In such a case the doctrine of *mens rea* is not applicable."** (1946) 2 Cal. 127 Legal Remembrance, Bengal v. Ambika Charan Dalal.

- The provisions as contained in section 6 of the Anti-Terrorism Act are penal/criminal in nature like all other penal provisions which can be divided into "*actus reus*" i.e. the Act in question and "*mens rea*" i.e. the requisite mental element. **It is not essential for a penal provision to contain both such ingredients as the provisions which omit the *mens rea* are called strict liability offences which aspect of the matter has been ignored by the learned High Court.**

- A bare perusal of section 6 of the Act would reveal that the Legislature intends, by necessary implication, the exclusion of *mens rea* in dealing with the contravention of section 6 of the Act which cannot be incorporated, added or inserted in 6 by any Court as such insertion or addition can only be made by the Legislature. The words
"designed to" as used in section 6 of the Act do not mean that the offence must be committed with the intention to create terror, sensation or insecurity but it depends upon the nature of the offence and its result on the basis whereof intention of the offender could be determined.

Where a criminal act is designed to create a sense of fear or insecurity in the mind of the general public that can only be adjudged by keeping in view the impact of the alleged offence and manner of the commission of alleged offence. A farfetched interpretation of the words "designed to" as used in section 6 of the Act has been made by the learned High Court which we are afraid is not correct as the impact of the alleged offence and the manner in which it is committed has been ignored on the basis whereof the design of the alleged offence can be unveiled. There is absolutely no doubt in our mind that the Act was brought into force for the prevention and elimination of terrorism, sectarian violence and for expeditious dispensation of justice in the heinous offences as stipulated in Act itself.

After having gone through the entire law as enunciated by this Court in different cases the judicial consensus seems to be that striking of terror is sine qua non for the application of the provisions as contained in section 6 of the Act which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of F.I.R., its cumulative effects on the society or a group of persons and the evidence which has come on record.

There is no denying the fact that it was never the intention of legislature that every offender irrespective of the nature of the offence and its overall impact on the society or a section of society must be tried by the Anti-Terrorist Court but the question as to whether such trial shall be conducted or not initially falls within the jurisdictional domain of Anti-Terrorist Court which cannot be interfered with in the absence of sufficient lawful justification which appears to be lacking in these cases.

As mentioned above, the interpretation of Section 6 in **PLD 2005 SC 530** was reversed by the Supreme Court in **PLD 2009 SC 11** which upheld the interpretation put forward by the Lahore High Court in **Basharat Ali**. However, in **Nazeer Ahmed and others vs. Noorudin**
others (2012 SCMR 517), the Supreme Court once again backtracked on its own precedent by observing that:

“Neither the motive nor intent for commission of the offence is relevant for the purpose of conferring jurisdiction on the Anti-Terrorism Court. It is the act which is designed to create a sense of insecurity or to destabilize the public at large, which attracts the provision of Section 6 of the Act.” [Emphasis Added]

The Supreme Court in this decision held that PLD 2009 SC 11 was ‘distinguishable on the facts’ without elaborating further. This decision has subsequently been relied upon by several Sindh High Court cases in 2013\(^4\), indicating that at present, the action based interpretation towards Section 6 holds the field in Pakistan.

**Conclusion**

An analysis of the reported judgments of the Appellate Courts vis-à-vis the ATA reveals that the interpretation of ‘terrorism’ remains the most contentious issue in terrorism trials. This is hardly surprising; given that Section 6 is often relied upon to challenge the jurisdiction of the ATC’s and in applications to transfer the case to regular courts under Section 23, ATA. As will be seen in the next section, legislative defects inherent in Section 6 represent one of the main reasons for this confusion. Nevertheless, it cannot be denied that inconsistent and unstable jurisprudence of the superior courts on this issue and a lack of reliance on the doctrine of binding precedent have certainly exacerbated the confusion regarding the application of the anti-terrorism special law.

**2.3.1.2 - Legislative Defects of Section 6, Anti-Terrorism Act, 1997**

The preceding section illustrates that inconsistency in precedent and overly broad interpretations of ‘terrorism’ under the ATA by the superior courts is a significant contributory factor towards the blurring of the distinction between acts of terrorism and ordinary criminal offences in Pakistan. Nevertheless, it cannot be denied that the principal reason for this discrepancy lies in the statutory defects and lacunas in the ATA itself and

especially Section 6, the effect of which is to grant unusually wide discretions to all those concerned with the application of the counter-terrorism law, including investigative agencies, prosecutors and the judiciary.

This section will analyze the provisions of Section 6 of the ATA and highlight the major legislative defects and inconsistencies present therein before providing recommendations that seek to remove these defects.

**General**

The general structure of Section 6, as it currently stands, originates from the Anti-Terrorism (Amendment) Ordinance, 2001 (Ordinance No. XXXIX of 2001) which replaced the erstwhile ‘terrorist act’ with the term ‘terrorism’. It is interesting to note that the structure of Section 6 and most of its wording under the 2001 Amendment Ordinance is almost exactly the same as the definition of terrorism contained in the United Kingdom’s **Terrorism Act, 2000**. This definition has also inspired the definitions of terrorism in Canada, Australia and New Zealand. Broadly speaking, terrorism under each of these definitions contains three major elements:

(a) The **actions** (or threats of action) that constitute terrorism, which encompass an extremely broad range of acts including causing death, grievous violence, grievous damage to property, kidnapping for ransom, hijacking, hostage taking, taking the law in one’s own hand, arson, using explosives, extortion, serious coercion of public servants and several other actions. The actions that constitute terrorism are set out in Section 6(2) of the Act;

(b) The **intention** behind those actions: they must be designed to coerce and intimidate or overawe the Government or the public of a section of the public or community or sect or a foreign government or population or an international organization; or to create a

---

45 Section 1, UK Terrorism Act, 2000.
sense of fear or insecurity in society. The element of the offence of terrorism is found under Section 6(1) (b) of the Act.

(c) The motive behind the actions: they are made for the purpose of advancing a religious, sectarian or ethnic cause. This element is set out in Section 6(1) (c) of the Act. The Anti-Terrorism (Second Amdt.) Act, 2013 (XX of 2013) has significantly expanded this section and will be considered in detail further below.

Despite the similarities in structure and content however, the Pakistani definition has significant variations, which will be discussed below. Further, Pakistan’s definition of terrorism is much broader and all-encompassing, an unfortunate effect of a string of legislative amendments targeting Section 6 over the past decade. This perhaps explains the diverse judicial interpretations of this section.

I. The Mental Element of Terrorism: Sections 6(1) (b) and (c), Anti-Terrorism Act, 1997

Section 6(1)(b), ATA

6. Terrorism.—(1) In this Act, “terrorism” means the use or threat of action where:-

   a) ........

   b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or

   c) ........

46 The element of intent is also useful since it provides an indication of the target to which actions constituting terrorism must be directed. It should be noted however, that the ‘target’ is not a legal requirement for terrorism and is merely included here for the purposes of analysis.

47 Ins. by the Anti-terrorism (Amdt.) Act, 2013 (XIII of 2013), s. 3.
Legislative Defect: Use of the words “designed to”

On a plain reading, clause (b) of section 6(1) appears to require terrorism offences to involve a particular kind of intention. However, the word ‘intention’ is not explicitly used, and the clause relies on the words ‘designed to’. As seen above, in many cases the superior judiciary in Pakistan interpreted this provision as requiring terrorism offences to contain a particular mens rea. Nevertheless, substantial case law does not view the words ‘designed to’ as being synonymous with intention or mens rea.48

The corresponding clause in the United Kingdom’s definition of terrorism also contains the words ‘designed to’. However, this has been clearly interpreted as meaning ‘intention’ in the UK.49

Under the definition of terrorism in Australia, Canada and New Zealand however, the words ‘designed to’ have been replaced with ‘intention’ to remove any ambiguity.

Legislative Defect: Inclusion of the words “or create a sense of fear or insecurity in society”

Another legislative defect in Section 6(1)(b) relates to its complexity. The clause expands the ambit of the required intention to actions which are designed to create a sense of fear or insecurity in society. As seen above, this phrase has often been quoted by the judiciary in applying Section 6. However, the phrase is generally not relied upon when determining intent, but rather when determining the impact or effect of an act.50 This proves to be counter-productive, as it leads credence to the action based approach to Section 6 where

---

48 See PLD 2005 Supreme Court 530, where the Supreme Court of Pakistan held that “a bare perusal of section 6 of the Act would reveal that the Legislature intends, by necessary implication, the exclusion of mens rea in dealing with the contravention of section 6 of the Act which cannot be incorporated, added or inserted in 6 by any Court as such insertion or addition can only be made by the Legislature. The words “designed to” as used in section 6 of the Act do not mean that the offence must be committed with the intention to create terror, sensation or insecurity but it depends upon the nature of the offence and its result on the basis whereof intention of the offender could be determined.” [Emphasis Added]


50 PLD 2003 SC 224, PLD 2003 SC 704.
the creation of a sense of fear or insecurity in society is adjudged by keeping in view the impact of the offence and the manner of its commission.\(^{51}\)

A perusal of the corresponding clause in countries with a similar definition of terrorism reveals that the requirement of intention is expressed in clear and simple terms and does not include extraneous language.

**United Kingdom**

“the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public”…

**Australia**

“The action is done or the threat is made with the intention of:

i) Coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country…; or

ii) Intimidating the public or a section of the public”…

**Canada**

[An act or omission that is committed] in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada”…

**New Zealand**

“An act falls within this subsection if...[it is committed] with the following intention:

a) to induce terror in a civilian population; or

b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.”

\(^{51}\) PLD 2005 SC 530.
The inclusion of the words “or create a sense of fear or insecurity in society” within the intention element may be problematic from two approaches. On the one hand, if creating a sense of fear or insecurity is viewed as being synonymous with the words ‘coerce and intimidate’ or ‘overawe’, then their inclusion within clause (b) is redundant since any action which coerces, intimidates or overawes the public or a section of the public or community or sect (as defined in clause (b)) will also create a sense of fear and insecurity in society.

If on the other hand, creating a sense of fear or insecurity in society is viewed as an alternative form of intention, it is problematic since it widens the ambit of the required intention for terrorism. Robberies, murders, grievous assaults and rape are all likely to create fear or insecurity in the locality in which they are committed. The perpetrators of such acts are likely to be aware of this fall out. Nevertheless, it is unlikely that they can be regarded as having the terrorist intent or coercing or intimidating the public which denotes a more widespread application.

➢ **Recommendations – S.6(1)(b)**

1. The words “the use or threat is designed to” should be replaced with “the use or threat is made with the intention of” in order to clarify the requirement of intent.

2. Explanatory notes should accompany this clause, further underscoring the inclusion of *mens rea* as an integral element in the offence of terrorism.

3. The words “or create a sense of fear or insecurity in society” should be omitted from the text of clause (b) to limit the application of the ATA. In our view, creating a sense of fear or insecurity has a wider connotation than coercion and intimidation and overawing. The terminology is too vague and ambiguous to serve as an effective filter. In any case, the word ‘intimidation’ as used in numerous other jurisdictions, to the exclusion of the terms ‘fear or insecurity’ adequately captures the terrorizing effect that such offences have on society.
Section 6(1)(c), ATA

6. Terrorism.-(1) In this Act, “terrorism” means the use or threat of action where:-

a) ........

b) ........

c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sector, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies.

The operative word in clause (c) of Section 6(1) is ‘purpose’. The exact word is used in the Canadian, UK and New Zealand definitions of terrorism, whereas the Australian definition relies on the word ‘intention’. Nevertheless, the element of a political, religious or ideological cause in all these definitions is commonly understood as a motive requirement; that is, as the emotion or belief prompting the prohibited physical conduct.\textsuperscript{52}

According to foreign case law, academic commentary and government reports on the role of motive in terrorism definitions, this element is included in order to ensure that the definition of terrorism applies to a fairly narrow range of circumstances, justifying the application of special legal rules in order to finely target, stigmatize and deter what is considered by society to be especially wrongful about terrorism.\textsuperscript{53} Further, the presence of the need to prove this motivation appropriately makes the task of the prosecution more difficult and reflects again the special nature of a serious terrorism offence, distinguishing it from other crime.


In Pakistan, Section 6(1) (c) by itself has not received particular interpretative attention by the superior courts. Only the seminal Basharat Ali case makes explicit reference to the requirement of motivation in determining terrorism.\(^{54}\) Even in the cases which adopted a mens rea based approach to Section 6, clause (c) of sub-section (1) was discussed in interchangeable terms with Section 6(1)(b), illustrating that intention had been conflated with motive.\(^{55}\)

Accordingly, the important role played by the motive requirement in delimiting the application of terrorism laws in countries with a similar legal regime has not materialized in Pakistan. Once again, one of the main reasons for this omission relates to the legislative defects present in this sub-section.

- **Legislative Defect: Use of the word ‘or’ between Section 6(1)(b) and Section 6(1)(c)**

One of the most glaring defects relating to the mental component of Section 6 is the inclusion of the word “of” between clauses (b) and (c) of sub-section 1. This has the effect of making these two clauses alternate requirements, enhancing the scope of the Act by considerably broadening the range of circumstances that would fall within the concept of terrorism. Importantly, this means that acts intended to coerce or intimidate the government or the public (under clause (b)) that are motivated by greed, revenge or hatred would also fall under the ambit of terrorism, including robberies or gang wars.

According to the Australian Human Rights and Equal Opportunities Commission, a distinctive feature of terrorism is the use of political violence. If terrorism undermines the State and the political process, the definition should require *proof of a motive* (political, religious, social, racial, ethnic or ideological). Motive elements distinguish terrorism from

---

\(^{54}\) The Lahore High Court in this case observed that S.6(1)(c) “earmarks the ‘purpose’ which should be the motivation for the act” and that “in order to qualify as terrorism the motivation behind the offence has to be political in the extended sense of the word”. See PLD 2004 Lahore 199.

\(^{55}\) See PLD 2005 Karachi 344.
private violence and ordinary crimes which also terrify (such as armed robbery, rape or mass murder).^56

The alternative role played by clause (c) in sub-section 1 perhaps explains its almost non-existent role in Pakistani ATA jurisprudence and the apparent interpretation that it constitutes merely another form of mens rea for a terrorist act. Accordingly, Section 6(1)(c) has failed thus far as a filtering mechanism for the application of the Act.

➢ Legislative Defect: Expansion of Section 6(1)(c) via the Anti-Terrorism (Second Amdt.) Act, 2013

Section 6(1) (c), in its original form, related to the use or threat of action “made for the purpose of advancing a religious, sectarian or ethnic cause.” In this respect, it was almost identical to other motive requirements contained in similar terrorism laws around the world, except that it confined motive to religious, sectarian or ethnic causes while other countries focused on political, religious and ideological causes and omitted reference to sectarian or ethnic causes.

The Anti-Terrorism (Second Amdt.) Act, 2013 has expanded Section 6(1) (c) by inserting, after “ethnic cause”, the following words:

“or intimidating and terrorizing the public, social sector, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies”

The inclusion of these words via this Amendment paralyses the correct application of the motive requirement and serves no purpose. Disturbingly, it betrays a lack of understanding of the interplay between intention, motive and action as distinct but correlated elements of terrorism.

The Amendment fails to comprehend that “intimidating and terrorizing the public” relates to the intention behind an act of terrorism and not its motivation and is already covered by Section 6(1) (b). The inclusion of “social sector, media persons, business community” is irrelevant as these are adequately covered by the words “public, or a section of the public, or community or sect” under clause (b). Indeed, the inclusion of these words might in fact be discriminatory and counter-productive to the aims of counter-terrorism legislation.

Similarly, the inclusion of words “attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies” is redundant and counter-productive as it does not relate to the motive behind an act but rather relates to the act itself. All these actions are covered already by the expansive Section 6(2) of the Act.

- **Legislative Defect: Section 6(3) of the Anti-Terrorism Act, 1997**

  (3) The use or threat of use of any action falling within sub-section (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not sub-section (1) (c) is satisfied.

Section 6(3) of the ATA owes its roots to Section 1(3) of the UK Terrorism Act, 2000, which reads as follows:

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

However, under the UK Act, subsection (1)(b) relates to the ‘designed to’ or intention element of the definition of terrorism. Thus, in the UK, actions involving the use of firearms or explosives will be terrorism even if they are not intended to intimidate the public or influence the government provided that they are made for the purpose of advancing a religious, political, racial or ideological cause. The motive requirement thus remains the crucial filtering mechanism by recognizing the distinct political nature of terrorism.
In the case of the ATA however, actions involving the use of firearms, explosives or any other weapon that are designed to intimidate or coerce the government or the public constitute terrorism regardless of the motive/purpose element of sub-section (1)(c). This highlights another critical defect relating to Section 6, since the intention to intimidate or coerce may be relatively easy to prove in cases involving firearms and explosives (as illustrated by the numerous case law discussed above). However, what is more difficult to prove is the purpose or motive behind such an act. It is for this reason that the UK definition retains the purpose requirement in cases involving firearms and explosives. On the other hand, the Pakistani definition relinquishes the main distinguishing factor of terrorism in such cases, focusing purely on the design or intention behind the act. Given that the action based approach towards Section 6 is already so prevalent under Pakistan jurisprudence, such a provision only further deteriorates the dwindling safeguards against the misuse of the ATA. This overreach of the ATA undermines the moral and political force of its offences, and dilutes the special character of terrorism as a crime.

Section 6(3) of the ATA also goes beyond the scope of Section 1(3) of the UK Act by including within its scope, the use or threat of actions involving “other weapons”. The inclusion of such a broad and unclear term enlarges the boundaries of a special law to an unacceptable extent. Indeed, given the prevalence of firearms in Pakistani society today, with little or no State control or regulation on the possession and use of firearms, it is debatable whether it is even necessary to include firearms within the scope of this provision. The ATA may have copied a provision from UK law (with modifications), but the context in which it operates in the UK does not seem to have been fully understood.

➢ Recommendations – Section 6(1)(c)

1. The word ‘or’ contained between sub-sections 1(b) and 1(c) should be replaced with the word ‘and’. Explanatory notes to the Act should clearly emphasize that both sub-sections are cumulative and essential requirements for terrorism offences.

2. The legislative intent behind sub-section 1(c) should be clearly defined in explanatory notes which clarify the role of motive in differentiating terrorism from other kinds of serious violence which also generate fear (such as common assault, armed robbery, rape or murder), while also according with commonplace public understanding of
what constitutes terrorism. The core premise is that political violence or violence done for some other public-oriented reason (such as religion, ideology, or race/ethnicity) is conceptually and morally different to violence perpetrated for private ends (such as profit, greed, jealousy, animosity, hatred, revenge, personal or family disputes etc.). Prosecuting an individual for politically motivated terrorism, rather than for common crimes like murder may help satisfy public indignation at terrorist acts, better express community condemnation, and placate popular (but reasonable) demands for justice.

3. The amendments inserted by the Anti-Terrorism (Second Amdt.) Act, 2013 should be removed from sub-section 1(c) for the reasons discussed above.

4. The insertion of causes additional to religious, sectarian or ethnic may be considered to be incorporated within sub-section 1(c) to better reflect the multifaceted nature of terrorism in Pakistan today. Subject to further research, this may include political, racial and ideological causes. These may be added to prevent expressions of politically motivated violence, including political violence in Karachi and overlapping with the otherwise ostensibly religious motivations of the various militant groups operating within the country.

5. Section 6(3) of the ATA should be modified so as to replace sub-section 1(b) with sub-section 1(c), so that the motive/purpose element continues to underpin a terrorism offence. The scope of Section 6(3) should also be reduced to only those actions falling under sub-section (2) which involve the use of explosives and not to actions involving firearms or any other weapon. However, it is difficult to conceive of a situation involving the use of explosives that is not designed to intimidate or coerce the government or the public and which at the same time is made for the purpose of advancing a religious, sectarian, ethnic (or other) cause. As such, the utility of retaining this provision remains in doubt and its complete omission may also be considered.
II. The Act of Terrorism: ‘Action’ falling within the meaning Sections 6(2), Anti-Terrorism Act, 1997

General

Section 6(2) of the ATA lists the actions which may potentially constitute terrorism under the Act. The section contains several sub-sections, each of which lists a particular act. The applicability of the ATA may be triggered by the use or threat of any of these acts.

The ‘action-based’ approach to terrorism by the superior courts in Pakistan discussed in the preceding section of this chapter is derived almost entirely from the wording of Section 6(2) of the ATA. As noted by the Supreme Court in PLD 2005 Supreme Court 530, Section 6 ‘does not revolve around the word “designed to”…or mens rea…but the key word, in our opinion is “action” on the basis whereof it can be adjudged as to whether the alleged offence falls within the scope of section 6 of the Act’. Recently, in 2012 SCMR 517, the Supreme Court once again emphasized that neither the motive nor intent is relevant for the purposes of conferring jurisdiction on the Anti-Terrorism Court but rather, it is the act which attracts the provision of Section 6 of the Act. Indeed, as seen above, the most recent jurisprudence on this area indicates that the action-based interpretation towards Section 6 holds the field in Pakistan today.57

It is not surprising therefore, that Section 6(2) today appears to be the sole determinative criteria for triggering the application of the ATA. This is evidenced by the extensive legislative amendments made to this statutory provision over the years, as a result of which it today contains 17 sub-sections.

This Report will review each of the ‘actions’ listed under the various sub-sections of Section 6(2) with a view to identifying the principal flaws of each sub-section. Where applicable, reference will be made to the corresponding laws of foreign jurisdictions and the academic and parliamentary debates that have informed the drafting of the definition of terrorism in these countries. This will be followed by recommendations that attempt to remove the statutory defects and lacunas inherent in Section 6(2).

57 See page 82 of this Report.
Section 6(2): Overlap with the laws of foreign jurisdictions

As stated previously, the current structure of the Pakistan’s definition of terrorism borrows heavily from the definition of terrorism contained in the UK’s Terrorism Act, 2000. Pakistan however, is not the only country to have relied on the UK’s definition. The definition of terrorism under the Australian and Canadian criminal codes and New Zealand’s Terrorism Suppression Act 2002 is also structured on the UK definition and indeed bears more resemblance with this definition than that found under Section 6 of the ATA.

Section 6(2) contains six sub-sections which overlap closely with the related laws of the UK, Australia, Canada and New Zealand.58 These sub-sections contain broad categories of acts which may constitute terrorism, including the causing of death, grievous violence against a person, grievous damage to property, endangering of a person’s life, a serious risk to the safety of the public or the serious disruption of electronic systems. These sub-sections are set out in the table below, along with the corresponding provisions in the laws of the UK, Australia, Canada and New Zealand.

For ease of reference, this Report will analyze these six broad sub-sections first. The various legislative defects of the remaining eleven sub-sections will be considered separately thereafter.

58These include Sections 6(2)(a), (b), (c), (d), (i) and (l).
### ACTIONS CONSTITUTING TERRORISM: COMPARATIVE TABLE

<table>
<thead>
<tr>
<th>Country</th>
<th>Pakistan</th>
<th>United Kingdom</th>
<th>Australia</th>
<th>Canada</th>
<th>New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Involves the doing of anything that causes death. (Section 6(2)(a))</td>
<td>Involves serious violence against a person.</td>
<td>Causes a person’s death.</td>
<td>Causes death or serious bodily harm to a person by the use of violence.</td>
<td>The death of, or other serious bodily injury to, one or more persons (other than a person carrying out the act).</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Involves grievous violence against a person or grievous bodily injury or harm to a person. (Section 6(2)(b))</td>
<td>Involves serious violence against a person.</td>
<td>Causes serious harm that is physical harm to a person.</td>
<td>Causes death or serious bodily harm to a person by the use of violence.</td>
<td>The death of, or other serious bodily injury to, one or more persons (other than a person carrying out the act).</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Involves grievous damage to property including government premises, official installations, schools, hospitals, offices or any other public or private property including</td>
<td>Involves serious damage to property.</td>
<td>Causes serious damage to property.</td>
<td>Causes substantial property damage, whether to private or public property, if causing such damage is likely to result in [death or serious bodily harm to person,</td>
<td>Destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in one or more of the</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scenario</td>
<td>Section 6(2)(c)</td>
<td>Section 6(2)(d)</td>
<td>Section 6(2)(e)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Damaging property by ransacking, looting or arson or by any other means</td>
<td>Endangers a person’s life or causes a serious risk to the health or safety of the public or any segment of the public</td>
<td>Endangers a person’s life, other than that of the person committing the action.</td>
<td>Endangers a person’s life, other than the life of the person taking the action.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Involves the doing of anything that is likely to cause death or endangers a person’s life</td>
<td>Creates a serious risk to the health or safety of the public.</td>
<td>Creates a serious risk to the health or safety of the public or a section of the public.</td>
<td>Creates a serious risk to the health or safety of the public or any segment of the public.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Creates a serious risk to safety of the public or a section of the public, or is designed to frighten the public.</td>
<td>A serious risk to the health or safety of a population.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life.

Section 6(2)(i)

| Is designed to seriously interfere with or seriously disrupt a communication system or public utility service. | Is designed seriously to interfere with or seriously to disrupt an electronic system. | Seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:  
(i) an information system; or  
(ii) telecommunications system; or  
(iii) a financial system; or  
(iv) a system used for the delivery of essential government services; or  
(v) a system used for, or by, an essential public utility; or  
(vi) a system used for, or by, a transport system. | Causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to [in preceding clauses] | Serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life. |
Section 6(2)(a) & (b), Anti-Terrorism Act, 1997

(a) involves the doing of anything that causes death;
(b) involves grievous violence against a person or grievous bodily injury or harm to a person;

Sub-sections (a) and (b) of Section 6(2) deal separately with death and grievous violence or bodily injury or harm. In this respect, it bears similarity with the Australian definition. The definitions of the UK, Canada and New Zealand however, use one sub-section to deal with both situations. The UK’s categorization is the broadest, simply referring to “serious violence against a person”, which presumably covers both death and serious injury. The Canadian and New Zealand definitions explicitly mention death and serious bodily harm.

➢ Recommendations - Section 6(2)(a) & (b)

1. The wording in Section 6(2)(a) may be amended by removing the words ‘involves the doing of anything that causes death’ and inserting the words ‘causes a person’s death’.

2. Section 6(2) (b) in its present form is unnecessarily complicated. It may be simplified by the following legislative changes:
   i) The word ‘involves’ may be replaced with the word ‘causes’
   ii) The sub-section should not refer to three different concepts (grievous violence, grievous bodily injury or grievous harm) and should instead refer only to either bodily injury or physical harm to a person.
   iii) The word ‘grievous’ may be replaced with the word ‘serious’.

3. Alternatively, both sub-sections may be merged into one sub-section, which covers death and serious bodily harm, in line with the definitions found in the UK, Canada and New Zealand. Hence the sub-section would read as follows:

   “Causes death or serious bodily/physical harm to a person”
Section 6(2)(c), Anti-Terrorism Act, 1997

(c) involves grievous damage to property \(^2\)[including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson or by any others means;]

The idea of damage to property constituting a potential terrorist activity by itself is a contentious issue. During the promulgation of the Terrorism Act, 2000 in the UK, the inclusion of ‘serious damage to property’ under the list of ‘actions’ under Section 1(2) of the UK Act was the subject of major debate.\(^59\) Historically, legislation on terrorism essentially directed its attention to campaigns against the State. The 2000 Act however, included attacks on corporate estate within the definition, which represented an ‘extraordinary’ departure from the traditional definition of terrorism.\(^60\)

The following extracts taken from the House of Commons Hansard archives illustrate well the principal difficulties associated with this issue [only relevant portions are reproduced below]:

“I shall focus on serious violence against property. What do we mean by that? The Home Secretary was right: he cannot give an absolute definition. However, we can be sure that the courts will attach a meaning to "serious violence". I shall suggest some activities which, in all probability, do constitute serious violence.

If I were a supporter of Greenpeace, which I am not, or of Friends of the Earth, which I am not, and I had it in mind to grub up a field of genetically modified crops or set fire to them, I would say that such an act was serious violence to property. It most certainly would be serious violence to persons if I were to knock a policeman about in the process of doing that.

\(^{59}\)As part of our research under this Report, the RSIL team accessed the UK Parliament’s Hansard archives online and comprehensively examined the debates of the House of Commons and the House of Lords during the promulgation of the Terrorism Act, 2000.

\(^{60}\)See HC Deb 14 December 1999, vol 341, cols 153-235
Available at: http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo991214/debtext/91214-05.htm#91214-05_head2
If I supported animal liberation, which I do not, I would recognise that breaking open mink cages to release mink was an act of serious violence to property. Those are not speculative acts—all of them have happened frequently. Incidentally, they threaten serious violence to individuals as well.

I strongly disapprove of all those characters, and I am glad to say that existing criminal law covers, in almost every respect, their activities. However, if I ask myself whether they should be treated as terrorists, I am bound to say, no way.

Why not? Let us consider some of the consequences that attach to an activity that falls within the scope of terrorism;

First, there is the power of proscription. The Home Secretary can tell Greenpeace or the Animal Liberation Front, for instance, "Because you are associated with what are clearly acts of terrorism, I am entitled to proscribe you"—and he is so entitled, according to the Bill.

Let us suppose that one of the organisations that could come within the scope of clause 1 wants to raise some money. Let us suppose that it asks for money, as it is bound to do: Greenpeace, the Animal Liberation Front and anti-abortion activists certainly do. Asking for money in connection with an activity that is capable of being terrorism is capable of constituting an offence, according to the Bill. Moreover, contributing money is an offence under clause 14. We should be very careful if we are feeling generous.

The Home Secretary says, "This is all artificial, because the Director of Public Prosecutions would never agree to a prosecution". That may be true, but what is the individual citizen to reckon in advance? The ordinary citizen will know only that his act is capable of constituting an offence; whether he is prosecuted will depend on the wisdom of the Director of Public Prosecutions. What will that individual do? He will feel that he cannot become involved in a democratic activity. Moreover, banks and accountants who happen to be handling the affairs of such organisations will probably be under a duty to make a disclosure, and will probably be deemed to have
committed an offence if they do not do so. We are told that the Director of Public Prosecutions would never be so foolish as to authorise a prosecution, but can the banks and the accountants count on that? Will they not say, "As a result of an abundance of caution, we will make a disclosure"?  

The question of serious damage to property is also difficult to define from a threshold perspective. What is serious? What is heinous? Is it something that involves a real threat to life? Is it something deliberate or accidental? Will a cash value also be placed on the action, depending on the extent of the damage to property, or will it be simply a question of inconvenience?

Despite the heated debate, the UK Terrorism Act retained ‘serious damage to property’ as an action that may constitute terrorism under Section 1. However, the controversy spilled over to other commonwealth countries such as Canada and New Zealand. Serious damage to property also plays a prominent role in the definition of terrorism in these countries, but its ambit is much reduced due to tighter and restricted statutory language.

Under the Canadian formulation, ‘substantial property damage’ may constitute terrorist activity, but only if it is likely to result in death or serious bodily harm to person or endangers a person’s life or causes a serious risk to the health or safety of the public or any segment of the public. The threat to life therefore, appears to be the real determinative criteria and it is conceivable that substantial property damage by itself would not fall within the ambit of a terrorist act.

Similarly, New Zealand’s definition also requires a link between serious damage to property and a threat to life. However, its definition is even more restrictive in that target property must be one of great value or importance, or cause major economic loss, or major environmental damage before it can be classified as a terrorist activity.

In the case of Pakistan, the inclusion of ‘grievous damage to property’ is in most respects justified. In the previous decade, the country has witnessed hundreds of attacks all forms of private and public property, including schools, official installations, historical sites and places

---

61 Remarks by Mr Douglas Hogg, MP – HC Deb 14 December 1999, vol 341, col 212
of worship. Many of these attacks did not involve a direct threat to life but were rather intended to send a message to the State and its institutions, as well as the general public. For example, during the Swat insurgency in 2008-2010, many girls schools were blown up by militants on weekends or late at night\(^{62}\). Despite not causing any fatalities, these attacks nevertheless were directly intended to intimidate the government and the public and were carried out for the purpose of advancing a political and/or religious cause. As such, these acts clearly fell within the boundaries of terrorism.

Given the potential for serious terrorist attacks to focus purely on property rather than people\(^{63}\), it makes sense to include property within the definition of terrorism. Nevertheless, Section 6(2)(c) of the ATA in its current form remains defective for the reasons outlined below.

- **Legislative Defect: 2013 Amendment to S.6(2)(c)**

Section 2 of the Anti-Terrorism (Second Amdt.) Act, 2013 (XX of 2013) amended S.6(2)(c) by adding the following words to the sub-section:

```
- including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson or by any others means;
```

This amendment constitutes a major legislative defect and should be removed since it serves no ostensible purpose. There is no need for specific reference to be made to ‘government premises, official installations, schools, hospitals, offices or any other public or private property’ since damage to property by itself is sufficient to cover attacks on any of these places. Indeed, under the principles of statutory interpretation, these additional words might actually serve to delimit the law. If the intention of the 2013 Amendment was to restrict the ambit of S.6(2)(c) to only attacks on significant properties such as government premises, official installations, schools, hospitals and offices, then the wording of the amendment

---


63 Attacks such as the 2013 attack on the Quaid-e-Azam Residency in Ziarat clearly constitute terrorism since they have an inordinate impact on the morale, image, security, defence and integrity of Pakistan.
should be tighter by excluding the reference to ‘any other public or private property’. Otherwise, there is little sense in including additional criteria under this sub-section.

Another defect in the 2013 Amendment lies in its specific reference to ‘ransacking, looting or arson’. Such activities, particularly ransacking and looting, normally fall within the purview of the ordinary criminal law. Their specific inclusion within S.6(2)(c) may undesirably extend the scope of the ATA to ordinary, even minor, criminal actions.

➢ Recommendations – S.6(2)(c)

1. The 2013 Amendment to this sub-section should be omitted altogether as it serves no purpose and actually may undermine the provision.

2. If the legislative intent is to reduce the ambit of this sub-section to cover only attacks on government premises, official installations, schools, hospitals and offices, then the sub-section should be drafted in a more restricted manner and exclude reference to ‘any other public or private property’. Further, the sub-section should omit any reference to the damage of property by ransacking, looting or arson.

3. The words ‘involves grievous damage to property’ may be replaced by ‘destruction of, or serious damage to property’.

Section 6(2)(d), Anti-Terrorism Act, 1997

(d) involves the doing of anything that is likely to cause death or endangers person’s life;

This is straightforward provision which is more or less replicated in the definition of terrorism in all the commonwealth countries examined above. From a semantic point of view, it might be better if the sub-section is restricted to the endangering of a person’s life since ‘likely to cause death’ does not add much, if anything to the definition. To take into account suicide bombers, the UK and Australia versions of this provision may be considered which include the words ‘other than that of the person committing the action’ at the end.
Section 6(2)(i), Anti-Terrorism Act, 1997

(i) creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;

- Legislative Defect: Use of the words “…or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life”

The creation of a ‘serious risk to the health or safety of the public or a section of the public’ is an action which is listed in the definition of terrorism in all the foreign commonwealth jurisdictions examined above. Pakistan’s formulation of this type of action however, goes further by adding the words:

“…or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life”

This variation is troublesome from two aspects. First, the use of the word ‘design’ threatens to conflate the critically important distinction between S.6(1)(b) and S.6(2), in that it imports an element of intention within the actus reus of terrorism. It should be noted that S.6(1)(b) already caters to actions which are “designed to coerce and intimidate…the public…or create a sense of fear or insecurity in society”. Hence, it makes poor legislative sense for S.6(2)(i) to refer to actions which are “designed to frighten the general public”. Further, the creation of the serious risk to the health or safety of the public automatically disrupts civic life and is a major obstacle to the carrying out of lawful trade and daily business. As such, nothing much is gained by adding these additional words to sub-section 2(i) of Section 6. Instead, these additional words are in fact counter-productive since they undermine the separate and distinct elements of intention, purpose and action contained within the definition of terrorism.

Secondly, the additional wording of sub-section 2(i) may unnecessarily broaden the ambit of the ATA, especially by including the disruption of “civic life” as a category of action under S.6(2). During the drafting of the Terrorism Act, 2000 in the UK, it was suggested that
‘serious disruption to economic and commercial life’ be added to the list of actions potentially sanctionable under the Act. However, this proposal was shelved in the face of strong criticism by members of the House of Commons. It was argued that an entirely peaceful mass demonstration in the City of London, with a huge number of people walking up and down the streets, could be said to have caused serious disruption to economic and commercial life. However, no violence would have been involved. As such, the suggested definition, although well intended, was considered by parliamentarians to be “dangerous and wrong”.

Similar arguments can be made in Pakistan’s case. Even though the ATA technically does not apply to “democratic and religious rallies or peaceful demonstrations in accordance with law”, the current formulation of sub-section 2(i) is rife with the potential for abuse and requires suitable amendment.

➢ Recommendations – Section 6(2)(i)

1. The words, “or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life” should be removed from this sub-section for the reasons explained above.

2. The sub-section should be modified to include serious risks to the health or safety of the public or a section of the public. This is because ‘safety’ usually refers to issues having an immediate impact whereas ‘health’ relates to physical and mental wellbeing and thus may also include the long-term consequences of an act. Such a modification would also bring sub-section 2(i) in line with its corresponding legislative provisions in other commonwealth countries.

Section 6(2)(l), Anti-Terrorism Act, 1997

(l) is designed to seriously interfere with or seriously disrupt a communication system or public utility service;

65 Section 6(1), Anti-Terrorism Act, 1997.
This particular sub-section is intended to counter the increasing risk of cyberterrorism. All the foreign commonwealth jurisdictions examined above have a provision similar to S.6(2)(l) of the ATA. However, there are important yet subtle differences in each definition.

The UK’s definition requires an action to be ‘designed seriously to interfere with or serious to disrupt an electronic system’. This formulation makes the UK’s definition the broadest for two reasons. Firstly, it includes actions which are ‘designed seriously to interfere or disrupt’ an electronic system. This wording makes it clear that it is not necessary for the action to result in serious interference with, or serious disruption to, the electronic system: it is sufficient that the action is designed to have that effect. Secondly, this definition merely refers to an ‘electronic system’ and neither defines this term nor provides any examples of such a system.

The Australian definition is narrower, in that the ‘design’ element is excluded. Further, ‘electronic systems’ is defined by referring to a (non-exhaustive) list of systems, such as telecommunications, financial, transport, essential public utility etc.

The Canadian definition does not make explicit reference to an ‘electronic system’ and instead requires serious interference with or serious disruption of an ‘essential service, facility or system, whether public or private’. Its ambit is therefore considerably broad, but is limited by the word ‘essential’. However, no determinative criterion is provided in this regard.

Finally, New Zealand’s definition requires serious interference or disruption to an infrastructure facility if likely to endanger human life. The link to the endangering of human lives makes this definition perhaps the most restrictive by comparison.

☑️ Legislative Defect: Limited applicability of S.6(2)(l), ATA

In the case of Pakistan, it is appropriate that the ATA, like the UK Terrorism Act, includes actions which are ‘designed’ to seriously interfere with or disrupt such systems. However, this sub-section does not adequately reflect the increasing threat of cyberterrorism and is limited in its application to attacks on ‘communication systems’ and ‘public utility services’. Given the current technology revolution in Pakistan, with increasing inter-connectivity
between banking, commerce, telecommunications and public utility systems and the enhanced role of critical government databases like NADRA, there is a crucial need to extend the ambit of sub-section S.6(2)(l).

➢ Recommendations: S.6(2)(l)

1. The ambit of this sub-section should be broadened. This would require removing the specific references to ‘communication systems or public utility service’ and replacing these instead with broader reference to an electronic system or an essential infrastructure facility. Illustrative (non-exhaustive) examples can then be provided as per the Australian model to provide the appropriate context to the provision.

2. Additionally or alternatively, reliance may be placed on the concept of ‘critical infrastructure’, i.e. those material assets, systems or services which, if destroyed, damaged or disrupted through physical, cyber or other means would risk national security, endanger public health or safety, threaten economic security, jeopardize the continuity of government, lower public confidence, or bring the nation into disrepute.

❖ Section 6(2): Additional Actions

The preceding section illustrated the considerable overlap of multiple sub-sections of Section 6(2) with the laws of major commonwealth countries. However, the similarities end here. This is because Section 6(2) contains eleven further sub-sections, which are at once, both too narrow and too wide. Too narrow because they focus on very specific actions which are arguably redundant, being covered by broad actions already contained in preceding sub-sections (such as the causing of death, grievous violence, and grievous damage to property etc.). At the same time, these further sub-sections may also be too wide, in that some can extend to cover ordinary criminal activities while others include elements of intention, conflating the distinction between Section 6(2) and Section 6(1)(b). The breadth and exhaustive nature of Section 6(2) is accordingly what make the Pakistan definition stand out vis-à-vis the definition of terrorism in other Commonwealth jurisdictions.
Section 6(2)(e), Anti-Terrorism Act, 1997

(e) involves kidnapping for ransom, hostage-taking or hijacking;

As seen above, a major chunk of the current caseload of the ATC’s in Pakistan relates to cases involving abductions and kidnapping for ransom. It is interesting to note that the offence of kidnapping for ransom is specifically mentioned in two separate areas of the ATA. Apart from Section 6(2)(e), this offence is also explicitly listed as falling within the exclusive jurisdiction of the ATC’s vide Clause 4(i) of the Third Schedule (although Clause 4(i) does not include hostage-taking or hijacking). As will be seen in the next section, this Report recommends that Clause 4(i) of the Third Schedule should be omitted from the ATA altogether since it provides exclusive jurisdiction to the ATC’s to try all cases of kidnapping for ransom without the statutory safeguards of S.6(1)(b) & (c). It is further argued that terrorism cases involving kidnapping for ransom would already be covered by S.6(2)(e) and hence there is no need for its separate inclusion within the Third Schedule.66

However, the question remains whether S.6(2)(e) is even necessary as a provision in the first place. The sub-section relates to three distinct crimes; kidnapping for ransom, hostage-taking and hijacking. All these are undoubtedly aggravated offences of a heinous nature. Indeed, hostage-taking and hijacking may even be regarded as one of the quintessential forms of (traditional) terrorism.

Nevertheless, it is questionable whether there is a need to specifically make reference to these crimes under S.6(2) of the ATA since they can easily be accommodated within the framework of the other broad sub-sections of Section 6(2). Thus, any of these crimes which involve death or serious physical harm would be covered by S.6(2)(a) and (b). All three are actions which would endanger a person’s life and/or create a serious risk to the safety of the public and hence would fall within the ambit of 6(2)(d) and (i). If these offences could not be adequately covered by the above mentioned general sub-sections, they would undoubtedly have been incorporated within the definition of terrorism in other jurisdictions. Their exclusion from foreign definitions indicates that no particular purpose is served by such specificity.

66See Pages 124 – 127 of this Report.
The arguments made in the preceding paragraph are repeated by this Report in relation to sub-sections 2(h), 2(j) and 2(n) of Section 6. However, they are particularly relevant for sub-section 2(e), since an analysis of case law under the ATA reveals that hundreds of ATA cases relate to ordinary kidnapping for ransom cases which have no connection with terrorism. This is partly attributable to the unstable jurisprudence and a lack of application of S.6(1)(b) and (c). Nevertheless, the specific reference to kidnapping for ransom in S.6(2)(e) and Clause 4(i) of the Third Schedule constitutes the major reason for the existing state of affairs.

It should be noted however that kidnapping for ransom constitutes a potent source of terrorist financing in Pakistan today.\textsuperscript{67} This may explain the emphasis the ATA places on this particular offence. The link between terrorist financing and kidnapping for ransom is discussed further below.\textsuperscript{68} This Report will suggest that specific reference be made in Section 11(H), ATA (which relates to fundraising) for those abductions or kidnappings carried out by terrorist organizations for the purpose of generating funds for terrorism. Requiring a specific link to terrorist financing would protect against kidnappings carried out by criminal gangs or sole agents from falling within the ambit of a special law, which would instead fall within the jurisdiction of the ordinary criminal courts under the existing Section 365-A of the PPC.

While it is desirable to omit sub-section 2(e) altogether from the remit of Section 6(2), this Report makes no final recommendation vis-à-vis this sub-section. The arguments raised above and discussed in detail further below, are intended for the deliberation of the relevant stakeholders. Kidnapping for ransom and extortion are at present, particularly acute problems in Pakistan and there is increasing political resolve to bring the perpetrators to book.\textsuperscript{69} Against this backdrop, this sub-section might be useful to include from a political point of view, even redundant legally.


\textsuperscript{68} See Page 126 of this Report.

Section 6(2)(ee), Anti-Terrorism Act, 1997

(ee) use of explosive by any device including bomb blast \(^{70}\) [or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive];

- **Legislative Defect: 2013 Amendment to S.6(2)(ee)**

The 2013 Amendment to this sub-section was presumably made with the legislative intention to criminalize the possession of explosives without lawful justification as an ATA offence. While commendable and undoubtedly necessary in the present scenario, it is counterproductive to include it within the definition of terrorism under Section 6. The possession of explosives without lawful justification should be made a strict liability offence requiring no proof of mens rea and stipulate higher penalties for larger quantities. Accordingly, it should be made a separate offence under the ATA with no accompanying requirement of showing intent or purpose under S.6(1)(b) and (c) – as is currently the case. The 2013 Amendment demonstrates yet again how even the legislature seems to regard the ‘action’ under S.6(2) as the only determinative criteria for terrorism cases.

- **Legislative Defect: Use of the words ‘including bomb blast’**

With regards to the first part of this sub-section, i.e. the ‘use of explosive by any device including bomb blast’, once again, there is no particular need to include this within the definition of terrorism, since if an explosion causes death or serious injury or serious damage to property, it would be covered by sub-sections 2(a), 2(b) and 2(c) of Section 6. Even if it causes minimal damage and no loss of life, it would be covered by sub-sections 2(d) or 2(i).

However, given the frequency of bomb attacks in Pakistan and the fact that these kinds of attacks are what constitute ‘hardcore’ cases of terrorism, perhaps it would be useful to retain this section. However, its wording may be changed by omitting the words ‘including bomb blast’ as it serves no purpose and is linguistically confusing. As discussed below, these words

\(^{70}\) Added, subs. & omitted by the Anti-terrorism (Second Amdt.) Act, 2013 (XX of 2013), s. 2.
have been reproduced in Clauses 4(ii) and 4(iii) of the Third Schedule and can be a source of major interpretational difficulty.\textsuperscript{71}

- **Recommendations – S.6(2)(ee)**

1. The 2013 Amendment to Section 6(2)(ee) should be deleted. The possession of explosives without lawful justification should be made a *strict liability offence* requiring no proof of *mens rea* and stipulate higher penalties for larger quantities. Accordingly, it should be made a separate offence under the ATA with no accompanying requirement of showing intent or purpose under S.6(1)(b) and (c) – as is currently the case.

2. The words ‘including bomb blast’ should be omitted from sub-section 2(ee). The subsection may accordingly read:

   “Involves the use of explosives by any device”

**Section 6(2)(f), Anti-Terrorism Act, 1997**

(f) incites hatred and contempt on religious, sectarian or ethnic basis to strip up violence or cause internal disturbance;

Religioulsly motivated violence in Pakistan is discussed in detail in Chapter Six of this Report. From a policy perspective, it might be better to remove the *incitement* of religious/sectarian or ethnic hatred and contempt from the definition of terrorism under Section 6 and instead make this a separate offence under the Act with its own determinative criteria.

Criminalizing inter-communal violence with a particular focus on curbing attacks perpetrated simply due to the victims’ religious, ethnic, linguistic or other background, is extremely pertinent in the Pakistani context. Instances abound where violence against the Christian\textsuperscript{72} or

\textsuperscript{71}See pages 127 – 130 of this Report.

Ahmadi communities in the country has been incited using religious platforms as a vehicle for rhetoric; the problem, therefore, extends beyond the historical focus of the ATA upon sectarian conflict to broader tensions between the various religious denominations within the country and as such the antiterrorism framework needs to accommodate this broader conception of the issue.

Such instances of inter-communal violence are not intended to further a particular religious, sectarian or ethnic cause as per §6(1)(c) but are, instead, *expressions of pre-existing prejudice and intolerance* between the different religious denominations within the country. When viewed in that light, therefore, inter-communal violence based on incitement as the Christian or Ahmadi communities in Pakistan have witnessed may not fall squarely within the current ambit of the ATA though they should, in fact, do so.

- **Recommendation – S.6(2)(f)**

The *incitement* of religious/sectarian or ethnic hatred and contempt may potentially be removed from the definition of terrorism under Section 6 and instead constitute a separate offence under the Act with its own determinative criteria. In this regard, Section 11X(3) may be suitably amended.

**Section 6(2)(g), Anti-Terrorism Act, 1997**

*(g) involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land.*

Sec. 6(2)(g) was introduced through the Anti-Terrorism (Amendment) Ordinance of 2010, presumably in the back drop of the Swat military operation. Pakistan has certainly witnessed terrorist groups and criminal organizations taking the law into their own hands by meting out...
punishments. In FATA and the KPK, cases have been reported where individuals suspected of being informants or spies have been found beheaded. In Karachi, members of rival gangs have been kidnapped, tortured and even murdered. Such ‘punishments’ or retributive activity certainly have an impact on society, terrorizing the public. Such acts would also presumably serve the same ends of retribution, deterrence and neutralization/incapacitation as State sanctioned punishments for crimes. Significant argument can be made regarding the need for the State to protect its monopoly over violence and suppress vigilantism. Furthermore, there is certainly good reason to include the establishment of rival judicial mechanisms capable of dispensing punishments within the definition of terrorism. Such parallel systems directly target the writ of the State, require persons to adhere to laws that are not recognized under the Constitution of Pakistan, and have a significant impact on society with the potential to terrorize, coerce, or intimidate. Unfortunately, Sec. 6(2)(g), as it currently stands, is defective in suppressing this.

- **Legislative Defect: Inclusion of a mens rea element through the words ‘with a view to coerce, intimidate, or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land’.

Section 6(2)(g) suffers from the same flaw that exists in Sec. 6(2)(i) in that it includes a mens rea element into a part of Sec. 6 that deals primarily with the actus reus of terrorism. This Report proposes that for an act to be included within the definition of terrorism it must have been done with the intention or mens rea of terrorism. This mental element is already provided in Sec. 6(1)(b) and, therefore, the words “with a view to coerce, intimidate, or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land” are wholly redundant.

- **Legislative Defect: Breadth of Sec.6(2)(g)**

The section aims to criminalize all punishments given by entities other than the State or those that are not recognized by law. It does not define punishments nor does it outline the mechanism of their application that may be illegal. There is no criterion to distinguish a punishment from an ordinary criminal act such as murder, kidnapping or other similar
offence. This is a serious issue as it is often impossible to determine whether an individual is killed as a result of being punished for some act or simply the result of a crime committed against him. This would depend on the intent of the perpetrators or the masterminds behind the killing.

It is pertinent to note that any form of violence against a person or property would already be covered by sub-sections (a), (b), and (c). However, it is unclear if this section applies to other acts that may conceivably constitute punishments such as detention and confinement, fines, forfeiture of property, forced labor, etc. There is little doubt that almost any form of punishment that could conceivably be included in sub-section (g), which is awarded without lawful authority would already constitute an offence under the Pakistan Penal Code. Furthermore, where the punishment is not direct, in other words, where the criminal organization, individual or group imposes a fine or forces the individual to do something as a punishment, this would certainly be accompanied by a threat for not complying. The threat of violence, again, would be covered by ordinary criminal law.

In the backdrop of the Swat operation, it is conceivable that the aim of legislators was to suppress alternative mechanisms of justice that directly challenge the writ of the State. In this regard, it may be prudent to criminalize the establishment of such alternative judicial mechanisms as opposed to merely the actual act of punishing an individual. The later would thus be included in the former as the meting out of punishments would be one part of an overall judicial structure aimed at supplanting the ordinary Courts of Pakistan. This would be a more wholesome means of targeting organizations, individuals, or groups who aim to punish individuals according to their own whims or standards.

➢ **Recommendation – S.6(2)(g)**

1. If Sec. 6(2)(g) is to be retained then the *mens rea* element included in the offence is redundant and should be removed. The link to Sec. 6(1)(b) would comprehensively attach the *mens rea* requirement without confusing the *actus rea* of the offence.

2. As the aim of the sub-section is presumably to suppress entities from establishing alternative judicial structures capable of meting out punishments, it may be prudent to reorient this sub-section by targeting those who establish such alternate judicial structures
that undermine the writ of the State. This would be more in line with the classic definition of terrorism that takes terrorism to be a crime against the State.

**Section 6(2)(o), Anti-Terrorism Act, 1997**

(o) involves in acts as part of armed resistance by groups or individuals against law enforcement agencies; or

It is worth mentioning Sec. 6(2)(o) at this juncture, since it too is essentially an offence aimed at undermining the State and thus fits the classical definition of terrorism. Sub-section (o) deals with acts that are a part of an armed resistance by groups or individuals against law enforcement agencies. The breadth of the section is considerable and the words “involves in acts as part of armed resistance” could mean any act that could potentially be shown to be part of armed resistance. Thus preparatory offences would also be included.

This section can be compared with Sec. 121 of the Pakistan Penal Code which creates the offence of waging war against the state:

**121. Waging or attempting to wage war or abetting waging of war against Pakistan:**

Whoever wages war against Pakistan, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

*Illustration*

A joins an insurrection against Pakistan. A has committed the offence defined in this section.

It is evident by the very nature of the offence of ‘armed resistance’ is to coerce the State and, in Pakistan’s context, would certainly be motivated to promote a particular religious or ethnic cause. Thus the act would itself imply a certain *mens rea* to the offence or, at the very least, would make it quite easy to prove the *mens rea* behind the act.
Section 6(2)(h), Anti-Terrorism Act, 1997

*(h) involves firing on religious congregation, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;*

The ATA makes explicit reference to the use of firearms or explosives in places of worship in two separate places within the Act. The first reference is made by Section 6(2)(h) while the second is found under clause 4(ii) of the Third Schedule. As will be seen further below, this Report suggests that clause 4(ii) of the Third Schedule may be omitted altogether, since the action it relates to is already covered by sub-section 2(h) of the Section 6 of the Act.

However, it may be further argued that even sub-section 2(h) serves no particular purpose and may be omitted from the Act. It cannot be denied that Pakistan has witnessed dozens of attacks in recent history that have involved serious violence against religious congregations, mosques, imambargahs, churches, temples and other places of worship. Indeed, at the time of the filing of this Report, the city of Peshawar suffered yet another devastating bomb blast in a church which killed 127 people and injured 170. Nevertheless, the definition of terrorism under the ATA does not require sub-section 2(h) to bring the perpetrators of such vicious acts within its purview. Such actions can easily be covered by sub-sections 2(a),(b),(c),(d),(ee) and (i) of Section 6. Provisions such as sub-section 2(h) have presumably been added to ensure that the anti-terrorism special law applies to such devastating attacks. Ironically however, the specificity of the provisions actually undermines the purpose of Section 6 and muddles its application. This argument is reinforced by referring to the ‘action’ clauses in countries with similar anti-terrorism legislation, which merely lay out in broad strokes the types of ‘actions’ which may constitute terrorism and rely on the intention and purpose behind the act as the real filtering mechanism for acts of terrorism.

➢ Recommendation – S.6(2)(h)

Sub-section 2(h) of Section 6 should be omitted altogether from the ATA as it relates to acts or situations which are already adequately covered by a wide range of provisions within the Act.
**Section 6(2)(j), Anti-Terrorism Act, 1997**

(j) involves the burning of vehicles or any other serious form of arson;

Section 6(2)(j) of the ATA should be removed from category of actions under S.6(2). This is because it relates to an activity that can be easily dealt with under the ordinary criminal law. It is possible to conceive of a terrorist attack - perpetrated with the necessary intention and purpose - that involves serious arson. However such an attack would constitute serious damage to property, and as such would fall within the ambit of sub-section 2(c) of Section 6. It is also likely to cause death or endanger a person’s and create a serious risk to the safety of the public, hence being caught by the various broad sub-sections of Section 6.

Given the ‘action-based’ interpretation of terrorism favored by many in the judiciary and apparent in the legislative amendments to Section 6, it is dangerous to include the burning of vehicles and serious arson as a specific action under S.6(2). The burning of vehicles and tires is a relatively common occurrence in Pakistan, often employed as a tactic by ordinary protestors to express dissatisfaction with the government on various subjects ranging from price hikes to gas and electricity load shedding. An expansive, ‘action-based’ interpretation of Section 6 may result in even minor protests involving minimal violence falling within the ambit of a special law, something which can easily be dealt with under the ordinary criminal law. This would compromise due process and increasing the burden on the Anti-Terrorism Courts.

➢ **Recommendation – S.6(2)(j)**

Sub-section 2(j) of Section 6 should be omitted altogether from the ATA as it relates to acts or situations which are already adequately covered by a wide range of provisions within the Act. The removal of this section from the scope of the Act is particularly necessary given its potential for abusing the application of a special law.

**Section 6(2)(k), Anti-Terrorism Act, 1997**

(k) involves extortion of money ("bhatta") or property;
The extortion of money or property are activities that are generally regarded as falling within the ambit of organized crime as opposed to terrorism per se. Nevertheless, the lack of an adequate legal and administrative framework for dealing with organized crime coupled with increasing reliance by terrorist organizations in Pakistan on bhatta makes this a useful sub-section to Section 6(2). This Report accordingly makes no recommendations vis-à-vis this sub-section.

Section 6(2)(m), Anti-Terrorism Act, 1997

(m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties;

This Report makes no recommendations vis-à-vis this sub-section.

Section 6(2)(n), Anti-Terrorism Act, 1997

(n) involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant;

The arguments outlined above in relation to sub-sections 2(e), 2(h) and 2(j) of Section 6(2) also apply in relation to this sub-section. As serious violence against a person is already covered by S.6(2)(b), it makes little sense for another sub-section to specifically refer to serious violence against public servants etc. The inclusion of ‘serious coercion or intimidation of a public servant’ within the definition via S.6(2)(m) further reduces the need for sub-section 2(n).

The inclusion of this sub-section is also dangerous given that it may allow law enforcement agencies the leverage to expand the application of the ATA by charging even trivial offenders under the Act. This is illustrated well in PLD 2003 Lahore 588, a case involving S.6(2)(n) of the Act. According to the Lahore High Court:

“Most of the allegations in the FIR were found to be untrue. Injuries were grossly exaggerated in an attempt to bolster and enhance the seriousness of the incident so as to attract the jurisdiction of a court constituted under the ATA and punish the parties for more than they had actually done...A minor and not so serious incident of an
altercation and a push, shove or scuffle taking place at the spot had apparently been given a color by the complainant of a graver matter involving 'terrorism'.

It is also pertinent to note that at first instance, the ATC had dismissed the application under Section 23 to transfer the case to an ordinary criminal court. Given the prevailing sense of confusion amongst the police, prosecutors and the judiciary as to what precisely constitutes an act of terrorism under Section 6, it is recommended that this sub-section be omitted from the ATA to prevent the misuse of the special law.

➤ Recommendation – S.6(2)(n)

Sub-section 2(n) of Section 6 should be omitted altogether from the ATA as it relates to acts or situations which are already adequately covered by a wide range of provisions within the Act. The removal of this section from the scope of the Act is particularly necessary given its potential for abusing the application of a special law.

Section 6(2)(p), Anti-Terrorism Act, 1997

(p) involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments.

The final sub-section of Section 6(2) was inserted by first Anti-terrorism Amendment Act of 2013 although it was proposed as early as 2010. The sub-section was presumably introduced as a – kneejerk – response to the illegal FM station set up earlier by Maulana Fazlullah in the Swat in which prohibited activities were announced in nightly broadcasts and the names of violators announced for assassination, terrorizing the inhabitants of the area.

➤ Recommendations – S.6(2)(p)

1. This Report finds sub-section 2(p) to be legislatively defective in many respects and recommends its omission from the list of actions under Section 6(2). The provision is

74 S.3 Anti-Terrorism (Amdt.) Act, 2013 (XIII of 2013)
exceptionally broadly worded, and may potentially constitute a violation of fundamental rights under the Constitution, including the freedom of speech under Article 19 and the freedom to profess religion and to manage religious institutions under Article 20. It is interesting to note that this sub-section does not require a FM station to be illegal. This potentially means that anyone discussing their own beliefs on a radio show without the ‘explicit approval of the government’ can be regarded as being engaged in terrorist activity!

2. While it cannot be denied that government regulation on the dissemination of religious teachings, beliefs and ideas is necessary and extremely pertinent in the Pakistani context, the solution is unlikely to lie in clubbing such activities as acts of terrorism under Section 6. Such activities can effectively be regulated by a statutory framework outside the ATA.

3. If however, these activities have to be included within the ATA framework, then they should be accommodated, after suitable amendment, within the existing provisions of the ATA outside of Section 6, especially those provisions dealing with hate speech. Chapter 6.4 of this Report explores hate speech and the incitement of inter-communal hatred in detail. In such a scenario, careful attention would be required in legislative drafting to ensure that the measures are proportionate and do not derogate from fundamental rights.

III. Section 6: Miscellaneous Provisions

Section 6(3A), Anti-Terrorism Act, 1997

The Anti-Terrorism (Amdt.) Act, 2013 attempted to bring Pakistan’s anti-terrorism legal framework in line with its international law obligations on this subject. In this regard, a new, fifth schedule which enlists several UN Conventions and Protocols related to terrorism and specifically establishes the jurisdiction of ATCs to try persons who violate or commit offence(s) under these Conventions. The 2013 further amends Section 6 of the Act by inserting a new provision in the form of Section 6(3A) which reads:

(3A) Notwithstanding anything contained in sub-section (1), an action in violation of a convention specified in the Fifth Schedule shall be an act of terrorism under this Act.
An analysis of the Fifth Schedule to the ATA and Section 6(3A) is provided in detail in Chapter Ten of this Report, which questions the wisdom of introducing a non obstante clause in the form of Section 6(3A), which is unclear and vague from a legal standpoint. It is argued that the said amendment has not brought required changes in other corresponding provisions of the ATA vis-à-vis the purpose of effective prosecution and conviction of an accused person.

**Section 6(6), Anti-Terrorism Act, 1997**

(6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

➤ **Legislative Defect: Use of the words ‘or any other provision of this Act’**

Chapter 2.2 of this Report provides a detailed overview of the legal requirements necessary for triggering the applicability of the ATA. Essentially, an act must be classified as a Scheduled Offence to bring it within the ambit of the ATA. According to Section 2(t), Scheduled Offences mean any offence set out in the Third Schedule of the Act. The Third Schedule contains four clauses, each of which constitutes a separate route through which an act may fall within the jurisdiction of the ATC’s.

The first clause of the Third Schedule relates to ‘any act of terrorism within the meaning of this Act’. As seen above, Section 2(x) provides that an act of terrorism has the meaning assigned to it in Section 6. The second clause of the Third Schedule relates to ‘any other offence punishable under this Act’. A complete list of these offences is provides in Chapter 2.2 above.

Section 6(6) however, blurs the distinction between Section 6 and the various other offences punishable under the ATA. Through this provision, all the various offences listed in the Act automatically become acts of terrorism, without the restrictive criteria of S.6(1)(b) and (c) or the requisite actus reus of S.6(2).

The various offences scattered across the ATA, such as membership of proscribed organization, terrorist financing and money laundering, non-disclosure, interference with
evidence, defective investigation etc. are Scheduled Offences, meant to provide the ATC’s with the jurisdiction to try such cases. They do not, and should not, be regarded as acts of terrorism in and of themselves. As such, the words ‘or any other provision of this Act’ should be omitted from Section 6(6) since it makes the second clause of the Third Schedule redundant and undermines the entire definition of terrorism provided by the preceding sub-sections of Section 6.

➢ Recommendation – S.6(6)

Section 6(6) of the ATA should be amended by omitting the words ‘or any other provision of this Act’. The amended section would accordingly read as follows:

“A person who commits an offence under this section shall be guilty of an act of terrorism.”

2.3.2 The Third Schedule to the Anti-Terrorism Act, 1997

It was seen in section 2.2 (above) that the Third Schedule provides the mechanism through which offences are classified as Scheduled Offences and hence are triable by the ATC’s under Section 12 of the Act.

The Third Schedule contains four clauses, each of which provides a route through which an offence may be classified as a Scheduled Offence. The first clause relates to ‘any act of terrorism within the meaning of this Act’. According to Section 2(x) of the Act, this relates to offences falling within the meaning of Section 6. The legislative defects and inconsistencies pertaining to Section 6 were discussed in detail in the preceding section.

In addition to Section 6, the ATA also creates various other offences which are scattered across its provisions. These include, inter alia, offences relating to proscribed organizations (membership, raising funds, solicitation and support, wearing uniform or displaying symbols etc.), offences involving terrorist financing and money laundering, creation of civil commotion, providing training in terrorism and aiding or abetting offences under the Act etc.

A complete list of the various offences created by the ATA is provided in section 2.2 of this Report (above). As a result of the second clause of the Third Schedule, these offences also
constitute a *Scheduled Offence* and are accordingly exclusively triable by the ATC’s under Section 12.

An analysis of offences additional to Section 6 is contained in various chapters of this Report.\(^75\) For the purposes of this section however, it is our opinion that such offences correctly fall within the jurisdiction of the ATC’s, as these offences have a clear nexus with terrorism and provide legal mechanisms to intercept and obstruct terrorist acts. As such, their inclusion within the scope of *Scheduled Offences* is warranted.

Clause 3 of the Third Schedule is a preventive provision and includes within the scope of the *Scheduled Offence* any attempt to commit or any conspiracy to commit, any of the offences provided under the ATA, including aiding and abetting of such offences. This includes the offence of terrorism under Section 6 as well as all the other offences scattered across the Act. From a jurisdictional perspective, we find no fault with this clause, since the ATC’s constitute the correct and necessary forum for hearing such cases.

Clause 4 was inserted by an amendment to the ATA in 2005\(^76\) and greatly widens the ambit of the Act. It is our opinion that this clause of the Third Schedule is particularly problematic from a jurisdictional point of view, since its broad and ambiguous formulation makes the ATA especially susceptible to abuse by investigation agencies and misinterpretation by the courts. Based on the arguments set out below, it is recommended that the final clause of the Third Schedule may be omitted altogether or at the least severely curtailed in its scope so as to better reflect the objectives and purpose of an anti-terrorism special law.

**Legislative Defect: Clause 4(i) of the Third Schedule**

Clause 4(i) of the Third Schedule provides *exclusive jurisdiction* to the ATC to try all offences involves abduction or kidnapping for ransom. The principal legislative defect with this provision is that it provides no qualifying criteria nor requires any link to terrorism. Hence, the filtering mechanism provided by Sections 6(1) (b) and (c) relating to design and purpose are excluded altogether. As such, *all* cases involving abduction or kidnapping for

\(^{75}\)See Chapter 4 (Proscribed Organizations); Chapter 5 (Preventive Detention); Chapter 6 (Terrorist Financing and Money Laundering) and Chapter 7 (Religiously Motivated Violence).

\(^{76}\)Act No. II of 2005, S.14.
ransom fall within the exclusive domain of the ATC’s, regardless of whether they are carried out by ordinary criminals, mentally disturbed persons or terrorist organizations for the purposes of terrorist financing.

The all-encompassing nature of the kidnapping for ransom clause in the Third Schedule is illustrated by the case of *Rana Abdul Ghaffar vs. Abdul Shakoor*\(^{77}\) in which an abduction case was initially held by the Lahore High Court as not attracting the jurisdiction of the ATC since it did not satisfy the requirements of Section 6 of the Act. Accordingly, it was transferred to the Additional Sessions Judge, to be tried under Section 365-A of the Pakistan Penal Code.\(^{78}\)

With the subsequent coming into effect of the 2005 Amendment however, the case was once again transferred to the ATC, not because the kidnapping was associated with terrorism, but simply due to its presence in the Third Schedule. The Lahore High Court observed:

“The Third Schedule appended with the Anti-Terrorism Act, 1997 not only mentions the offence of ‘terrorism’ but also mentions other offences which now, through the above mentioned amendment introduced on 11-1-2005, includes an offence of abduction or kidnapping for ransom. This unmistakably shows that an Anti-Terrorism Court can try not only an offence of ‘terrorism’ as defined in section 6 of the Anti-Terrorism A Act, 1997 but it can also try any other offence which is declared by the law to be exclusively triable by such a Court.”

Our case studies reveal that this provision has resulted in an exponential increase in the number of cases tried by the ATC’s which has serious implications for resource allocation amongst the police and the ATC’s. As mentioned previously, such overburdening of the system has debilitating effects for real terrorism cases.

---

\(^{77}\) PLD 2006 Lahore 64

\(^{78}\) Section 365-A, PPC relates of the offence of kidnapping or abduction under ordinary criminal law in Pakistan. It reads as follows: Kidnapping or abduction for extorting property, valuable security etc. Whoever kidnaps or abducts any person for the purpose of extorting from the person kidnapped or abducted, or from any person interested in the person kidnapped or abducted any property, whether movable or immovable, or valuable security, or to compel any person to comply with any other demand, whether in cash or otherwise, for obtaining the release of the person kidnapped or abducted, shall be punished with [death or] imprisonment for life and shall also be liable to forfeiture of property.]
It is pertinent to note however, that kidnapping for ransom along with extortion and car-jacking, are three important sources of terrorist financing in Pakistan.\(^79\) Indeed, the United States in 2012 estimated that terrorist organizations around the world had amassed approximately $120 million in ransom payments in the past eight years, making it one of the most serious terrorism financing challenges facing governments today.\(^80\) According to official sources, the Tehreek-i-Taliban Pakistan (TTP) generated funds to the tune of Rs. 3 billion between 2008-2012 through kidnappings and extortions in Karachi, Islamabad and Rawalpindi alone.\(^81\)

Apart from serving as a source of terrorist financing, the offence of kidnapping itself has been used for terrorist purposes since decades. This is particularly true of abductions which target key officials, whose incapacitation threatens the continuity of government, induces public anxiety, lowers national morale and public confidence, and brings the nation into disrepute.

Notwithstanding the above, clause 4(i) of the Third Schedule remains defective, in that it requires no link to terrorist financing to be established, nor does it require the kidnapping to be done with the necessary intent or motivation to constitute an act of terror. With respect to the latter, it is relevant to note that S.6(2)(e) already includes kidnapping for ransom within the list of actions which may constitute terrorism under Section 6, provided the necessary design or purpose is present as required by sub-sections 1(b) or 1(c). The separate inclusion of kidnapping for ransom without these qualifying criteria in the Third Schedule accordingly makes little sense and unacceptably increases the caseload of the ATC’s. While it cannot be denied that kidnapping for ransom constitutes a heinous offence, it should not, in and of itself, require the application of a special law.


Recommendations: Clause 4(i), Third Schedule, Anti-Terrorism Act, 1997

1. Clause 4(i) of the Third Schedule, relating to abduction or kidnapping for ransom, may be omitted altogether from the Schedule. The offence can adequately be blended within the existing provisions of the ATA.

2. Kidnapping committed with an intention to coerce or intimidate the government or the public and carried out for the purpose of advancing a religious, sectarian, ethnic (or subject to amendment, political, racial, ideological) causes can already be accommodated within Section 6, since Section 6(2)(e) specifically includes this offence within the range of actions which may constitute terrorism. If the increased safeguards proposed in this Report vis-à-vis Section 6 are incorporated, genuine terrorism cases involving kidnapping (such as those targeting key officials mentioned above) can adequately fall within the jurisdiction of the ATC’s.

3. Specific reference may be made in Section 11(H), ATA (which relates to fundraising) for those abductions or kidnappings carried out by terrorist organizations for the purpose of generating funds for terrorism. Accordingly, where there is reasonable cause to suspect that an abduction or kidnapping for ransom has taken place for the purpose of terrorism or by a terrorist or by an organization concerned with terrorism, this would constitute a separate offence under Section 11(H) of the ATA with its separate sentencing implications. Requiring a specific link to terrorist financing would protect against kidnappings carried out by criminal gangs or sole agents from falling within the ambit of a special law, which would instead fall within the jurisdiction of the ordinary criminal courts under the existing Section 365-A of the PPC.

Legislative Defect: Clauses 4(ii) and 4(iii) of the Third Schedule

Clauses 4(ii) and 4(iii) of the Third Schedule are curious legislative provisions, notable for their poor drafting and vague language. At best, these provisions overlap significantly with existing sub-sections of Section 6, rendering them redundant. At worst, they may be interpreted to widen the ambit of the ATA to the majority of crimes which take place in Pakistan today.
Clause 4(ii), Third Schedule

(ii) “use of fire arms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby...”

The legislative intent behind this clause of the Third Schedule is unclear. Presumably, the clause intends to cover those offences which target places of worship, including mosques, imambargahs, churches and temples etc. by using fire arms or explosives. If this interpretation is correct, clause 4(ii) may be redundant as these offences already fall within the scope of acts covered by S. 6(2). Section 6(2)(ee) relates to actions involving the “use of explosive by any device including bomb blast” whereas Section 6(2)(h) mentions actions involving “firing on religious congregation, mosques, imambargahs, churches, temples and all other places of worship...”

Therefore, any attack of places of worship which rely on the use of explosives or firearms would already be covered by sub-sections 2(ee) and 2(h) of Section 6. However, their separate inclusion in the Third Schedule may indicate a legislative intent to make these offences strict liability offences, with no accompanying mens rea requirement, thereby improving the chances of a conviction in such cases.

Unfortunately, the ambiguity in the wording of this clause means that it can be interpreted as including any offence in which a firearm or explosive is used, thereby undermining the entire basis of a special law. The primary cause of this ambiguity lies in the use of the word ‘including’. This usage makes it unclear whether the generic description of the offence (the use of firearms or explosives by any device) applies specifically to attacks on places of worship, or whether it applies to any situation where a firearm or explosive is used.

As noted in the preceding section, Section 6(3) of the ATA specifically caters to offences involving firearms and explosives. However, this is qualified in two important respects. Firstly, the terrorist offence must involve the use or threat of action falling under sub-section (2). Secondly, the action must be accompanied by the necessary design (or intent) stipulated in sub-section 1(b). The legislative lacunas of Section 6(3) were discussed in the previous section. These defects notwithstanding, Section 6(3) remains a qualifying provision, requiring certain criteria to be fulfilled before an offence involving firearms or explosives can be
categorized as an act of terrorism. In contrast, clause 4(ii) of the Third Schedule, due to its ambiguous wording, undermines the safeguards of Section 6, and may result in any case involving the use of firearms or explosives being triable, in and of itself, under the ATA.

Clause 4(iii), Third Schedule

(iii) “firing or use of explosive by any device, including bomb blast in the court premises.”

The observations made above regarding clause 4(ii) apply largely to this clause as well. Once again, there is ambiguity in the statutory language as to whether this clause applies specifically to attacks on court premises which involve firing or the use of explosives, or whether it applies to any situation where a firearm or explosive is used.

The necessity of including attacks on court premises as a separate offence under the Third Schedule is also doubtful, since such attacks would already satisfy most of the provisions of sub-section (2), including S.6(2)(c), (d), (ee), (i) and (m). The application of Section 6(3) would also be triggered. As such, the utility of this clause is doubtful, unless such acts are to be regarded as strict liability offences. Even in such a case, the statutory language would require redrafting for further clarity in order to limit the possibility of abuse.

➤ Recommendations – Clauses 4(ii) and 4(iii), Third Schedule

3. Clauses 4(ii) and 4(iii) may be omitted altogether from the Third Schedule, since the situations they relate to are already catered for by the ATA. Attacks on places of worship by the use of firearms and/or explosives are actions which would squarely fall within the scope of Section 6(2), specifically sub-sections 2(ee) and 2(h). Similarly, attacks on court premises by the use of firearms and/or explosives would be covered by multiple provisions of Section 6(2).

4. If however, the legislative intent is to make such offences strict liability offences, then the words “use of firearms and explosives by any device, including bomb blast” should be removed from these clauses. This would resolve the statutory ambiguity which currently exists with regard to these clauses and also remove the confusion vis-à-vis the applicability of Section 6(3) and Section 6(1)(b) and (c) in such cases. However, Section
6(2) (h) would require suitable amendment if this course is adopted. Nevertheless, the wisdom of making such acts as strict liability offences is a question of debate and would require further research.

Scheduled Offences: Assessing the Utility of the Third Schedule

Notwithstanding the specific comments made above regarding the Third Schedule, an additional argument can be made as to whether it is even necessary, or desirable, for the ATA to adopt a “scheduled offence” approach towards jurisdiction in the first place. As seen above, all the present clauses of the Third Schedule are such that they can be adequately blended into the main body of the anti-terrorism statute, obviating the need for a separate schedule.

Section 12 of the Act can be modified so as to bring clauses 1, 2 and 3 of the Third Schedule within its scope. Thus, any acts of terrorism within the meaning of Section 6 and any other offence punishable under the Act would trigger the jurisdiction of the Anti-Terrorism Courts. This would also include any attempt or conspiracy to commit or any aid or abetment of such offences. With such an amendment, the subjects of the first three clauses of the Third Schedule would be accommodated within the main body of the Act and would obviate the need to classify them separately as Scheduled Offences.

With regards to offences involving abduction or kidnapping for ransom, this Report recommended the deletion of clause 4(i) of the Third Schedule for the reasons set out above. Similarly, this Report recommended that clauses 4(ii) and (iii) may also be deleted, since they relate to acts which can adequately be dealt with by the existing provisions of the ATA. However, certain amendments were suggested in the case of a legislative intent to declare such acts as strict liability offences. Even in such a case, it may be more desirable to create separate offences involving attacks on places of worship or court premises within the main body of the ATA that clearly specific the strict liability nature of such offences. This would remove the need for their inclusion under the Third Schedule.

Based on the reasoning above, there is little need for retaining the Third Schedule of the ATA. There is precedent for this approach in some European countries and the Council of Europe Convention on the Prevention of Terrorism. However, the objective of the ‘scheduled
offence approach’ in other jurisdictions is to avoid the pitfalls of a separate definition of terrorism and instead categorize certain offences as being potentially terrorist and apply special powers in relation to them. Importantly, the overwhelming majority of these countries do not have a specialized trial system to try suspected terrorists. Hence, defendants continue to receive the constitutional protection of the criminal courts.

In the case of Pakistan however, the context remains different, since the ATA already defines what constitutes an act of terrorism and sets up special courts to deal with offences under the Act. Against this backdrop, the use of a Scheduled Offence approach may be questionable, since its application broadens the ambit of a special law and renders it susceptible to abuse by the possible inclusion of offences which have no nexus with acts of terrorism. This was illustrated in the Mehram Ali case, where the petitioners had argued that the Government had abused its powers under the Act to amend the Schedule by adding offences which had no nexus with the object of the Act. Further, case law under the Third Schedule and multiple legislative amendments thereto indicate that Scheduled Offences remains an elusive concept under the ATA and has resulted in interpretational difficulties and inconsistencies.

These criticisms notwithstanding, there is also intrinsic value in retaining the Scheduled Offence approach, primarily because it affords the Executive the necessary flexibility to implement the object of the Act and to respond quickly to the constantly evolving nature of the threat. A possible solution aimed at preventing abuse can be to amend Section 34 so as to place the principle of nexus enunciated by the Honorable Supreme Court in Mehram Ali on a statutory footing. Hence, under Section 34, the Government may only amend the Third Schedule by including those offences which have a nexus with the object of the Act, and specifically with acts of terrorism under Section 6.

In conclusion, this Report makes no determination as to whether the “scheduled offence approach” via the Third Schedule of the ATA should be retained or not. The above discussion is however, intended to generate further debate on this issue amongst the concerned stakeholders and policy makers.
2.3.3 The Preamble to the Anti-Terrorism Act, 1997

i) The role of a preamble in a Penal Statute

A preamble is an amendable, descriptive part of a statute, which is normally situated after the long title and before the substantive provisions of the law in the Act.\(^{82}\) It illustrates the purpose, scope and spirit of the law contained in the Act. It is said that the preamble has no enacting force, i.e. it is not a source of positive law, compared to the provisions which follow it.\(^ {83}\) Furthermore, preambles can be said to have a dual role, i.e. a contextual and a constructive role. The constructive role is where the preamble is used as an aid in interpreting ambiguous or equivocal provisions, and the contextual role is where the preamble aids with affirming the ordinary meaning of the text of the Act.\(^ {84}\) In view of the difficulties pertaining to the scope of the ATA as illustrated by the preceding sections, it is imperative that the preamble to the ATA contains a forceful statement of purpose on behalf of the legislature. In this regard, this report proposes an overhaul of the ATA’s preamble so that the preamble plays a more constructive role in giving the underlying logic of the Act the force of law.

A review of penal statutes in Pakistan shows that preambles are not accorded primary significance. This can be gleaned from various statutes enacted over the years. The Suppression of Terrorist Activities 1975, Control of Narcotic Substances Act 1997, and the Anti-Terrorism Act 1997 are all examples of this minimalist approach as their preambles merely set forth the aim of the Act and have not clearly identified the scope of the law. There has however been a recent change in trend as the Investigation for Fair Trial Act 2013 contains a lengthier and more comprehensive preamble. A comprehensive preamble need not necessarily be lengthy, as long as it deals with the broad issues that arise, without widening the ambit of the law to an undesirable extent.

The judiciary has also laid emphasis on using the preamble as an important aid to interpretation of legislative instruments. As a guide to legislative intent and the object of the

---

Act, the preamble may delineate how various ambiguous enactments may be restrained\textsuperscript{85} or enlarged\textsuperscript{86}. In the case of \textit{Powell v Kempton Park Race Course Co}\textsuperscript{87}, Lord Halsbury elucidated that a preamble may afford useful light as to what a statute intends to reach, and that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.

Moreover, Sir John Nicholl in the case of \textit{Brett v Brett} stated,

\emph{The key to the opening of every law is the reason and spirit of the law-it is the ‘animus imponentis’, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connexion with its whole context-meaning by this as well the title and preamble as the purview or enacting part of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute; rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature in making and passing the statute itself.}\textsuperscript{88}

Pakistan’s Supreme Court in a key ATA judgment\textsuperscript{89} held that the preamble of a statute is a legitimate aid in discovering the purpose of a statute. The preamble of a statute has been said to be a good means of finding out its meaning and intent and, as it were, a key to the understanding of it. The study of the preamble to a piece of legislation provides a clue to arriving at the intention of the lawmaker. If however, there is an inconsistency or conflict in the plain meaning of the Act and the Preamble, the latter has to give in and the statute is to be construed according to its plain meaning. A preamble sheds useful light as to what a statute is intended to achieve or remedy, however, it is true that the preamble cannot control, restrict, extend or otherwise add to or detract from a substantive provision of the statute, where it is expressed in clear unambiguous language. Therefore, the preamble also has its limitations and it cannot be applied to explain the Act except where the provisions contained in its body

\textsuperscript{85} \text{Powell v Kempton Park Race Course Co Ltd [1989]}
\textsuperscript{86} \text{See Earl of Halsbury, \textit{Laws of England}, vol 27 (1913) Statutes, ‘2 Classification and Framework’ [2011]. See also Maxwell, (1 ed, 1875), above n 13, 46.}
\textsuperscript{87} \text{[1897] House of Lords.}
\textsuperscript{88} \text{Brett v Brett(1826) 3 Add 210; 162 ER 456, 458-9.}
\textsuperscript{89} \text{PLD 2005 SC 530}
are otherwise vague. The same approach is evident in substantial judgments such as PLJ 2008 SC 182, PLD 2008 Karachi 260, PLD 2012 Baluchistan 122 to name a few.

➤ Legislative Defect: Preamble to the ATA

The preamble of the Anti-Terrorism Act 1997 states, ‘an Act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences.’ As mentioned above, the judiciary views a preamble as a legitimate aid in discovering the purpose of the statute. Therefore, the preamble holds seminal importance and cannot be sidelined when inferring the spirit of the law.

Unfortunately, as case studies reveal that many ordinary criminal offences have been bought within the ambit of the ATA by simply focusing on the ‘heinous’ nature of the offence. This is well illustrated by the case of Sheral v Sajan alias Sajoo90, the learned counsel for the appellant submitted that for an offence to fall within section 6 of the ATA, there are two requirements. Firstly, the offence should be heinous and secondly, that the offence should have the impact of creating terror in the minds of the general public. This was a case involving ordinary homicide and not a case pertaining to terrorism per se; regardless it was still transferred to an ATC to be heard and disposed of expeditiously.

The Anti-Terrorism Act is a special law that should only cater to a speedy trial of cases that reflect terrorist intent and motivation, crimes that justify the suspension of the constitutional protections of the ordinary criminal courts. One of the reasons that the ATCs seem to be handling cases of ordinary criminal offences is the wording of the preamble of the ATA. Due to the inclusion of the word ‘heinous’, a trend for classifying almost every theft, homicide, and kidnapping case as a terrorism case has emerged. This approach focuses on the nature, gravity and cumulative fall-out of the offence.91 Counsel normally stresses upon the brutality and savageness of the act, and whether people were witness to it. This directly translates to the anti-terrorism courts having fewer time and resources for cases which actually pertain to terrorism.

---

90 2011 YLR 2929 Karachi High Court
91 These are categorized as the action-based approach in our Report (see above).
➢ Recommendations – Preamble to the ATA

1. It is recommended that the word ‘heinous’ be removed from the preamble so that the language cannot be misconstrued to include ordinary criminal offences which are heinous in nature. However, simply doing that might not accomplish the task and issuance of policy guidelines for the judiciary might be necessary, which will be addressed subsequently in this report.

2. The preamble should ideally also state that the Act contains special law and should not be applied to ordinary criminal offences for sentencing purposes.

2.3.4 The Lack of Explanatory Notes & Policy Guidelines

General

Explanatory notes are usually inserted next to legislative provisions in an Act, wherever there is ambiguity or the provision in question needs further elaboration. They have also been known to be published in a Schedule of legislative instruments or separately. Recently, there has been a trend to publish detailed explanatory notes with statutes in order to aid the exercise of statutory interpretation by the judiciary.

The importance accorded to explanatory notes in statutory interpretation is new; the notes were first used by UK’s Parliament alongside bills in 1999. Lord Hope in R v A [2001] stated, “But I think that it is legitimate to refer for the purposes of clarification to the notes to this section in the explanatory notes to the Act prepared by the Home Office. I would use it in the same way as I would use the explanatory note attached to a statutory instrument.”

However, the authority on using them as aids for interpretation, is the judgment of R(Westminster City Council) v National Asylum Support Service [2002], Lord Steyn states that, “...Insofar as the Explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible as aids to construction.” Lord Steyn referred to explanatory

---

92Sixth Form Law. n.d. [online] [Accessed: 30 August 2013].
93[2002] UKHL 38
notes again in the case of R v Chief Constable of South Yorkshire ex parte LS and Marper [2004]<sup>94</sup> by stating,

Explanatory notes are not endorsed by Parliament. On the other hand, in so far as they cast light on the setting of a statute, and the mischief at which it is aimed, they are admissible in aid of construction of the statute. After all, they may potentially contain much more immediate and valuable material than other aids regularly used by the courts, such as Law Commission Reports, Government Committee reports, Green papers, and so forth.<sup>95</sup>

A 36 page document containing the explanatory notes to the Anti-Terrorism Act 2006 (UK) was produced separately to aid the understanding of the Act. The notes stated that the explanatory notes need to be read in conjunction with the Act. They are not, and are not meant to be a comprehensive description of the Act. So where a section or part of a section does not seem to require an explanation or comment, none is given.<sup>96</sup> These explanatory notes included a detailed discussion of the new offences that were added to the Act, such as ‘encouragement of terrorism’. Each new offence that was added was addressed in different sections of the explanatory notes, comprehensively.

**Explanatory notes in the Anti-Terrorism Act 1997**

Pakistan has also adopted the usage of explanatory notes over the years and they can be seen in Acts such as the Anti-Terrorism Act, 1997 and the Investigation for Fair Trial Act, 2013. However, the nature and purpose of these explanatory notes has varied. It is crucial to note that the explanatory notes in the ATA 1997 do not discuss the spirit of the section or the aim behind it. They have also been used to add something that was previously missing from the section or to elaborate further for e.g. the explanatory note that has been added after S 12 of the ATA which deals with jurisdiction. The explanatory note states,

“Where [an ATC] is established in relation to two or more areas, such [ATC] shall be deemed, for the purpose of this sub-section, to have been established in relation to each of these areas.”

---

<sup>94</sup>[2004] UKHL 39

<sup>95</sup>Sixth Form Law. n.d. [online] [Accessed: 30 August 2013].

It built upon the section and did not serve the purpose of clarification, as one would assume it should. It could be argued that explanatory notes need to be more comprehensive, and need to clarify any ambiguity in the law. They should not be used to add to the statute. They can also discuss the spirit of the section, and why a new section was introduced in the Act, as was done in UK’s Anti-Terrorism Act (2006). The explanatory notes need not be incorporated in the statute, and can be published separately as mentioned supra. That can provide an opportunity to give detailed guidance to the judiciary when interpreting the statute. Moreover, as time goes by, a varied perspective of the sections can also be introduced in updated explanatory notes, separate to the Act. It is hoped that more comprehensive explanatory notes will prevent any discrepancies in statutory interpretation, which are prevalent as evinced by case law pertaining to Scheduled offences of the Anti-Terrorism Act 1997.

➢ Recommendations – Explanatory Notes to the ATA

1. It is suggested that comprehensive explanatory notes be added to the Act, particularly to S.6(1)(b), S. 6(1)(c) and S.6(2).

2. An alternative option could be the publishing of detailed explanatory notes separate to the Act akin to the explanatory notes published for the Anti-Terrorism Act 2006 (UK).

3. The purpose of these explanatory notes should be to clarify any ambiguity in the statutory provision, and it should not be used for adding to the statute.

The Use of Policy Guidelines

An alternative approach that may be used as an aid to interpreting the Anti-Terrorism Act 1997 can be the incorporation of a ‘policy guidelines’ or a ‘policy objectives’ section within the Act. This maverick approach will serve the purpose of equipping the judiciary with a valuable tool for interpreting the ATA.

Policy guidelines or objectives are published alongside legislation or preferably incorporated within the text of the Act which aims to provide guidance to the judiciary in interpreting the statute. However, it is crucial to note that this is not a definitive statement of the law and is aimed at countering any hardships faced when interpreting the law.

As stated by American Justice Jackson in SEC vs. Joiner:
The courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.97

Therefore, in order to allow the judiciary to interpret the law in regard to its context, its general purpose, and to carry out the legislative policy, the provision of policy guidelines may be necessary.

Sometimes merely relying on the literal interpretation of words in a statute can create confusion or does not convey the policy or logic behind enacting the particular statutory provision. As US Judge Learned Hand observed, “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”98

Thus, if policy guidelines are to be incorporated into the Anti-Terrorism Act, then the judiciary can be made aware of the purpose, the policy or object behind enacting the Act. As reflected by case law which pertains to Schedule Offences of the Act, it is clear that inconsistency in judicial approach is prevalent and therefore there is a vital need for certain guidelines for the judiciary to follow. Even though, these policy guidelines will not have the force of law, they will nevertheless go a long way in providing the context in which certain statutory provisions are stipulated. This will significantly contribute towards enhancing consistent judicial interpretation of the ATA.

**Conclusion**

As reflected by its title, this Report seeks to make the case for change in Pakistan’s anti-terrorism laws. For change to take place, the starting point must be the definition of terrorism contained in Section 6, the lynchpin of this special law. An analysis of Section 6 of the Anti-Terrorism Act, 1997 makes it clear that the definition of terrorism in Pakistan is riddled with legislative defects which have expanded the ambit of the ATA to an unwarranted extent.

98 Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).
This Chapter has attempted to provide statutory recommendations with the ultimate objective of ensuring that there should be nothing in Pakistan’s anti-terrorism legislation that could be covered by the ordinary criminal law, since terrorism law exists precisely to cover areas that cannot be dealt with by ordinary criminal law. As stated during the House of Commons Hansard debates on the definition of terrorism, “it is bad law, as well as bad politics, to sweep people into the definition of ‘terrorism’, when they are just straightforward criminals. Terrorism is not general criminality by another name. It is a specific form of criminality—that is why it was traditionally defined as criminality against the state and the Government”\textsuperscript{99}. Accordingly, it is imperative that Section 6 does not define terrorism activities in a way which would be regarded simply as ordinary criminal activities.

\textsuperscript{99}House of Commons Standing Committee D: \textit{Terrorism Bill, 1st Sitting}, 18 January, 2000
CHAPTER THREE

SPECIAL POLICE POWERS UNDER THE ATA 1997

3.1 INTRODUCTION

Terrorism has widely been recognized as a unique form of crime. To respond to this threat, legislatures the world over, have granted expansive powers to their law enforcement authorities. Justifications for such expansive powers are numerous but primarily gravitate around the mass effect that terrorism has on the public and society. Importantly, terrorism strikes at the very foundation of security in a state. Terrorism undermines the state, its institutions and its ability to maintain security. The threat, by its very nature, is so profound that its immediate suppression is called for. In the last decade and a half, various legislatures have resorted to draconian measures to tackle this threat, with often mixed results. While the efficacy of these measures depends primarily on the efficiency and alertness of law enforcement authorities, without the necessary powers, these entities remain hamstrung, unable to respond to this inordinate threat.

Not surprisingly, it is these police powers that are subject to significant criticism for their potential to violate fundamental rights. Beyond the powers of the police, numerous legislatures have enacted fast track procedures to prosecute and convict those accused of terrorism. Due process rights have been curtailed and often with little Parliamentary or Judicial oversight. The Anti-Terrorism Act of 1997 shares some of these features. It grants the Police and, in some circumstances, the Armed Forces and Civil Armed Forces (collectively referred to as ‘law enforcement bodies’)$^{100}$, powers over and above those available to them for ordinary crimes. The existing breadth of the definition of terrorism, especially through the incorporation of ‘Scheduled Offences’ in the ATA, coupled with lax judicial interpretation, have often allowed ordinary offences to be tried under the ATA. This has blurred the line for law enforcement bodies and allowed the use of ATA special powers in ordinary criminal cases. It is here where the ATA 1997 must be revisited to ensure that its impact on fundamental rights is most limited. While the need for special police powers to deal with terrorism certainly exists, these powers must be balanced against the impact they

---

$^{100}$In general terms law enforcement bodies is a term that may be employed for any entity involved in the prevention, investigation and prosecution of terrorism.
have on the fundamental rights of the accused provided in the Constitution of Pakistan. Additionally, significant checks need to be enforced against the arbitrary use or misuse of such powers.

In addition Police powers in relation to preventing terrorism, specifically, have been limited till recently. With the enactment of the Investigation for Fair Trial Act 2013, the Police are now empowered to apply for warrants for electronic surveillance of terrorism suspects. This is a significant tool and demands greater attention in its actual implementation.

This section highlights the existing police powers under the ATA 1997 and assesses how they depart from ordinary police powers under the Criminal Procedure Code. The section also looks at the link the ATA has with the Investigation for Fair Trial Act 2013 and assesses how this may be operationalized. Finally, the section looks at areas for reform to reduce the abuse of these special powers.

3.2 Special Police Powers under the ATA

The ATA provides special police powers scattered throughout the act. Whereas most of these are specific to the investigation or procedure relating to a particular offence, there are also more general powers. This section examines the ATA with regard to all its provisions providing the police or in some cases the armed forces and civil armed forces, special powers.

3.2.1 The Calling in of Armed Forces and Civil Armed Forces

Section 4 of the ATA provides for the ‘Calling in of armed forces and civil armed forces in aid of civil power’, by the Federal and Provincial Governments. The stated purpose for such deployment in aid of civil power is mentioned in Sec.4(2) as ‘the prevention and punishment of terrorist acts and scheduled offences in accordance with the provisions of this Act.’ Sec. 4 provides no qualifying criteria or minimum threshold to seek such deployment nor do the Courts seem particularly bothered by it. The Lahore High Court in Mehram Ali stated “no possible exception can be taken to this provision as a similar provision exists in Article 243
Given Pakistan’s history with regards to such deployments of Armed Forces or Civil Armed Forces in aid of civil power, the power here is akin to an emergency provision. There is significant argument for it to remain an exception as opposed to the norm, especially since the Armed Forces are not generally trained for civil policing purposes. Law enforcement must remain a Police led effort with the calling in of Armed Forces or Civil Armed Forces as a measure of last resort and that too only for auxiliary purposes in support of civilian led policing efforts. The gravity and scale of terrorism has, however, led to justifiable deployments – Karachi, FATA, and areas of KPK being noteworthy here. Ensuring the correct balance between citizen’s rights and the need to suppress terrorism must remain primary, even in these troubled areas.

**Legislative Defects: Section 4 of ATA**

The Constitution of Pakistan under Article 245 allows for the calling in of armed forces or civil armed forces when the circumstances demand such a deployment. As case law has proven such deployments cannot be challenged if a genuine law and order situation exists. Therefore, Sec. 4 of the ATA is not deemed to have any defects.

**Recommendations – Section 4 of ATA**

No recommendations are proposed for Section 4.

### 3.2.2 ATA Powers to Employ Force, Arrest, and Search

Sec. 5 of the ATA, gives extensive powers to the Police, armed forces or civilian armed forces for the prevention of terrorism. Sec. 5 is reproduced below:

5. Use of armed forces and civil armed forces to prevent terrorism.- (1) Any police officers, or member of the armed forces, or civil armed forces, who is present or deployed in any area may, after giving sufficient warning, use the necessary force to prevent the commission of terrorist acts or scheduled offences.

---

and, in so doing shall, in the case of an officer of the armed forces or civil armed forces, exercise all the powers of a police officer under the Code.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), an officer of the police, armed forces and civil armed forces may-

(i) after giving prior warning use such force as may be deemed necessary or appropriate, bearing in mind all the facts and circumstances of the situation, against any person who is committing a terrorist act or a schedule offence, [it shall be lawful for any such officer, or any senior officer, when fired upon,] to fire, or order the firing upon any person or persons against whom he is authorized to use force in terms hereof;

(ii) arrest without warrant, any person who has committed an act of terrorism or a scheduled offence or against whom a reasonable suspicion exists that he has committed, or is about to commit, any such act or offence; and

(iii) enter and search, without warrant, any premises to make any arrest or to take possession of any property, firearm, weapon or article used, or likely to be used, in the commission of any terrorist act or scheduled offence.

(3) Nothing contained in sub-section (1) or (2) shall affect the provisions of Chapter IX of the Code and the provision of section 132 of the Code shall apply to any person acting under this section.

3.2.3 Use of Force

Section 5(1) on its own would seem to grant extensive powers to the Police, Armed Forces and Civil Armed Forces to use necessary force in preventing acts of terrorism. The Armed Forces or Civil Armed Forces are granted all the powers of a Police Officer under the Cr.P.C.

---

102 Certain words omitted by the Anti-terrorism (Second Amdt.) Ordinance, 1999 (13 of 1999), s. 4.
103 Subs. by the Anti-terrorism (Amtd.) Ordinance, 2001 (39 of 2001), s. 4, for certain words, which was previously amended by Ord. 29 of 2000 s. 2.
While such powers would certainly be extensive without any limiting words or further clarification in the Act, it is unclear as to what extent these powers would actually be exercised. However, it is likely that courts would interpret the breadth of sub-section (1) through the limits provided in subsection (2).

Section 5(2) has become notorious due to the criticism it has received from the superior judiciary of Pakistan. Of particular relevance is Section 5(2)(i) which authorizes the firing upon an individual to prevent a terrorist act from occurring. The original sub-section granted Police officers and member of the Armed Forces or Civil Armed Forces almost complete discretion on when to use such force. The sub-section originally read:

5(2): … an officer of the police, armed forces and civil armed forces may--

(i) After giving warning use such force as may be deemed necessary or appropriate, bearing in mind all the facts and circumstances of the situation, against any person who is committing, or in all probability is likely to commit a terrorist act or a scheduled offence, and it shall be lawful for any such officer, or any superior officer, to fire, or order the firing upon any person or persons against whom he is authorized to use force in terms hereof;

In the Supreme Court’s decision in *Mehram Ali* the section was declared invalid, “to the extent it authorizes the officer of the police, armed forces and civil armed forces charged with the duty of preventing terrorism, to open fire or order for opening of fire against person who in his opinion in all probability is likely to commit a terrorist act or any scheduled offence, without being fired upon.” In light of this criticism, the subsection was amended by the Anti-Terrorism (Amendment), Ordinance of 1999, to omit the words, ‘or in all probability is likely to commit’. This amendment did not seem a genuine attempt to adhere to the Supreme Court’s instructions in *Mehram Ali* and was declared as such in *Constitutional Petitions No. 22 and No. 25 of 1999*. On this occasion the Supreme Court noted that,

If the provisions of section 5 of the Act in their present form are given effect to, it will create horrible and far-reaching consequences, inasmuch as, the law enforcing agencies cannot be given a licence to kill indiscriminately any persons who are allegedly involved in committing terrorist acts as defined under the Act or any of the

---

104 PLD 1998 Supreme Court 1445 para.1(i).
105 Ordinance IV of 1999.
106 PLD 2000 Supreme Court 111.
scheduled offences. Clearly, such a right is to be exercised as a preventive measure and not made basis for launching an attack for retaliation, lest it would tantamount to legalizing alleged police encounters/extra judicial killings in the garb of exercise of power by a Police Officer vesting in him under section 5(2)(i) of the Act.\textsuperscript{107}

Subsequent to this decision Section 5(2)(i) was amended by Anti-Terrorism (Amendment) Ordinance, 2001 to its present form. It is interesting to note, that what the legislature took from the Supreme Court’s ruling in the Constitutional Petitions was rather myopic in view. Instead of redrafting the entire section to place well-crafted limits on the discretion of law enforcement bodies to use force, the legislature made the use of force contingent upon being fired upon first.

- **Legislative Defects: Section 5(1) and 5(2)(i) of ATA**

A Police Officer, member of the Armed Forces, or Civil Armed Forces presently may only fire or order the firing upon an individual if they have been fired upon first. The intent of the Supreme Court to protect the public against alleged police encounters or extra judicial killings is commendable. Unfortunately, the Supreme Court’s solution to the expansiveness of the original Section 5(2)(i), as interpreted by Parliament, has had several unintended consequences which have the potential of undermining the object and purpose of the ATA entirely.

Firstly, the subsection, as amended to its present form, changes the very nature of the powers originally granted under it. Section 5(2)(i) was originally intended as an empowering section granting law enforcement bodies the authorization to employ force when necessary to prevent an act of terrorism. This would cover firing upon an individual about to open fire in a crowded market, or to fire upon a suicide bomber about to detonate his explosive vest, etc. In its original form, special powers over and above those ordinarily granted to law enforcement bodies, would be granted to prevent the uniquely dangerous violence that constitutes terrorism. The current version of the subsection, unfortunately, alters the powers to prevent terrorism and instead allows law enforcement bodies to react to terrorism. This fundamentally defeats the very purpose of Section 5 which is the ‘Use of armed forces and civil armed forces to prevent terrorism’. The power is altered from being a sword to now being a shield.

\textsuperscript{107}PLD 2000 Supreme Court 111 para.6.
Secondly, as discussed, the power to react to an incident of firing, whether it forms a terrorist offence or any other offence, already vests with law enforcement bodies. There is, therefore, no need for such a power, if we can refer to it as such, to be incorporated in a special act with overriding effect dealing with a most heinous crime – terrorism. This, therefore, renders the subsection in its amended form, redundant.

Thirdly, by requiring law enforcement bodies to be first fired upon before firing on a perpetrator, the Act essentially makes Section 5(2)(i) a subsection authorizing lawful private defence – more commonly known as self-defence. This interpretation is further supported by the Supreme Court’s reasoning in Constitutional Petitions No. 22 and No. 25 of 1999 wherein immediately after repeating the invalidity of Sec. 5(2)(i) as it originally stood, the Court went into significant detail regarding section 99-106 of the Pakistan Penal Code. Unfortunately, the phrasing, ‘when fired upon’ is significantly more limited than the defence of private defence under the PPC. This is a strange paradox considering that in terrorism cases, the Police are subjected to higher levels of potential violence than in ordinary crimes. The ATA being a special law with overriding effect may potentially nullify the defence of private defence under the PPC and limit Police officials to the more stringent requirements of Section 5(2)(i) available under the ATA. Such an approach would certainly have catastrophic consequences on the ability of the Police to respond to live threats of terrorism.

Fourthly, the intention of the Supreme Court to limit the discretion of the Police and protect the public from fake police encounters is not adequately addressed by the limiting words, ‘when fired upon’. Unscrupulous members of the Police may stage encounters and fire shots from the deceased’s weapon to exculpate themselves via Section 5(2)(i). Such a scenario is illustrated by the fake police encounter in the case of Ch. Muhammad Yaqoob and others v. The State and others. Here the accused, members of the Police, staged an encounter to murder the deceased. To add veracity to their version of the events, the accused fired from weapons which were later foisted upon the deceased. It is pertinent to note the court’s reasoning in this case at para.10:

We may observe that Mr. Minto, learned counsel for the appellants, has not been able to point out any provision of law whereby the police personnel can exercise right of private self-defence more than what has been provided for in sections 96 to 106, P.P.C. In this view of the matter, simpliciter, an encounter will not entitle a police

1992 SCMR 1983
party to kill indiscriminately the persons who are allegedly involved in the encounter as the basic requirement provided inter alia in section 99, P.P.C., namely, "the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence", will be very much applicable. [emphasis added]

From the court’s reasoning we can determine two fundamental principles. Firstly, the Police is fully entitled to raise the right of private self-defence as a shield against a charge of murder. Secondly, that this right must not exceed the basic requirements of the defence contained in Sec.99 of the PPC, namely, “the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.”

The ATA’s terminology, ‘when fired upon’, only limits when the Police can use force, i.e. in response to firing, but Section 5(2)(i) does not limit the extent of the force that is used. Arguably, this is more worrisome and requires revisiting the ATA to effectively protect the public from excessive use of force by the Police or other law enforcement bodies. It would be prudent to incorporate into Section 5(2)(i) the protections afforded under the PPC for Private Defence instead of the wording, ‘when fired upon’. These would include the requirement that deadly force only be utilized if the Police reasonably apprehend that death or grievous hurt will be the consequence of the perpetrators actions, that the force is necessary to defend against the threat, that the Police had no other recourse or option to avoid the threat, and that the force used is not excessive to obviate the threat. There should be no doubt that deadly force must only be employed as a last resort but in situations of extreme danger, such as those that arise in acts of terrorism, this valuable power must be available to those entrusted with protecting the public. The final determination as to what amounts to lawful use of force, as noted in numerous judgments, rests with the Courts.

Sec. 5(2)(i) of the ATA as it currently stands, notes that the power to fire upon an individual committing a terrorist act only commences when that individual fires upon the Police. If Sec. 5(2)(i) is to be equated with private defence as the Supreme Court seems to suggest, then the commencement provisions of private defence ought to also apply. Sec. 102 of the PPC relating to the ‘Commencement and continuance of the right of private defence of the body’ is reproduced below:

109 Sec. 100 Pakistan Penal Code. It is to be noted that private defence under this section of the PPC also extends to an assault with the intention of committing rape, an assault with the intention of gratifying unnatural lust, an assault with the intention of kidnapping or abducting, and an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to public authorities for his release.
Sec. 102. Commencement and continuance of the right of private defence of the body. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

It is evident by the wording of this section and the case law developed under it that an individual exercising the right of private defence does not have to first be subjected to an attack or sustain injuries. Once ‘a reasonable apprehension of danger to the body arises’, an individual may take steps to defend himself from that danger. The words, ‘when fired upon’, in Section 5(2)(i) of the ATA would contradict and unnecessarily limit the scope of Sec. 102 of the PPC.

Finally, it is worth noting, that private defence can be extended to an individual to protect a stranger. This would certainly fit well the Police’s duty to protect the public. The words, ‘when fired upon’, imply that it is the Police official that must be subjected to the assault. It is evident by the trend of terrorism in Pakistan, that not all attacks are targeted against the Police, Armed Forces, or Civil Armed Forces but often against the public. The ability to employ force to prevent such attacks must be made available to law enforcement bodies through the ATA.

➤ Recommendations – Sec. 5(1) and (2)(i) of ATA

1) The words, ‘when fired upon’, should be removed from the Section 5(2)(i).

2) The limitation on the police, armed forces, and civil armed forces to use force to prevent acts of terrorism must be modified in line with the provisions of Sections 96-106 of the PPC and the case law developed under it dealing with the ‘Right to Private Defence’. These include but are not limited to the following:

   a. The right to use force may arise when there is a reasonable apprehension that death or grievous hurt will be the consequence of an individual’s act,

---

1009 MLD 596 Lahore. Here the court noted: “The second, and a very salutary principle is that the degree and the imminence of the apprehension of threat to one’s person or property is not measured by the injuries actually found in the end to have been inflicted. The exercise of the right itself interrupts the infliction of the injuries. The law recognizes this right of the defending person by keeping statutorily his right one step above that of the person invading that right e, g it extends to causing death, inter alia, where only grievous hurt is apprehended or, of causing grievous hurt where only simple hurt is apprehended (sections 100 and 101, P. P. C.). Further, the right commences ”as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and it continues as long as such apprehension or danger to the body continues” (section 102, P. P. C.)” [emphasis added]

111R v. Duffy (1966) and also see Inderjit Barua v. State of Assam AIR 1983 Delhi 513.
i. The reasonable apprehension of harm may apply to the police officer himself or members of the public as well (strangers).

b. Deadly force be used only as a last resort,

c. The use of force must be necessary to obviate the threat,

d. The use of force must be proportionate and not excessive in any way,

e. The courts must remain the final arbiters of what is deemed.

3.2.4 Powers of Arrest

Section 5(2)(ii) grants powers of arrest without the need for a warrant. This section essentially establishes an act of terrorism and the scheduled offences as cognizable offences. The same is confirmed by Section 30(1) of the Act. Cognizable offences under the Cr.P.C. do not require a warrant from a magistrate for the arrest of a suspect.112 The requirements of the subsection are that a member of a law enforcement body may arrest an individual:

a) who has actually committed an act of terrorism or a scheduled offence; or
b) against whom a reasonable suspicion exists that he has committed such an offence; or

c) he is about to commit such an offence.

This, therefore, applies to perpetrators, individuals suspected of perpetrating an act and, importantly, those against whom a reasonable suspicion exists that they are about to commit an act of terrorism. The third situation under which an arrest is permitted is essential in preventing acts of terrorism and would conceivably stretch to anyone preparing or planning an act of terrorism.

This section may be compared to Section 54 of the Cr.P.C. which governs when the police may arrest without warrant. Section 54 gives nine grounds upon which an arrest may take place without warrant. The first ground provided in the section is relevant here and is reproduced below:

54. When police may arrest without warrant: (1) Any police-officer may, without an order from a Magistrate and without a warrant arrest--

---

112See Sec. 4(f) of the Criminal Procedure Code. Also see Schedule 2 of the Cr.P.C. and Sec.54. For details of how a warrant for arrest is issued see. Sec. 74 of the Cr.P.C.
first, any person who has been concerned in any cognizable offence 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;

The word ‘concerned’ does not require actual commission and may be extended to acts of preparation as Section 5(2)(ii) of the ATA specifically includes. Therefore, there does not seem to be any deviation in the Section 5(2)(ii) from the Cr.P.C.’s powers governing arrest without warrant.

➤ **Legislative Defects – Sec. 5(2)(ii) of ATA**

The ATA reflects the ordinary criminal law and, therefore, any legislative defects would be applicable to the ordinary criminal as much as they would be to Section 5(2)(ii) of the ATA. No legislative defects are observed in Section 5(2)(ii).

➤ **Recommendations:**

No recommendations are proposed.

### 3.2.5 Enter and Search

Section 5(2)(iii) contain extensive enter and search powers without the need for a warrant. These extend to entering a premises without a warrant to arrest an individual suspected of terrorism. Additionally, these powers grant the Police, Armed Forces, or Civil Armed Forces the ability to enter a premises without a warrant to take possession of ‘any property, firearm, weapon or article used, or likely to be used, in the commission of any terrorist act or scheduled offence.’ The wording clearly authorizes preventive searches in this regard. Not only would a member of the Police, Armed Forces, or Civil Armed Forces be allowed to enter and search a premises for the purposes of arrest or to collect evidence in connection with an act of terrorism or a schedule offence but would also be entitled to enter and search a premises where they suspect that an act of terrorism is being planned or preparation for such an act is taking place. Importantly, the Police, Armed Forces, and Civil Armed Forces are entitled to take possession of anything that may be used as evidence in terrorist prosecution.

It is pertinent to note here that Section 5(2)(iii) was declared to be ‘absolute, unqualified, and unguided and, therefore, violative of Article 14 of the Constitution,’ by Justice Karamat Nazir
Bhandari in his dissenting opinion when *Mehram Ali* came before the Lahore High Court. Justice Bhandari stated that the, “Legislature has to lay down necessary conditions such as contained in the Criminal Procedure Code, 1898, to place check on the powers of the Police Officer. The Power in the present form is liable to be misused.” The majority decision in this case was that Section 5(2)(iii) did not violate Article 14 of the Constitution if the search was conducted properly to curb terrorism.

- **Legislative Defects – Sec. 5(2)(iii) of ATA**

The Courts have examined this provision and not found it in violation of the Constitution. While the powers are wide, the use of such powers in connection with a more restrictively defined offence of terrorism, would be proportionate. This report does not observe any legislative defects in relation to Section 5(2)(iii).

- **Recommendations:**

No recommendations are proposed for Section 5(2)(iii).

### 3.2.6 Chapter IX and Sec. 132 of the Cr.P.C

Sec. 5(3) makes reference to Chapter IX of the Cr.P.C and states that nothing in the preceding subsections (1) and (2) would affect Chapter IX. Additionally, sec. 5(3) also states that sec. 132 of the Cr.P.C. would apply to any person acting under this section. Chapter IX of the Cr.P.C relates to ‘Unlawful Assemblies and the Maintenance of Public Peace and Security’. The Chapter covers ss.127-132-A which primarily relate to the dispersing of unlawful assemblies and the use of force in this regard. Sec. 5(3), therefore, notes that the use of force for dispersing assemblies either by the Police or the Armed Forces or Civil Armed Forces will be governed by the provisions of Chapter IX of the Cr.P.C. and not the ATA.

Sec. 132 of the Cr.P.C grants protection from prosecution to any individual who acts in accordance with the sections of Chapter IX in good faith to disperse an unlawful assembly. Any prosecution would have to be authorized by the Provincial Government or the Federal Government, as the case may be. By directly applying the provisions of Sec. 132 to members of law enforcement bodies acting under Sec. 5 of the ATA, it is presumed that the same good
faith protections are being afforded to them. Therefore, any use of force, arrest, or entry and search conducted in good faith under Section 5 of the ATA would provide the officer conducting it protection from prosecution.

- **Legislative Defects:**
The inclusion of safeguards found in the Cr.P.C. into the ATA is welcome. Thus the incorporation of Chapter IX of the Cr.P.C. cannot be adjudged as a defect in any way. Section 132 grants a level of indemnity to officers acting in good faith, this is reflective of Article 237 of the Constitution which empowers the Parliament to make law of indemnity in relation to any person in the service of the Federal or Provincial Government in connection with the maintenance or restoration of order in any area. Section 5(3) in its entirety would be in line with the Constitution and no legislative defects are observed.

- **Recommendations – Sec. 5(3) of ATA**
No recommendations are proposed.

### 3.2.7 Power to Enter and Search Connected with Sec. 8 of the ATA

A specific power to enter, search and take possession of written material or recordings is granted to the police under Section 10 of the ATA. These powers are exercisable in relation to Section 8 of the ATA which relates to the ‘Prohibition of acts intended or likely to stir up sectarian hatred’. Thus where reasonable grounds exist that any material or recording which is likely to stir up sectarian hatred is in the possession of an individual, a member of a law enforcement body may enter and search the premises where it is suspected the material or recording is situated. In Mehram Ali and again in Constitutional Petitions No. 22 and 25 of 1999 it was held that a search, without providing in writing the reasons for such search, were illegal. Section 10 of the ATA was, therefore, amended to ensure that any officer acting under the section would record in writing his reasons for entering and searching the premises and serve this on the individual before conducting entering and searching. This brings it in line with the Cr.P.C.
Legislative Defects:
As amended, this section has no defects that are deemed to be disproportionate to the threat of terrorism.

Recommendations – Section 8 of ATA
No recommendations are proposed.

3.2.8 Application of the Cr.P.C. to all searches and arrests made under the ATA

It is pertinent to note here the provisions of Section 19A of the ATA which reads:

19A. Mode of making searches and arrest. The provisions of the Code, except that of section 103, shall mutatis mutandis, apply to all searches and arrest by police officers and an officer of equivalent rank of the law enforcement agencies made under this Act.

Sec. 19A was added to the ATA through Anti-terrorism (Second Amendment) Act, 2013 (XX of 2013). With regards to arrests the applicable sections of the Cr.P.C. are contained in Chapter V (Ss.46-67). Chapter V Cr.P.C. outlines in significant detail how an arrest is to be made and also grants powers in relation to searching a premises for the purposes of arrest. This would include breaking open doors and windows when ingress to the premises is not granted and how the breaking open of zenana would proceed.114 Chapter V deals with all forms of arrest including those made pursuant to a warrant, by the Police for a cognizable offence, or by private persons.

With regards to searches Section 19A has a dual impact. Firstly, the safeguards and procedure available under the Cr.P.C. relating to searches have been recognized. Thus, the provisions of Chapter VII of the Cr.P.C. (ss. 94-105) relating to searches pursuant to a warrant and the provisions of ss.165-166 relating to searches by a Police Officer have been applied to all searches under the ATA. Notably, neither Sec. 5(2)(iii) nor Section 10 of the ATA require a warrant to conduct a search. Secondly, Section 103 of the Cr.P.C. contained in Chapter VII has been opted out of. Section 103 reads:

---

114Zenana may be defined as, “any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public” – Sec. 48 Cr.P.C
103. **Search to be made in presence of witnesses:** (1) Before making a search under this chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) Occupant of place searched may attend: The occupant of the place searched, or some person in this behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under Section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person, at his request.

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by any order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Pakistan Penal Code.

In effect Section 19A does not require the police to make a search in the presence of witnesses and more importantly does not require the occupant of a place that is searched to be permitted to attend during the search. The nature of searches conducted under the ATA, therefore, are quite different from those conducted for ordinary crimes to which the Cr.P.C. applies in its entirety.

- **Legislative Defects – Section 19A:**

  Searches that are not conducted before witnesses may undermine the credibility of evidence that is recovered from the search. At the trial stage this may prove a significant impediment to successful prosecution. While the nature of searches under the ATA seem designed to
empower aggressive policing, it may nonetheless be prudent to incorporate a requirement to conduct a search in the presence of witnesses unless no credible witness is available. This omission in the ATA is a serious flaw and would have a negative impact at trial.

- **Recommendations – Section 19A of ATA**
  1) Incorporate a requirement to conduct searches in the presence of witnesses unless no credible witness is available.
  2) The ATA may allow other evidence of a search to be admissible that enhance the credible of the search. This may include video recordings or photographs.

### 3.3 Joint Investigation Teams

The ATA provides a unique mechanism for the investigation of terrorist acts by providing for the establishment of Joint Investigation Teams under Section 19. Ordinarily, the investigation of crimes is carried out by the officer incharge of a police-station or someone deputed by him under Section 156 of the Cr.P.C. Such an investigation, for cognizable offences, may commence either upon the receipt of information through a First Information Report (F.I.R) under Section 154 Cr.P.C. or on the Police officer’s own initiative. For non-cognizable offences, the Police must receive an order from a Magistrate as per Section 155(2). The investigating officer’s report, is then forwarded to a Magistrate with jurisdiction through the Public Prosecutor under Section 173. This mechanism established a uniform mechanism for all crimes to be investigated in a similar fashion. For the purposes of terrorism investigation this mechanism had two prime defects. Firstly, by leaving the investigation of terrorism to the officer incharge of a Police Station, it did not provide any cogent means of intelligence gathering nor did it establish any formal liaison with the intelligence agencies operating in Pakistan. The officer incharge of a police station would, therefore, either rely on his own intelligence obtained from informants or on the Police Special Branch. It goes without saying that the investigation of terrorism, especially in a preventive framework, is almost entirely intelligence driven. Secondly, the Cr.P.C.’s requirements had come to be seen by the judiciary and the legislature as iron clad and, therefore, did not provide for an efficient mechanism to appoint specialist investigators with the resources to effectively investigate acts of terrorism.

---

115 See Sec. 157 of the Cr.P.C.
It is for these reasons that the concept of Joint Investigation Teams was introduced through Section 19 of the ATA in 2002. These teams could be constituted by the Federal Government and may include members of the intelligence agencies of Pakistan. The intention being that by establishing such teams there would be a formal mechanism to share intelligence pertinent to a terrorist investigation.

➢ **Legislative Defects – Section 19 of ATA**

As stated in Section 19(1), JITs were formed merely to ‘assist’ the investigation officer. It would still be the investigation officer who would be ultimately responsible for the overall investigation and it would be based on his report that prosecution would subsequently take place. This meant that while members of the intelligence agencies would be part of a JIT there was no real way to ensure that they provided the requisite intelligence to facilitate the investigation. Intelligence sharing thus suffered.

Another reason for this problem may be due to institutional mistrust. It is plausible that intelligence officials fear the disclosing of sensitive intelligence to the Police as there are few safeguards within the Police to prevent such information ending up in the wrong hands.

Additionally, intelligence agencies may be reluctant to expose their members to judicial scrutiny, as would be required if a trial was conducted on the basis of evidence obtained from intelligence. However, a more insidious threat exists to the success of JITs – admissibility of evidence. Even in a well-functioning JIT, where intelligence is shared and the perpetrators are arrested for prosecution, intelligence is rarely of a form that would be admissible as evidence in court. Prior to the Investigation for Fair Trial Act 2013, there was no real mechanism for legal electronic surveillance or intercepts of terrorism suspects. Thus any intelligence gathered before the IFTA would not be admissible in court. Intelligence agencies were, therefore, deterred from sharing information that may lead to the arrest of a suspect but no subsequent conviction.

It is evident from the discussion above that the concept of a JIT was a step to bridge the intelligence gap that investigation officers faced. Unfortunately, without greater integration of JITs and ensuring that the intelligence gathered is admissible in court there is little impact these teams will have on the conviction rate. Furthermore, JITs are constituted by the Government after the occurrence of a terrorist incident. In other words, they are reactive and are only established to investigate a terrorist act. There are no standing JITs aimed at
investigating and preventing acts of terrorism. JITs established for the purpose of investigating terror cells or organizations may go a long way in apprehending terrorists before they accomplish their aims.

The 2013 amendment to the ATA also does away with the constraints imposed by the Cr.P.C. that only the officer incharge of the police station may conduct the investigation. Now under Section 19(1A) the Federal Government may entrust an inquiry or investigation to any agency or authority as it deems fit. This is a welcome revision and opens the door to establishing a special cadre of terrorism investigators. The need for establishing such a cadre is paramount. Firstly, the institutional memory developed by such a cadre would increase the efficacy of terrorism investigations. Secondly, investigation officers are generally from the district in which the crime is committed. This makes them susceptible to local threats and terrorists groups. Investigators from outside the district would significantly reduce the potential danger faced by investigators. Thirdly, a special cadre of terrorism investigators may be provided additional funds over and above the general pool of funds available for investigation. Availability of greater resources would go a long way in ensuring a more thorough investigation of incidents of terrorism. Fourthly, by having a dedicated cadre of investigators, members of intelligence agencies would be able to build a relationship of trust and interdependence. This would help establish stronger links amongst intelligence agencies and the police.

➢ **Recommendations – Section 19 of ATA**

1) A special cadre of ‘Terrorism Investigators’ be established in the provinces. The ATA may not be the ideal vehicle for such Police restructuring but any redrafting of the ATA must make room for the deputation of such special investigators to terrorism investigations.

2) The ATA mandate that all members of the JIT must submit a complete report as part of the ‘challan’ submitted to the Prosecutor and the ATC Judge.

3) A regular review meeting between senior members or those in operational command positions of the intelligence agencies, police, and other law enforcement bodies, be instituted to go over all cooperation and intelligence sharing conducted through JITs. This may be arranged under the auspices of the National Counter Terrorism Authority.

4) Standing JITs or Integrated Task Forces be instituted to target and take down specific terrorist organizations or groups. Their aim should be to prevent acts of terrorism
from taking place and in this regard should utilize the powers granted for surveillance and intercepts under the Investigation for Fair Trial Act 2013.

3.4 **POWER TO CALL INFORMATION**

The ATA also grants wide-ranging powers to the Police in relation to calling of information for the purposes of investigation. Section 21-EE, as amended reads as follows:

21EE. **Power to call information etc.**- (1) The Superintendent of Police during the course of investigation or an equivalent officer of security forces operating in aid of civil power under Section 4 and 5, may by an order in writing, on the request of the Joint Investigation Team,-

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made there under;

(b) require any person to produce or deliver any document or thing useful or relevant to the inquiry or investigation;

(c) examine any person acquainted with the facts;

(d) with the permission of the Anti-terrorism Court, require any bank of financial institution, notwithstanding anything contained in any other law for the time being in force, to provide any information relating to any person, including copies of entries made in the bank’s or a financial institution’s book, including information of transactions saved in electronic or digital form which are reasonably believed to be connected with commission of an offence under this Act and the keeper of such books or records shall be obliged to certify the copies in accordance with law; and

(e) require information or obtain record of telephone and mobile phone data, e-mail, MMS and CNIC and encrypted messages or any other information suspected to be linked in any manner with commission of an offence under this Act, from any service provider company of department.
(2) The copies obtained, information received or evidence collected in pursuance of clause (d) and (e) of sub-section (1) shall be kept confidential and shall not be divulged to any unauthorized person or used for any purpose other than the legal proceedings under this Act.

(3) Any contravention of an order made under sub-section (1) shall be punishable with imprisonment which may extend to two years or with fine which may extend to one hundred thousand rupees or with both.

The JIT, may request the Superintendent of Police or an equivalent officer to order the provision of any information, document, or individual acquainted with the facts for the purposes of investigation. A similar provision exists in the Cr.P.C. as Section 94. However, under the Cr.P.C. an investigation officer cannot seek bank account details unless authorized by the High Court. Under the ATA, it is the ATC that would grant such authorization. Furthermore, under Section 21-EE (e) information relating to telephone and mobile phone data, email, MMS, and CNIC and encrypted messages may be obtained from any service provider, company, or department.

➢ Legislative Defects – Section 21-EE of ATA

The powers afforded under Section 21-EE are significant and allows law enforcement entities to search telephone or mobile phone communications data without the need for a warrant. This is troublesome and has the potential of violating fundamental rights found in the Constitution. While such records should be available for the purposes of investigation they should require some form of judicial oversight.

There is also a question mark over the potential interaction subsection (e) may have with the Investigation for Fair Trial Act 2013. This act authorizes the issuing of warrants by a High Court Judge for electronic surveillance and intercepts. The oversight mechanism introduced by the IFTA 2013 grants stronger safeguards against unwarranted abuse of the right of privacy.

The IFTA 2013 allows for an authorized officer to seek the approval of the Minister of Interior to approach a High Court Judge for granting of a warrant of surveillance or interception.\textsuperscript{116} The authorized officer is to approach the Minister of Interior through his

\textsuperscript{116}Sec. 7 and Sec. 8 of the Investigation for Fair Trial Act 2013
Head of Department. This establishes three layers of authorization required for a warrant - the Head of Department, the Minister of Interior, and finally, the High Court Judge. Section 16 of the IFTA 2013 lists the potential forms of surveillance or interception for which a warrant may be authorized by the High Court Judge:

**16. Authorization under the warrant.** (1) The warrant of surveillance or interception to be issued by the Judge may authorize and allow the lawful doing of any or all of the following acts, namely:-

(a) interception and recording of telephonic communication of the suspect with any person;

(b) video recording of any person, persons, premises, event, situation etc.;

(c) interception or recording or obtaining of any electronic transaction including but not limited to e-mails, SMS etc.;

(d) interception and taking over of any equipment used in the communication in respect of which the warrant is issued, including but not limited to telephone, cell phone, mobile sims, electronic database, demonstrating linking of electronic communication with the database belonging to the person in respect of whom the warrant has been issued:

Provided that the judge shall authorize take-over of equipment only where the material or statement of the authorized officer discloses a substantial threat or possibility of an attempt to commit a scheduled offence;

(e) collection of evidence through any modern devices in addition to the ones mentioned above;

(f) use of human intelligence;

(g) covert surveillance and property interference; and

(h) access to any information or data in any form related to a transaction, communication or its content.

---

117 Sec. 6 of the Investigation for Fair Trial Act 2013
Any other form of surveillance or interception that the Federal Government may notify in this behalf.

It is interesting to note that Section 38 of the IFTA 2013 states that, “The provisions of this Act shall have effect, notwithstanding anything contained in any other law for the time being in force including the Code of Criminal Procedure 1898 (Act V of 1898) and the Qanun-e-Shahadat, 1984 (P.O. 10 of 1984).” This grants the IFTA 2013 the same overriding effect as the ATA 1997. Having been enacted later in time, it is plausible that the IFTA 2013 would override the provisions of the ATA. This would be welcome with regards to the safeguards available under it but would make investigations more onerous for law enforcement entities. A balance would have to be found for allowing effective investigations while at the same time preventing the disproportionate encroachment of fundamental rights.

As noted, Section 21-EE (e) of the ATA, covers some of the areas for which the IFTA 2013 requires a special warrant from a High Court Judge. While Section 21-EE (e) is more limited in scope, it is far less onerous in that the Police or JIT need not apply for any warrant whatsoever. Schedule I of the IFTA 2013 does make it clear that the Act does apply to ATA Offences, however, it is unclear as yet, what impact this will have on Section 21-EE of the ATA. While the IFTA 2013 does afford safeguards, the exigencies of terrorism investigation, especially within a preventive framework may not allow for the three layers of authorization envisaged in the IFTA 2013. It may be prudent require a warrant for obtaining evidence as mentioned in Section 21-EE(e) but with less stringent requirements. The JIT or Investigating Officer should be permitted to approach a Judge of the High Court directly for an emergency warrant for a period of one to three weeks. The other provisions of the IFTA 2013 may apply, mutatis mutandis, to such types of warrants.

It is important to note that while Section 21-EE (2) does require any information received under this section to be kept confidential except for trial purposes, there is no other mechanism established to ensure this. There is reason for trials involving confidential information to be held in-camera and for investigating entities to ensure confidentiality of the information.

➢ Recommendations-- Section 21-EE of ATA

1) Investigation of terrorist offences involving surveillance or intercepts that come under the purview of the IFTA 2013 should be conducted under the IFTA’s framework.
2) Where circumstances do not allow for the time consuming procedure to obtain a High Court warrant under the IFTA, the ATA should provide for a special emergency mechanism. This mechanism would allow investigators or the JIT to directly request a warrant for surveillance or intercept from a High Court Judge. The warrant would be for a more limited period than warrants under the IFTA.

3) Stronger mechanism need to be established to ensure confidential information is not divulged to unauthorized persons or leaked to the public.

3.5 CORDONS FOR TERRORIST INVESTIGATION

The ATA allows members of the Police (not below the rank of Deputy Superintendent of Police) or a JIT to designate a specific area as cordoned for the purposes of terrorist investigation. Section 21-A outlines the process for designating a particular area as a cordoned area and imposes an initial time-frame of 14 days extendable up to 28 days for the area to remain cordoned. The powers of the Police or JIT in association with cordoned areas are listed in Section 21-B of the ATA which is reproduced here:

21B. Terrorist Investigation. – (1) A policeman in uniform or a member of a Joint Investigation Team may:-

(a) order a person in a cordoned area to leave immediately;
(b) order a person immediately to leave the premises which are wholly or partly in or adjacent to a cordoned area;
(c) order the driver or person in charge of a vehicle in a cordoned area to move it from the area immediately;
(d) arrange for the removal of a vehicle from the cordoned area;
(e) arrange for the movement of a vehicle within a cordoned area;
(f) prohibit or restrict access to a cordoned area by pedestrians or vehicles;
(g) enter and search any premises in a cordoned area if he suspects anyone concerned with terrorism is hiding there;
(h) search and arrest any person he reasonably suspects to be a person concerned in terrorism:

Provided that any search of a person shall be done by a Police person of the same sex; or

(i) take possession of any property in a cordoned area he reasonably suspects is likely to be used for the purposes of terrorism.

These powers are intended to facilitate the investigation process and to empower the Police or JIT to take effective measures to preserve the crime scene. Additionally, from a security point of view cordons may be used to limit the impact of double tap bombings that affect rescuers and police personnel.\(^\text{118}\) While cordons would ordinarily seem a routine matter the ATA has aimed to grant Police officers wider powers through Section 21-B. The enter and search powers in Section 21-B (g), (h), and (i) are especially pertinent here. Subsection (g) allows for the entry and search of any premises where the officer believes a terrorism suspect is hiding. Subsection (h) authorizes the search and arrest of an individual suspected of being concerned with terrorism and subsection (i) allows the collection of evidence that is suspected to be involved in terrorism. None of these powers require a warrant and go in tandem with the powers granted under Section 5.

**Legislative Defects – Section 21-A and Section 21-B of ATA**

Sections 21-A and 21-B allow for cordons to be designated only for terrorist investigations. Furthermore, the power to make such a designation is available only to the Police or a member of a JIT. It is not available to armed forces or civil armed forces deployed under Section 4. There is an argument to be made for the expansion of the concept of cordons. Cordons may be employed in a preventive counter-terrorism framework as well. Certain areas, especially in an urban context like Karachi, may be designated as a Special Operations Area granting law enforcement officials powers similar to those available under Section 21-B. Additional powers may also be granted to prevent the entry or existence from such a designated area or the imposition of a targeted curfew in that specific locality. Here the aim would be the prevention of terrorism as opposed to the investigation of it. Such designations

\(^{118}\)Double-tap bombings are twin bombings in the same area with a short time interval between them. The first may be aimed at a specific target while the second is aimed at rescuers and police officials who are investigating the scene.
would allow for operations, raids and sweeps to disrupt terrorists or gangs operating in a particular area and allow for a more surgical response to their activities.

For such a proposal to be implementable it would be essential to establish cogent criteria that would trigger such a designation. The designation would have to be more limited in time than what Section 21-A permits and certain oversight mechanisms would have to be put in place to prevent the abuse of this power. If the powers available under a cordon are granted to police officers to take preventive action more thorough counter-terrorism sweeps would be possible.

- **Recommendations – Section 21-A and Section 21-B of ATA**
  1) The concept of Cordons should be expanded to allow for the designation of ‘Special Operations Areas’. This would grant legal cover for more thorough counter-terrorism sweeps in sensitive areas of urban centers.
  2) The power to designate a Special Operations Area should be granted to members of the armed forces and civil armed forces deployed under Section 4 of the ATA in addition to the Police. This would be a logical step as these forces are often involved in such operations.
  3) The designation for Special Operations Area may be of two categories. Category one would allow all the powers currently available under Section 21-B of the ATA. This designation may be made by the police, armed forces or civil armed forces directly. Category two would be measures to prohibit entry or exit from the designated area or to impose targeted curfews in the area. Category two measures would have to be authorized by the Provincial Home Secretary.

### 3.6 Remand

Another area where the ATA has significantly expanded Police powers is with regards to obtaining remand of a suspect. Section 21-E of the ATA dealing with Remand is reproduced below:

**21E. Remand.** – (1) Where a person is detained for investigation, the Investigating Officer, within twenty-four hours of the arrest, excluding the time necessary for the journey from the place of arrest to the Court, shall produce the accused before the Court, and may apply for remand of the accused to police custody, or custody of any
other investigating agency joined in the investigation for which the maximum period allowed may be not less than fifteen days and not more than thirty days at one time:

Provided that, where an accused cannot within twenty-four hours be produced before the Court, a temporary order for police custody or custody of any other investigating agency joined in the investigation not exceeding twenty-four hours may be obtained from the nearest Magistrate for the purpose of producing the accused before the Court within that period.

(2) No expansion of the time of the remand of the accused in police custody or custody of any other investigating agency joined in the investigation shall be allowed, unless it can be shown by the investigating Officer, to the satisfaction of the Court that further evidence may be available and the Court is satisfied that no bodily harm has been or will be caused to the accused:

Provided that the total period of such remand shall not exceed ninety days.

(3) The Court shall be deemed to be a Magistrate for purposes of sub-section (1)

Provided that the Magistrates appointed under the Shariah Nizam-e-Adl Regulation, 2009 shall also have the same powers as given to a court under this section.

Under ordinary criminal procedure according to Section 167 of the Cr.P.C. where an individual is arrested and investigation of the crime cannot be completed within 24 hours then the Police may seek remand from the nearest Magistrate. The remand cannot be for longer than 15 days. The criteria allowing a remand to be granted is provided in the Explanation at the end of Sec.344 which reads:

Reasonable cause for remand: If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Section 21-E of the ATA significantly expands police powers to obtain a remand. Firstly, the accused is to be produced before an Anti-Terrorism Court (ATC) within 24 hours as opposed to a Magistrate for the purpose of seeking a remand. Secondly, in somewhat vague language, the section sets the minimum period for which a remand may be sought to be 15 days with a
maximum being 30 days at one time. Thirdly, it allows for the Investigating Officer to seek a temporary order for custody from a Magistrate, if the accused cannot be brought before the ATC within 24 hours. This order is only for a 24 hour period for the purpose of producing the accused before the ATC. Fourthly, an expansion in the period of remand can only be given if the Investigating Officer can satisfy the ATC that further evidence may be available and that no bodily harm has or will be caused to the accused. In total an accused can be remanded for 90 days.

- **Legislative Defects – Section 21-E of ATA**

This section is a significant departure from the ordinary criminal procedure and in this regard contains certain provisions that have the potential to violate constitutionally guaranteed fundamental rights. Firstly, the length of remand is significant. While the initial remand of 15-30 days may be somewhat proportionate to a terrorism investigation, the total extendable duration of 90 days is unjustifiable. Especially, since a 90 day preventive detention for inquiry provision already exists in the ATA. The remand provisions of the ATA should not be employed as a mechanism for preventive detention.

Any extension in remand must be based on strong criteria and cogent evidence to safeguard the rights of the accused. Case law provides some indication of this. In *Zawar Hussain v. The State*, the ATC denied extension of remand beyond a total of seven days. When brought before the Lahore High Court, this order was set aside. The High Court noted that remand should have been granted because the accused were notable hardened criminals. Both the accused had been involved in several instances of dacoity before. The case brought before the ATC was particularly heinous and involved dacoity and subsequent firing on a police vehicle killing one police constable and seriously injuring another. Furthermore, the Lahore High Court, criticized the trial judge for not giving a reasoned order for his refusal to extend physical remand, despite Section 21-E allowing for such extension.

Another important departure from the Cr.P.C. is that under the ATA an accused may also be remanded into the custody of any investigating agency joined in the investigation. Thus, custody of the accused is no more within the sole ambit of the Police. Obvious, human rights concerns are raised here. It may be prudent for a mechanism of oversight to be established when individuals are remanded into the custody of entities other than the Police.

---

Recommendations – Section 21-E of ATA

1) The total extendable duration of remand must be shortened. It cannot be equivalent to the maximum duration of preventive detention permitted under the ATA.

2) Any extension of remand beyond 30 days must be based on strong criteria and cogent evidence.

3) If an individual is remanded into the custody of any entity other than the Police, he shall be required to be examined by a medical professional every week. Any evidence of torture would cancel that entities right to hold him and he would be transferred back to Police custody.

3.7 CONFESSION BEFORE A POLICE OFFICER

Section 21-H of the ATA makes a serious departure from ordinary criminal procedure in that it allows for the admissibility of confessions made before a police officer. Section 21-H is reproduced below:

21H. Conditional admissibility of confession. Notwithstanding anything contained in the Qanoon-e-Shahdat, 1984 (President’s Order No. 10 of 1984) or any other law for the time being in force, where in any court proceedings held under this Act the evidence (Which includes circumstantial and other evidence) produced raises the presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused during investigation without being compelled, before a police officer not below the rank of a Distt. Superintendent of Police, may be admissible in evidence against him, if the Court so deems fit;

Provided that the Distt. Superintendent of Police before recording any such confession, had explained to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and that no Distt. Superintendent of Police has recorded such confession unless, upon questioning the person making it, the Disst. Superintendent of Police had reason to believe that it was made voluntarily; and that when he recorded the confession, he made a memorandum at the foot of such record to the following effect;
I have explained to (….name…), that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that confession was voluntarily made. It was taken in my presence, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him”

(Signed)

“Distt. Superintendent of Police.”

The Cr.P.C. only allows confessions to be made before a Magistrate of the First Class or a specially empowered Magistrate of the Second Class under Section 164 read with Section 364. There is good reason for these requirements under the Cr.P.C. It safeguards against unlawful means of pressurizing the accused by the Police for a confession. Furthermore, the accused may feel safer before a Magistrate than an officer of the Police. A Magistrate is also in a better position to explain to the accused his rights.

- **Legislative Defects – Section 21-H of ATA**

The Police have numerous coercive means at their disposal and confessions are generally easier to extract before a Police officer. However, in ordinary cases these confessions bear no evidentiary value and the accused often recants when brought before a Magistrate or at trial. In an attempt to lend evidentiary value to confessions made before a Police officer, the ATA incorporated Section 21-H. It is interesting to note, however, that the judiciary has interpreted this section with much caution. The case law under Section 21-H clearly states that the ATA merely makes a confession before a Police officer admissible at trial, it would still be up to the trial judge to assess the evidentiary value of the confession. Various cases have suggested that without corroborating evidence, a confession before a Police officer alone could not be the sole basis of a conviction. These safeguards are welcome and help protect the rights of the accused.

Confessions before a Magistrate carry greater probative value and are admissible at trial under the Cr.P.C. Section 21-H of the ATA does not prohibit a confession before a magistrate

---

120 See 2011 PCrLJ 370 Gilgit-Baltistan Chief Court; 2011 PCrLJ 389 Gilgit-Baltistan Chief Court; and also 2006 PCrLJ 1671 Quetta High Court Balochistan.
121 See 2011 PCrLJ 370 Gilgit-Baltistan Chief Court
but may encourage the Police to file a challan relying primarily on the confession recorded before them. The Police would be able to claim that they did their job and extracted a confession. The courts on the other hand would disregard the confession if no corroborating evidence is provided by the prosecution. This would result in the accused being acquitted.

➢ **Recommendations – Section 21-H of ATA**

1) Confessions before a Police Officer must be made admissible only if a Magistrate is not available to record the confession. Reasons are to be furnished as to why a Magistrate could not record the statement. A Magistrate may record the confessional statement of the accused while he is in Police custody at the Police Station.

### 3.8 POLICE POWERS TO PROHIBIT THE DISPOSAL OF PROPERTY PENDING INVESTIGATION

The ATA grants members of the Police not below the rank of Superintendent of Police or the Joint Investigation Team powers to order the seizure of property in certain limited circumstances. Section 11-EEEEE of the ATA reads:

**11EEEEE. Prohibition on disposal of property.**- (1) If during the course of inquiry or investigation, the police officer not below the rank of Superintendent of Police or the Joint Investigation Team, as the case, may be, has sufficient evidence to believe that any property which is subject matter of the inquiry or investigation is likely to be removed transferred or otherwise disposed of before an order of the appropriate authority for its seizure is obtained, such officer or the team may, by order in writing, direct the owner or any person who is, for the time being, in possession thereof not to remove, transfer or otherwise dispose of such officer or the team, as the case may be, and such order shall be subject to any order made by the Court having jurisdiction in the matter.

(2) Any contravention of an order made under sub-section (1) shall be punishable with rigorous imprisonment for a term which may extend to two years, or with fine, or with both.

Under Section 11-EEEEE of the ATA, if the officer has ‘sufficient evidence to believe that any property which is the subject matter of [an] inquiry or investigation is likely to be
removed, transferred, or otherwise disposed of before an order of the appropriate authority for its seizure is obtained’ such officer may by order in writing direct the owner or any other person not to remove, transfer, or otherwise dispose of the property. A violation of such an order may be punishable with up to 2 years of rigorous imprisonment, or with a fine, or both.

The Cr.P.C. also allows for a similar order under Section 516-A, however, the power to make such an order vests with the Criminal Court and not the Police. Sec. 11-EEEE recognizes the urgency often involved in terrorist investigations and allows members of the Police to take immediate action to prevent the removal, transfer, or disposal of property that is used in connection with terrorist activities. While the general tenor of the ATA mandates immediate investigation and prosecution, in reality, terrorist investigations can take significantly longer than the mandated period in the ATA. It is prudent, therefore, to allow members of the Police force to act immediately to prevent the disposal of property employed for terrorist purposes. Furthermore, Section 11-EEEE immediately follows Section 11-EEE on ‘Preventive detention for inquiry’ (discussed below), which allows for the detention of an individual up to 90 days pending an inquiry into his acts. It is here where greater time for detention may allow a terrorist suspect or his associates to dispose of property.

Section 11-EEEE has significant bearing on the collection of evidence. Property used in terrorist activities often forms the basis of prosecution and without powers to preserve such evidence, there is considerable risk of failure to convict.

In any case, as the wording of Section 11-EEEE seems to suggest the Police power is provisional in nature and empowers the Police only to act immediately without the need for Court authorization when it is not practicable due to time constraints to obtain such an order. Such wording would suggest that once the Police are able to obtain such an order from the appropriate authority they would be required to obtain it. Unfortunately, the wording of Section 11EEEE is somewhat unclear on this point. The provisions of this section may be amended to allow for greater judicial oversight of a Police order prohibiting the disposal of property. While the wording of the section does imply that a judicial authority would subsequently approve the order, it is unclear when the Police are under a duty to obtain such an order.

➤ Legislative Defects – Sec. 11-EEEE of ATA
Section 11-EEEE is unclear as to how quickly the Police are required to get an order from the appropriate authority to replace their order prohibiting the disposal of property. Alternatively, the ATA may impose a period of time after which the order prohibiting the disposal of property would lapse. This period of lapse may also be applied in addition to a requirement to seek a replaced order from the appropriate authority.

➢ **Recommendations – Section 11-EEEE of ATA**

1) The Police must be required to approach the appropriate authority to replace their temporary order prohibiting the disposal of property as soon as practicable. The appropriate authority should be defined as the Anti-Terrorism Court.

2) Alternatively, a Police order prohibiting the disposal of property should be made to lapse after 10 days.

### 3.9 Duty to Disclose Information to the Police

The ATA imposes a duty on an individual to disclose information to a Police officer if they believe or suspect that another person has committed any offence under the ATA. This duty is imposed via Section 11-L of the ATA as reproduced below:

**11-L. Disclosure of information.** (1) Where a person-

(a) believes or suspects that another person has committed an offence under this Act; and

(b) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment, he commits an offence if he does not disclose to a police officer as soon as is reasonably practicable his belief or suspicion, and the information on which it is based.

(2) It is a defense for a person charged with an offence under sub-section (1) of this section to prove that he had a reasonable excuse for not making the disclosure:

Provided that this sub-section does not require disclosure by a professional legal advisor of any information which he obtains in privileged circumstances.
(3) A person may disclose to a police officer:

   (i) a suspicion or belief that any money or other property is terrorist property or is derived from terrorist property; or

   (ii) any matter on which the suspicion is based.

(4) Sub-section (3) shall have effect notwithstanding any restriction on the disclosure of information imposed by any law for the time being in force.

 Legislative Defects – Section 11-L of ATA

Interestingly, the duty to disclose information is only imposed if the basis for suspicion is information received in the course of a trade, profession, business or employment. Thus information received outside of these settings would seemingly not impose any duty to disclose. The duty also extends to a suspicion or belief relating to any money or property that may be related to terrorism. The only exception to this duty is the privilege that legal counsel have with their clients.

It is worthy of note that while Section 11-L(1)(b) states non-disclosure to be an offence, it does not prescribe any punishment in relation to it. It is possible that Section 11-L(1)(b) may be a Scheduled Offence as the Third Schedule of the ATA states that “any other offence punishable under this Act” would be a Scheduled Offence. Unfortunately, even here no specific punishment is ascribed. Under Section 7, however, numerous punishments are prescribed. Here Section 7 (1)(i) and Section 7(2) may provide the necessary punishment. Section 7(1)(i) states:

   (i) any other act of terrorism not falling under clauses (a) to (h) above or under any other provision of this Act, shall be punishable, on conviction, to imprisonment of not less than five years and not more than ten years or with fine or with both.

It is to be noted that punishment for Section 11-L is not mentioned under clauses (a) to (h). The ambiguous wording of this subsection leads one to believe that it applies to offences of terrorism that are not covered by the ATA. However, such offences do not exist outside of the ATA framework. It may be that the wording refers to all other offences under the ATA except those for whom a punishment is prescribed under clauses (a) to (h). If this is the case
then non-disclosure of information would carry a penalty of imprisonment of at least 5 years up to 10 years or a fine or both.

In the alternative, it is possible that Section 7(2) applies. Section 7(2) reads:

(2) An accused, convicted of an offence under this Act shall be punishable with imprisonment of ten years or more, including the offences of kidnapping for ransom and hijacking shall also be liable to forfeiture of property.

It is possible, though highly controversial, that non-disclosure of information related to terrorism may attract a minimum sentence of 10 years imprisonment if the courts interpret this section to be applicable to the offence in Section 11-L. Sec. 7(2) was added under the 2013 amendments to the ATA and makes specific reference to kidnapping for ransom and hijacking. It may be possible that the drafters of the amendment, inadvertently have made this applicable to Section 11-L. This would be plausible as the punishment seems disproportionate to the offence of non-disclosure of information.

While Section 7(1)(i) may be a more reasonable section apply due to its lesser sanction, the wording of Sec. 7(2) are a better fit. Unfortunately, the convoluted nature of the ATA does not afford us a clear answer either way.

It is argued that non-disclosure of information received in the course of a trade, profession, business or employment is similar to non-compliance with an order to furnish information required under Section 21-EE (see above). For Section 21-EE the punishment for such non-compliance is imprisonment up to 2 years or with a fine of one hundred thousand rupees or both. Due to the similarities of the two offences, it is proposed that their penalties also be equated.

For Section 11-L to have any real impact, it would have to be operationalized through unambiguous wording as to the sanction that it would carry. The section would then have the potential of being a potent investigatory tool.

➢ **Recommendations – Section 11-L of ATA**

1) The duty to disclose information must be given a sanction if it is to be operationalized. The penalty may be imprisonment up to 2 years or a fine or both. This would equate non-disclosure under Section 11-L to non-compliance of a Police order to furnish information under Section 21-EE.
CHAPTER FOUR

PROScriBED ORGANIZATIONS AND PREVENTIVE DETENTION

4.1 INTRODUCTION

This chapter delves into the sections of ATA dealing with terrorist organizations or any individuals associated with such organizations. This chapter elucidates various factors that determine whether an organization is concerned with terrorism or whether any individual is a member of such an organization and the criteria, if any, the Federal Government needs to establish to declare the organization or an individual proscribed. This part of the report shall investigate the procedural issues that arise due to the current wordings of the legislation, in declaring an organization proscribed. It further dwells into the measures to be taken on behalf of the Government to restrict the individuals in assessing public spaces or to detain such individuals in order to prevent terrorism. Further, this section of the report shall also discuss the procedure for deproscription and the review process for such applications. The report shall engage into the lacunas in the current system and what measures can be taken in order to attain a just and transparent system. This chapter reviews the sections dealing with proscribed organizations and its members, highlighting the loopholes existing in the current legislative framework, and providing recommendations to create an effective counter-terrorism framework in comparison to other relevant jurisdictions.

4.2 TERRORIST ORGANIZATIONS

Section 11-A of the ATA, was inserted in the legislation by the Anti-Terrorism Amendment Ordinance 2001 (39 of 2001). This section sets out the criteria by which an organization would be deemed to be involved in terrorism. This section is vital to establishing a preventive framework to counter the spread of terrorism by organizations involved in it. Section 11-A is reproduced below:

11-A. Organization concerned in terrorism:- (1) For the purposes of this Act, an organization is concerned in terrorism if it:-

(a) commits (facilitates) or participates in acts of terrorism;
(b) prepares for terrorism
(c) promotes or encourages terrorism
(d) supports and assists any organizations concerned with terrorism;
(e) patronizes and assists in the incitement of hatred and contempt on religious,
   sectarian or ethnic lines that stir up disorder;
(f) fails to expel from its ranks or ostracize those who commit acts of terrorism
   and presents them as heroic persons; or
(g) is otherwise concerned in terrorism.

(2) An organization shall fall within the meaning of sub-section (1) if it –

(a) is owned or controlled, directly or indirectly, by a terrorist or an organization
    referred in sub-section (1); or

(b) acts on behalf of, or at the direction of, a terrorist or an organization referred
    in sub-section (1)

Sub-section 2 of 11-A was inserted in the Act by Anti-Terrorism (Amendment) Act 2013
(XIII of 2013). Canada, Australia and the UK have incorporated very similar wording into
their respective Anti-Terror legislation. It is evident that ownership and control or acting on
behalf or at the direction of a terrorist or an organization are important to cover the various
strains of activity that terrorist organizations are involved in.

4.3 **POWER OF THE GOVERNMENT TO PROSCRIBE ORGANIZATIONS**

**Section 11-B** of the ATA deals specifically with the proscription of organizations concerned
in terrorism. It states that an organization may be proscribed if the Federal Government has
reasons to believe that an organization is concerned in terrorist activities. The section is
reproduced below:

**11-B. Proscription.** - (1) For the purposes of this Act, an organization is proscribed
if:-

(a) the Federal Government, having reasons to believe that an organization is
    concerned in terrorism, by order, lists it in the First Schedule;
(b) it operates under the same name as an organization listed in the First Schedule or it operates under a different name; or

(c) the First Schedule is amended by the Federal Government in any way to enforce proscription:

Provided that if any or all office bearers, activists or associates of a proscribed organization from a new organization under a different name, upon suspicion about their involvement in similar activities, the said organization shall also be deemed to be a proscribed organization and the Government may issue a formal notification of its proscription.

(2) The Federal Government may, by order, add or remove an organization from the First Schedule or amend it any other way.

➢ Legislative Defect: Ambiguity as to the relevant authority which will proscribe organizations

The proviso under sub-section (c) was later inserted by the Anti-Terrorism (Amendment) Act 2013 (XX of 2013). The language of this section is akin to UK legislation on the topic. Another issue that might arise from the wording of this section relates to which entity of the Federal Government may add or remove the name of an organization from the First Schedule. Currently, it is the Ministry of Interior that makes such decisions through notification in the Official Gazette.

➢ Legislative Defect: Lack of requisite criteria to proscribe organizations

While Section 11-A does establish acts that would constitute involvement in terrorism, neither Section 11-A nor Section 11-B, establish the evidentiary requirements needed to proscribe an organization. This leaves a significant amount of discretion with the Federal Government. For the purposes of transparency, it may be prudent to require minimum evidentiary requirements on the basis of which proscription is done. If this is, primarily, intelligence based evidence which may not be disclosed to the public, then a special mechanism for review of such evidence needs to exist.

---

122 Section 3 of Terrorism Act 2000 [UK]
Apart from evidential requirements to warrant proscription, the threshold also needs to be established. There is often a fine line between an organization operating legally and one which may be involved in terrorism. To safeguard the rights of individuals, owners, and employees of such organizations it may be prudent to have a more specific criteria for determining when an organization warrants proscription. The UK Terrorism Act of 2000 has faced similar problems regarding the ambiguity in language concerning the tests to establish whether an organization is concerned with terrorism or not. The Home Secretary, thereafter, listed the criteria for determining such organizations in an Explanatory Memorandum.\(^{123}\) The criteria were set to be as follows:

1. The nature and scale of the organization’s activities;
2. The specific threat that it poses to the UK;
3. The specific threat that it poses to British nationals overseas;
4. The extent of the organization’s presence in the UK; and
5. The need to support international partners in the fight against terrorism.

Similarly, the Australian Government has provided a guideline through a Protocol\(^{124}\) which is aimed at assisting the public to understand the procedure, and requirements that apply to the Government when they enlist an organization as a terrorist organization. The Protocol provides the tests that need to be established to attain a reasonable belief by the Government that such an organization is concerned with terrorism. Moreover, the Protocol comprises the commonwealth agencies involved in assisting the Attorney General of Australia to list the terrorist organizations.\(^{125}\)

➢ **Recommendations – Section 11 B**

1. Such requirements or criteria should either be inserted directly into the language of the ATA to hone its standard for proscription or be standalone guidelines issued by the Federal Government.

\(^{123}\)Explanatory Memorandum to the Terrorism Act 2000 (Proscribed Organisations) (Amendment Order) 2011


\(^{125}\) Ibid
2. Furthermore, it may also be feasible to attach these guidelines for proscription to the ATA itself by adding a new Schedule. This would certainly serve the ends of justice and transparency.

4.4 **The Right of Review Against Proscription**

Section 11-C of ATA provides a right of review to aggrieved organizations against the Federal Government’s designation of proscription. Sec. 11-C is reproduced below:

**11-C. Right of Review.** (1) Where a proscribed organization is aggrieved by the order of the Federal Government made under section 11 B, it may, within thirty days of such order, file a review application, in writing, before the Federal Government, stating the grounds on which it is made, and the Federal Government shall, after hearing the applicant, decide the matter within thirty days.

(2) An organization whose review application has been refused under sub-section (1) may file an appeal to the High Court within thirty days of the refusal of the review application.

(3) The Federal Government shall appoint a Proscribed Organization Review Committee to determine all review applications under sub-section (1)

- Legislative Defect: Role of Review Committee

Section 11-C of the ATA elucidates the right of review in case any proscribed organization is aggrieved by a decision taken by the Federal Government and mentions a Proscribed Organizations Review Committee to be set-up by the Federal Government to review all applications against proscription. Unfortunately, the section does not elucidate any further on the role of this Committee nor does it specify what individuals would constitute such a Committee. This is a glaring omission and the provisions concerning the Committee ought to be strengthened and given greater specifics.

Furthermore, Section 11-C does not require the Government to furnish a reasoned decision regarding the rejection of an appeal against proscription. For greater transparency this is vital that any decision by the Federal Government with regards to proscription be made on cogent
grounds. An arbitrary use of such powers can be a violation of fundamental rights of those who are aggrieved.

➢ **Recommendations – Section 11 C**

1. It is therefore, proposed that the role of the Review Committee is explicitly mentioned in the Section and the procedure to evaluate the applications by the Committee is also incorporated.

2. It is further proposed that the process through which the Federal Government establishes the Committee is also expounded.

3. Moreover, the section should mention the officials comprising the Review Committee who should be above a specific grade (stipulated in the section) from different governmental departments who can be part of the Review Committee.

### 4.5 Subsequent Right of Appeal Against Proscription After 3 Years

Section 11-C should be read with Section 11-U of the ATA, which provides for deproscription through application after 3 years of being proscribed. Section 11-U is reproduced below:

**11U. Deproscription.**- (1) After three years of the disposal of the appeal, if any, or where no appeal was filed, from the date of the order of proscription, or from the date of any refusal of an application of deproscription, the proscribed organizations may apply in writing to the Federal Government for the exercise of its power under Section 11 B (d) to remove the organization from the First Schedule, where the proscribed organization feels that it can prove to the satisfaction of the Federal Government that the reasons for its proscription have ceased to exist.

(2) The Federal Government shall decide such application within a period of ninety days, after providing a reasonable opportunity of hearing of the applicant.
Proscription thus requires an organization to first approach the Federal Government and if rejected to approach the concerned High Court within 30 days. If both of these avenues are exhausted then an organization has to wait 3 years before it can approach the Federal Government again.

- **Legislative Defect: Effective measures required for deproscription**

The proscription requirements of the ATA ought to have a triple function. Firstly, proscription should be aimed at neutralizing an entity that is involved in terrorism and preventing it from taking further action in this regard. This may also lead to prosecution of members involved in terrorist acts. Secondly, proscription should aim to deter organizations from taking up activities that may be related to terrorism. Thirdly, the proscription provisions should aim to incentivize the reform of organizations that may have members acting in a way that concerns the organization in terrorism. The 3 year minimum requirement seems arbitrary and the right to appeal proscription should lie with an organization as soon as it feels it has reformed itself and its members. While the onus to prove such reformation may remain on the organization, it should be allowed to do so fairly, as soon as it deems itself ready. This would promote the incentivization aims of the proscription provisions of the ATA.

Deproscription may also be conducted incrementally. Where the Federal Government feels that an organization has taken steps to reform itself, it may re-designate the organization as an ‘Organization under Observation’ as provided by Section 11-D (discussed below) for a reasonable period to assess the reforms indicated in the appeal. Subsequently even this ‘Observation’ designation may be dropped if the Federal Government is so satisfied.

- **Recommendations – Section 11 C and Section 11 U**

While Section 11-C does make mention of a Proscribed Organizations Review Committee to assess review applications, there is no such provision for assessing applications for deproscription under Section 11-U. If a standing committee is established under Section 11-C then it may be efficient to forward Section 11-U applications to it as well.
Section 11E of the ATA, 1997 deals with measures that are taken against proscribed organizations. The section aims to restrict any activities carried out by these proscribed organizations by denying them the resources and funding they rely upon. It also deals with those measures taken against its office bearers or associates of such organizations if they continue to carry out the activities of the organization after it has been proscribed. The section is reproduced below:-

11 E. Measure to be taken against a proscribed organization. Where any organization shall be proscribed:-

(1) Amongst other measures to be taken by the Federal Government-

(a) its offices, if any, shall be sealed;

(b) its money or other property, if any, shall be frozen or seized;

(c) all literature, posters, banner, or printed, electronic, digital or other material shall be seized; and

(d) publication, printing or dissemination of any press statements, press conferences or public utterances by or on behalf of or in support of a proscribed organization shall be prohibited.

(1A) Upon proscription of an organization if the office bearers, activists, or the members or the associates of such organizations are found continuing the activities of the proscribed organization, in addition to any other action under this Act or any other law for the time being in force to which they may be liable,-

(a) they shall be not be issued any passport or allowed to travel abroad;

(b) no bank or financial institution or any other entity providing financial support shall provide any loan facility or financial support to such persons or issue the credit cards to such persons; and

(c) the arms licenses, if already issued, shall be deemed to have been cancelled and the arms shall be deposited forthwith in the nearest Police Station, failing which such arms shall be confiscated and the holders of such arms shall be liable for the punishment

126 Subs. by the Anti-terrorism (Amdt.) Act, 2013 (XIII of 2013), S 5.
127 Ins. by the Anti-terrorism (Second Amdt.) Act, 2013 (XX of 2013), S 5.
provided under the Pakistan Arms Ordinance, 1965 (WP-XX of 1965). No fresh license, to such persons for any kind of weapon shall be issued.]

(2) The Proscribed Organization shall submit all accounts of its income and expenditure for its political and social welfare activities and disclose all funding sources to the competent authority designated by the Federal Government.

- **Legislative Defect: Lack of right to appeal for proscribed organizations to carry on their social welfare operations**

Although the measures mentioned above are necessary in order to create an effective counter-terrorism framework by curtailing the activities of proscribed organizations, it is imperative to recognize that a few of these organizations are not monolithic entities but do, instead perform considerable charity work and, keeping in mind Pakistan’s fragile economy, it might be excessively harsh to ban all the activities/functions of these organizations. For example, following the devastating earthquake in 2005 some of the first responders to the stricken regions were extremist organizations such as the Jamaat ul-Dawa, a daughter organization of the Lashkar-e-Taiba.\(^{128}\) Effecting such a fractional proscription of such organizations, however, can only be achieved if mechanisms are developed which effectively sever the social welfare operations of such organizations from their extremism-related ones: i.e. all terrorism-related activities from their charitable work. This may be affected if absolute transparency can be maintained on financial, organizational grounds, through a duty of disclosure, and inspection powers being granted to law enforcement agencies.

- **Recommendations - Section 11E**

It is proposed that Section 11-E could be amended to include a right to appeal, which appeal if granted, would enable the organization to carry on its charitable activities. However, the section should then also impose a duty of disclosure upon the proscribed organization to disclose, among other things, a list of names of all its office bearers, its organizational structure and hierarchy. This duty of disclosure could also include a duty to disclose the organization’s sources of funding, the addresses of its offices, and the names of any other organizations which provide support to it. The organization should also disclose financial information, helping to ensure financial transparency.

In order to ensure that the premises which the organization uses that are allegedly being retained for charitable purposes, are, in fact being used for such purposes, the section may also empower law enforcement agencies with the authority to inspect said premises. This will apply if an officer has reasonable cause to believe that the office or premises of a proscribed organization is still being used to further terrorist activities. These inspection powers could include, inter alia, the power to:

1. observe the carrying on of business or professional activities by the relevant person in charge, organization;\(^{129}\)
2. inspect any recorded information found on the premises;
3. require any person on the premises to provide an explanation of any recorded information; or to state where it may be found;
4. to inspect any cash found on the premises. The source of that cash may also be questioned.\(^{130}\)

The section should also provide for the scenario where the duty of disclosure is not complied with or if questionable materials or evidence suggesting terrorist involvement are found upon inspection. This should ideally result in an effective revocation of the organization’s right to carry on charitable work, subject to the right of appeal.

### 4.6 The Offence of Membership of a Proscribed Organization

**Section 11F** of the ATA, 1997 makes membership of a proscribed organization an offence. The section aims to restrict the growth of these organizations, by making it an offence to become a member and not allowing its members to invite support for it. The section is reproduced below:-

11F. Membership, support and meetings relating to a Proscribed Organization-

(1) A person is guilty of an offence if he belongs or professes to belong to a proscribed organization.

(2) A person guilty of an offence under sub-section (1) shall be liable on conviction to a term not exceeding six months imprisonment and a fine.

\(^{129}\) Section 38, The Money Laundering Regulations, 2007 [UK]

\(^{130}\) Section 38, The Money Laundering Regulations, 2007 [UK]
(3) A person commits an offence if he:-
(a) solicits or invites support for a proscribed organization, and the support is not, or is not restricted to, the provisions of\(^{131}\) [money or other property]; or
(b) arranges, manages or assists in managing, or addressing a meeting which he knows is:-
(i) to support a proscribed organization;
(ii) to further the activities of a proscribed organization; or
(iii) to be addressed by a person who belongs or professes to belong to a proscribed organization.

(4) A person commits an offence if he addresses a meeting, or delivers a sermon to a religious gathering, by any means whether verbal, written, electronic, digital or otherwise, and the purpose of his address or sermon, is to encourage support for a proscribed organization or to further its activities.

(5) A person commits an offence if he solicits, collects or raises\(^{132}\) [money or other property] for a proscribed organization.

(6) A person guilty of an offence under sub-section (3), (4) and (5) shall be liable on conviction to a term of imprisonment, not less than one year and not more than five years and a fine.

➢ Legislative Defect: Lack of valid defence

Other jurisdictions have similar provisions pertaining to membership of terrorist organizations, for example Sections 11\(^{133}\) and 12\(^{134}\) of UK’s Anti-Terrorism Act 2000, and

\(^{131}\) Subs. by the Anti-terrorism (Amndt.) Act, 2013 (XIII of 2013), S. 6
\(^{132}\) Ibid.
\(^{133}\) “11.—(1) A person commits an offence if he belongs or professes to belong to a proscribed organization.
(2) It is a defence for a person charged with an offence under subsection (1) to prove— (a) that the organization was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organization at any time while it was proscribed. (3) A person guilty of an offence under this section shall be liable— (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both. (4) In subsection (2) “proscribed” means proscribed for the purposes of any of the following—…”
\(^{134}\) 12.—(1) A person commits an offence if— (a) he invites support for a proscribed organization, and (b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15). (2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is— (a) to support a proscribed organization, (b) to further the activities of a proscribed organization, or (c) to be addressed by a person who belongs or professes to belong to a proscribed organization. (3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organization or to further its activities. (4) Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no
division 102.3 of the Australian Criminal Code 1995. However, other jurisdictions have also provided for a defence when it comes to these offences. For example S 11(2) of UK’s Terrorism Act 2000 states that it is a defence for a person charged with an offence under subsection (1) to prove (a) that the organization was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organization at any time while it was proscribed. Therefore, in order to meet the exigencies of justice a valid defence needs to be provided.

Legislative Defect: Ineffective penal provisions

Another difference between UK’s and Pakistan’s anti-terrorism law in relation to membership of a proscribed organization is that a person guilty of an offence under UK law\(^{135}\), shall be liable on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or both, or on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or both. The ATA, on the other hand, provides that a person guilty of an offence under sub-section (1) of 11 F, shall be liable on conviction to a term not exceeding six months imprisonment and a fine.

Moreover, the penalty for gaining membership of a terrorist organization under the Australian Criminal Code 1995, is also 10 years.\(^{136}\) The Code also states that the punishment will not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organization as soon as practicable after the person knew that the organization was a terrorist organization. The section is reproduced below:-

**Australia Criminal Code 1995**

**102.3 Membership of a terrorist organization**

(1) A person commits an offence if:

(a) the person intentionally is a member of an organization; and

(b) the organization is a terrorist organization; and

reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organization or further its activities.

(5) In subsections (2) to (4)— (a) “meeting” means a meeting of three or more persons, whether or not the public are admitted, and (b) a meeting is private if the public are not admitted. (6) A person guilty of an offence under this section shall be liable— (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

\(^{135}\) S 11 The Terrorism Act 2000 (UK)

\(^{136}\) Division 102.3, Australian Criminal Code 1995.
(c) the person knows the organization is a terrorist organization.

Penalty: Imprisonment for 10 years.

(2) Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organization as soon as practicable after the person knew that the organization was a terrorist organization.

Note: A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).

In order to create an effective deterrent for individuals from joining the ranks of these proscribed organizations, the term of imprisonment stipulated in the statutory provision for the offence of becoming a member of a proscribed organization needs to be increased.

➢ Legislative defect: Lack of distinction between public and private meetings to solicit support for a proscribed organization

Section 11F of the ATA does not differentiate between the offence of addressing a public or holding a private meeting to invite support for a proscribed organization. This distinction needs to be made in order to clarify that private (discrete) meetings also fall within the ambit of this provision and so meetings held at private premises for this purpose are also included. The relevant sub-sections of Section 11-F are reproduced below.

(7) A person commits an offence if he:-
   (c) solicits or invites support for a proscribed organization, and the support is not, or is not restricted to, the provisions of\textsuperscript{137} [money or other property]; or
   (d) arranges, manages or assists in managing, or addressing a meeting which he knows is:-
      (iv) to support a proscribed organization;
      (v)  to further the activities of a proscribed organization; or
      (vi) to be addressed by a person who belongs or professes to belong to a proscribed organization.

(8) A person commits an offence if he addresses a meeting, or delivers a sermon to a religious gathering, by any means whether verbal, written, electronic, digital or otherwise, and the purpose of his address or sermon, is to encourage support for a proscribed organization or to further its activities.

\textsuperscript{137} Subs. by the Anti-terrorism (Amdt.) Act, 2013 (XIII of 2013), S. 6
UK’s Terrorism Act, 2000 (UK) also states that it is an offence to incite support for a proscribed organization. However, the key difference is that the statutory provision (Section 12 of the Act) distinguishes between private and public meetings and also stipulates a defence for attending a private meeting held for this purpose. Section 12 of the Terrorism Act, 2000 (UK) states that where a person is charged with an offence under this section, in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2) (c) of the section would support a proscribed organization or further its activities. Furthermore, the section also sets out the meaning of “meeting” as a meeting of three or more persons, whether or not the public are admitted.

Thus, if Section 11F of the ATA does incorporate the difference between public and private meetings, it should also provide for a defence in the case where an individual can prove that he had no reasonable cause to believe that the address mentioned would support a proscribed organization or further its activities.

➢ **Recommendations - Section 11F**

The penalty for membership of a terrorist organization needs to be increased to create an effective deterrent. The accused should be liable on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or both, or on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or both.

Furthermore, sub-section 3(b) of S 11F the Act needs to be amended in order to distinguish between private and public meetings. It may be incorporated in the section that a private meeting is a meeting between two or more persons to further the cause of a proscribed organization. Additionally, if the accused is able to prove that he had no reasonable cause to believe that the private meeting would be to support a proscribed organization or further its activities, it would be a valid defence.

Another defence in relation to membership of a proscribed organization could be added which would state that if the accused took all reasonable steps to cease to be a member of the organization as soon as practicable after the person knew the organization was a terrorist organization, it would be a valid defence. Furthermore, if the organization was not proscribed on the last (or only) occasion on which the accused became a member or began to profess to be a member, and has not taken part in the activities of the organization at any time while it
was proscribed should also suffice as a defence. However, in order for this to be brought about, the date on which an organization is deemed as ‘proscribed’ for the purposes of the Act should also be mentioned along with the organization’s name in the first schedule. The Act as it stands right now does not mention any names of proscribed organizations, as it should be in the First Schedule of the Act.

The list of proscribed organizations is published in the Gazette of Pakistan. However, at times this information is not privy to the general public. Therefore, in order to allow the citizens of Pakistan to protect themselves from committing an offence under ATA, the list of proscribed organizations should be made public knowledge, to increase transparency. This will then ensure that an individual cannot raise the defence of not knowing that an organization was proscribed at the time he/she attended a meeting to gather support for the said organization.

The date on which the organization became proscribed for the purposes of the Act should also be mentioned next to the name of the organization in the First Schedule of the ATA.

UK’s Home Office has provided a list of proscribed organizations online, which was last revised on 19th July, 2013. This ensures that citizens of UK are able to make well-informed decisions.

4.7 DEMONSTRATING AFFILIATION WITH A PROSCRIBED ORGANIZATION

Section 11 G of the ATA, 1997 deals with the offence of demonstrating an affiliation with a proscribed organization. It is reproduced below:-

Section 11 G. Uniform.- (1) A person commits an offence if he:-

(a) Wears, carries or displays any article, symbol, or any flag or banner connected with or associated with any proscribed organization; or

(b) Carries, wears or displays any uniform, item of clothing or dress in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization.

---

A similar provision in the Terrorism Act, 2000 exists. However, the difference between the provision dealing with the offence (of wearing a uniform or an article of clothing that arouses reasonable suspicion that the person belongs to a proscribed organization) under ATA and that of the Terrorism Act, 2000 (UK) is that the provision under ATA does not allow a police official to arrest the accused without a warrant based on the terms under Section 11G of the Act.

> **Recommendations – Section 11G**

Keeping in mind the wave of terrorism that has engulfed Pakistan, it is crucial that police officers, not below the rank of an SHO, should be given the power to arrest an individual if he wears an item of clothing, or carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization, without a warrant. However, there should be a time limit within which the accused will have to be presented in Court, for example 48 hours. The punishment stipulated for this offence under ATA is appropriate.

### 4.8 Restrictions Imposed upon Persons Suspected of Terrorist Involvement

Under the Anti-Terrorism Act of 1997 (XXVIII of 1997) [ATA], the Federal Government could place an organization under observation if the Federal Government – as per Section 11D of the ATA – has reason to believe that it was “acting in a manner that it may be concerned in terrorism…” As per the provisions of Section 11D, an organization may be placed under observation if its name is listed by the Federal Government in the Second Schedule to the ATA – as per Section 11D(1)(a) – or if it operates under the same name as an organization so listed in the Second Schedule – as per Section 11D(1)(b).

Under Section 11D(2) an organization or person may file a review application before the Federal Government challenging being placed under observation, with the Federal

---

139 [(2)] A person who commits an offence under sub-section (1) shall be liable to imprisonment for a term which may extend to five years, or with fine, or with both.

140 Subs. by Act No. II of 2005

141 S 13, The Terrorism Act 2000 (UK).
Government required to decide the matter within sixty days. Each observation period is to last six months – as per Section 11D(4) – and the Federal Government may extend this period – as per Section 11D(3) – provided that the organization under observation is granted an opportunity to be heard.

The specifics of such observation are provided for in Section 11EE of the ATA; under this section, the Federal Government is empowered to take certain actions and place certain restrictions upon organizations or persons under observation, which are as follows [relevant provisions of Section 11EE reproduced below and significant portions underlined]:

**11EE. Security for good behavior.**

(1) *Where the Federal or Provincial Government on an information received from any source that any person is an activist, office bearer, or an associate of an organization kept under observation under section 11D... or in any way concerned or suspected to be concerned with such organization or affiliated with any group or organization suspected to be involved in terrorism or sectarianism, such Government may notify the name of such person or persons in a list entered in the Fourth Schedule.*

(2) *Where a person’s name is listed in the Fourth Schedule, the Federal or Provincial Government... without prejudice to any other action which may lie against such person under this Act or any other law for the time being in force, may take following actions and exercise following powers, namely:-*

   a. *require such person to execute a bond with one or more sureties to the satisfaction of the District Police Officer in the territorial limits of which the said person ordinarily resides, or carries on business... for such period not exceeding three years and in such amount as may be specified;*

   Provided that where he fails to execute the bond or cannot produce a surety or sureties to the satisfaction of the District
Police Officer order him to be detained and produced within twenty-four hours before a court which shall order him to be detained in prison until he executes the bond or until a satisfactory surety or sureties if required, are available or, failing that the term of the order under clause (a) expires:

Provided further that where he is a minor, the bond executed by a surety or sureties only may be accepted.

b. require any such person to seek prior permission from the officer incharge of the Police Station of the concerned area before moving from his permanent place of residence for any period of time and to keep him informed about the place he would be visiting and the persons, he would be meeting during the stay;

c. require:

i. that his movements to be restricted to any place or area specified in the order;

ii. him to report himself at such times and places and in such mode as may be specified in the order;

iii. him to comply with both the direction; and

iv. that he shall not reside within areas specified in the order;

d. direct that he shall not visit or go within surroundings specified in the order including any of the under mentioned places, without the written permission of the officer incharge of the Police Station with in whose jurisdiction such place is situated, namely:--

i. schools, colleges and other institutions where person under twenty-one years of age or women are given
education or other training or are housed permanently or temporarily;
i. theatres, cinemas, fairs, amusement parks, hotels, clubs, restaurants, tea shops and other place of public entertainment or resort;
ii. airports, railway stations, bus stands, telephone exchanges, television stations, radio stations and other such places;
iii. public or private parks and gardens and public or private playing fields; and
iv. the scene of any public meeting or procession of any assemblage of the public whether in an enclosed place or otherwise in connection with any public event festival or other celebrations;
v. check and probe the assets of such persons or their immediate family members... through police or any other Government agency, which shall exercise the power as are available to it under the relevant law for the purposes of the investigation, to ascertain whether assets and sources of income are legitimate and are being spent on lawful objectives:

Provided that no order under clause (d) or (e) above shall be made operative for a period of more than three years; and

f. monitor and keep surveillance over the activities of such person through police or any other Government agency or any person or authority designated for the purpose.

(3) Any person whose name has been notified in the list entered in the Fourth Schedule under sub-section (1) or is aggrieved by any direction or order of the Federal or Provincial Government made under sub-section (2), may within thirty days of such notification, direction or order, prefer an appeal to the Federal or Provincial Government, as
the case may be, and such Government after providing an opportunity of being heard to such person decide the appeal within thirty days.

(4) Any person who violates and direction or order of the Federal or Provincial Government or any terms of bond referred to in sub-section (2), shall be punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

➢ Legislative Defect: the lowered standard for the imposition of the restrictions under S. 11EE

The restrictions placed upon organizations or persons under Section 11EE are, therefore, incredibly extensive; such a person is effectively barred from almost any public space or interaction – severely curtailing their day-to-day lives and contravening several of their constitutionally-granted rights including the right to freedom of movement, as per article 15 of the Constitution; the right to freedom of assembly, as per article 16 of the Constitution; freedom of association, as per article 17 of the Constitution; freedom of trade, business or profession, as per article 18 of the Constitution; and freedom of religious practice, as per article 20 of the Constitution, among others.

While these constitutional rights are subject to ‘reasonable restrictions imposed by law in the public interest’ restrictions placed by the operation of Section 11EE are not predicated upon the standard of ‘reasonability’ but are, instead, based upon “information received from any source that any person is… [associated with] an organization kept under observation under Section 11D… or in any way concerned or suspected to be concerned with such organization or affiliated with any… organization suspected to be involved in terrorism or sectarianism.” Similarly, Section 11D enables the Federal Government to place an organization under observation when it has “reason to believe that [it] is acting in a manner that it may be concerned in terrorism…” The standard imposed in Section 11D and Section 11EE are, therefore, far lower than that of ‘reasonableness’ as required by the Constitution.

➢ Legislative Defect: the extensive nature of the restrictions under S. 11EE

Additionally, many of these restrictions are incredibly difficult – if not impossible outright – to effect; as a senior police official, District Police Officers [DPO] are few and far between
and it is quite possible for the area wherein the person under observation lives or works to lack such an official. Furthermore, Section 11EE grants the DPOs with an inordinate amount of discretion in determining the surety required of those under observation. Such persons are required to “execute a bond with one or more sureties to the satisfaction of the [DPO]…” but the ATA does not provide DPOs with any guidelines along which to act in this regard, leaving open the possibility for corruption or abuse.

Continuing in the same vein, requiring a person under observation, if she or he is “moving from his permanent place of residence for any period of time and to keep him informed about the place he would be visiting and the persons, he would be meeting during the stay”; and barring her or him from residing in any areas specified in the order. Furthermore, Section 11EE bars such persons from visiting or ‘going within the surroundings’ of such places mentioned in the order, or various other public venues. As touched upon above, the exceedingly wide ambit of the places declared ‘off-limits’ to persons under observation is so broad as to effectively bar them from engaging in almost any public activity, preventing them from participating in their civic lives.

The Pakistani judiciary has not addressed the intersection of the restrictions Section 11EE imposes with the fundamental rights enshrined in the Constitution. This is a point of some concern as, while the Constitution does allow for the circumscription of these rights as discussed above, such restrictions are subject to the standard of ‘reasonableness’. The restrictions imposed by the ATA, conversely, are subject to far lower legal standards. The courts in their opinions have, however, focused instead on the evidentiary requirements prerequisite to the imposition of the restrictions under Section 11EE.

The Lahore High Court, in Hafiz Bilal Ahmad v. the Station House Officer, Police Station 18-Hazari, Tehsil and District Jhang141 laid down the prerequisites for a person’s inclusion in the Fourth Schedule. As per the court’s opinion on the issue, delineated these as:

1. The presence of “concrete material and cogent reason to, *prima facie*, establish that the person is an activist, office-bearer or an associate of a proscribed organization, or an organization suspected to be involved in terrorism or sectarianism…”;

141 PLD 2011 Lahore 145
2. That “the material or information, placed before the concerned Government, should be of such nature, which could satisfy a reasonable person for making the necessary entry in the 4th Schedule”; and
3. Most importantly, “the competent authority must prove the legality of the order.”

In *Khwaja Mureed Hussain v. the Government of Punjab, Home Department, Lahore*\(^{142}\) the court, while discussing Section 11EE, stated that the “availability of concrete material and cogent reason to prima facie establish that the person is an activist, office-bearer or an associate of… an organization suspected to be involved in terrorism or sectarianism is *sine qua non* to incorporate the name of such person in the [Fourth Schedule].” Similarly, in *Muhammad Yousaf Farooqi v. the Government of Punjab*\(^{143}\) the court reiterated the need for substantive evidence of an individual’s association with terrorist activities in order to justify the restrictions imposed by Section 11EE.

The courts, therefore, have not examined the justifiability of the restrictions imposed by Section 11D and Section 11EE but have instead focused on providing clarity and placing restrictions upon the *ad hoc* application thereof. The judicial precedent has emphasized the necessity for tangible evidence before placing an individual’s name in the Fourth Schedule and subjecting them to the restrictions of Section 11EE but has, to date, refrained from examining the effect and scope of these restrictions.

In addition to being problematic in the constitutional context, the restrictions imposed under Section 11EE are operationally unfeasible. The restrictions are paradoxically, both extremely broad and, at the same time, extremely specific: on one hand they operate to exclude the restricted person from the specific places and venues delineated; on the other these places and venues, while narrowly specified in the Act, nonetheless encompass such a broad section of public life that it precludes the restricted person from engaging in almost any form of public activity. Such a framework is incredibly taxing on State resources and, in the context of Pakistan where such resources must be carefully allocated for best effect, it is unfeasible to expect the State to devote sufficient resources to restrict such persons so comprehensively. In practice, therefore, what results is a law which has a far greater impact than what the enforcement mechanisms can effect. It is impractical to expect law enforcement officials to

\(^{142}\) 2013 P.Cr.L.J. 312 Lahore
\(^{143}\) 2012 P.Cr.L.J 905 Lahore
observe and constrain the activities of all the individuals listed in the Fourth Schedule – which includes all members or associates of terrorist organizations; those suspected of being the same and those who might not be associated with such a group but who are, nonetheless, suspected of terrorist involvement.

To provide a point of contrast for the Pakistani antiterrorism framework under the ATA, under the Prevention of Terrorism Act of 2005 [PTA], promulgated by the Parliament of the UK, a similar regime of restrictions was enacted upon persons who were suspected of terrorist involvement. In the case of Re MB\textsuperscript{144} Justice Sullivan, in his opinion, determined that, as per the control orders provided for by the PTA, “[t]he controlees' rights under the [European Convention on Human Rights] are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision.” In the unique legal context of the UK, then, the PTA and the control orders which originate therefrom are incompatible with the broader legal framework.

In the Pakistani context, however, the constitutional document itself allows for certain restrictions to be imposed upon the operation of a person’s fundamental rights; these restrictions are subject to the standard of ‘reasonableness’ and are imposed in response to a pressing public need. In this context, therefore, a framework such as that provided in the PTA would – arguably – be consistent with the corpus of domestic antiterrorism jurisprudence. The control order regime as constructed by the PTA, in fact, provides greater protections to those under observation or restrictions than those available to such individuals under the ATA’s regime. While the latter specifies the particular locales or venues from which the restricted person is barred the control orders operate instead to restrict certain specific activities. These orders also allow for discretion in application – while the ATA explicitly bars affectees from all the listed venues the PTA, as per S. 3, allows the issuing authority the ability to tailor the control order – and its restrictions – to better fit the affectee, curtailing their involvement in terrorist activities while, at the same time, refraining from denying them the right to engage in the broader public life.

The control order regime in the UK under the PTA was repealed and replaced instead with the terrorism prevention and investigation measures [TPIM] regime under the Act of the

same name. The Terrorism Prevention and Investigation Measures Act of 2011 [TPIM Act] still operates to impose certain restrictions upon the actions of those suspected of terrorist involvement but also provides four preconditions to the application of such restrictions, provided for in S. 3 of the TPIM Act [relevant portions reproduced below]:

3. **Conditions A to E**

   (1) **Condition A** is that the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity (the “relevant activity”).

   (2) **Condition B** is that some or all of the relevant activity is new terrorism-related activity.

   (3) **Condition C** is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.

   (4) **Condition D** is that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity, for the specified terrorism prevention and investigation measures to be imposed on the individual.

   (5) ...

   (6) In this section “new terrorism-related activity” means—

   a. if no TPIM notice relating to the individual has ever been in force, terrorism-related activity occurring at any time (whether before or after the coming into force of this Act);

   b. if only one TPIM notice relating to the individual has ever been in force, terrorism-related activity occurring after that notice came into force; or
c. if two or more TPIM notices relating to the individual have been in force, terrorism-related activity occurring after such a notice came into force most recently.

These preconditions for the issuance of orders for the observation or restriction of those suspected of terrorist involvement are predicated upon the issuing authority – in the case of the UK the Secretary of State – ‘reasonably’ believing that the individual in question should be observed or restricted and that the ‘necessity’ of imposing such constraints upon such an individual in order to prevent her / him from engaging in ‘terrorism-related activities.’ The standards in the case of TPIMs, therefore, are ‘reasonability’ and ‘necessity’, standards far more stringent than those currently informing the operation of the ATA.

As discussed above, the Pakistani constitution also employs these two standards when discussing the imposition of constraints upon an individual’s constitutional rights; in light of that, therefore, it is argued that a hybrid of the UK’s control order and TPIM regimes be instituted in place of the current control regime under the ATA. The control order regime enables the issuing authority to specifically tailor the restrictions imposed upon the individual, placing reasonable constraints upon her / him on those activities which the authority has reason to believe pertain to the furtherance of terrorism, while allowing her / him to engage in all other facets of public life. The conditions from the TPIM regime, on the other hand, provide the individual with a series of additional legal protections in the way of prerequisites necessary before such restrictions may be imposed. Again, the standard employed is one of reasonableness, a standard consistent with the broader constitutional framework within which the antiterrorism regime of Pakistan is embedded.

➢ Recommendations – Sections 11 D and 11 EE

In summary, therefore, it is recommended that

1. The standard for the imposition of the restrictions under Sections 11D and Sections 11EE be changed from that of ‘suspicion’ to that of ‘reasonableness’, in order to harmonize the section with the provisions of the Constitution;

2. The restrictions be replaced with more specific, targeted restrictions – similar to the ones provided for under the old Control Order regime in the UK – in order to curtail
extremist activity more effectively, make the restrictions more feasible from an enforcement perspective and to better protect the affectees’ constitutional rights.

4.9 **POWERS TO ARREST AND DETAIN INDIVIDUALS LINKED TO PROSCRIBED ORGANIZATIONS OR ORGANIZATIONS UNDER OBSERVATION**

In addition to the broad-sweeping powers to restrict activity described above, the ATA also enables the Government to arrest and detain individuals associated with organizations which have either been proscribed outright or which are currently under observation. These powers go beyond the restrictions discussed above as they enable the Government to incarcerate such individuals.

Section 11-EEE of the ATA grants special powers to arrest and detain individuals who may be linked to either proscribed organizations or organizations under observation. This section is poorly drafted and creates significant confusion with regards to the arrest of an individual whose name is on the Fourth Schedule of the ATA. Section 11-EEE is reproduced below:

**11EEE. Powers to arrest and detain suspected persons.**—(1) Government if satisfied that with a view to prevent any person whose name is included in the list referred to in 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.

(2) The provisions of Article 10 of the Constitution of the Islamic Republic of Pakistan shall *mutatis mutandis* apply to the arrest and detention of a person ordered under sub-section (1).

**Legislative Defect – Section 11-EEE:**

The section grants special powers of arrest and detention to the Government in relation to any person who is already included in the Fourth Schedule. Thus being included in the Fourth
Schedule is a pre-requisite to arrest and detention under this Section. The Section states that the purpose behind this is to, “prevent any person whose name is included in the list referred to in section 11EE.” It does not state what the individual is prevented from, though a logical assumption would be engaging in terrorist activity or in acting as a functionary of a proscribed organization. Thus an individual already listed in the Fourth Schedule may be arrested and detained for a maximum of 12 months.

The only requirement for imposing such detention is that the Government be ‘satisfied’. This would seem to be a very wide degree of discretion. Case law has circumscribed what being ‘satisfied’ would entail. In Mrs. Majeeda Fatima v. District Magistrate and Deputy Commissioner, District Central Karachi, while interpreting the word ‘satisfaction’ in the West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960) in relation to preventive detention, the Sindh High Court noted, “satisfaction is to be objective in nature and not subjective of such nature as to allow the Authorities to act on whims and caprices without there being material before them in support of grounds of detention.”

In Iffat Razi v. Government of Punjab and others, the Government had not been able to produce any material evidencing an individual to be a member of a banned organization under the West Pakistan Maintenance of Public Order Ordinance 1960. The Punjab High Court stated that merely declaring an individual to be a member of banned organization could not be enough to curb his liberty. Substantial material would have to be produced in a detention order. Furthermore, the court noted that a detention order without such material clearly showing that the individual ought to be detained in the interests of maintaining public order would be invalid.

Notably, in Mir Abdul Baqi Baluch v. The Government of Pakistan through Cabinet Secretary, Rawalpindi and others such detentions were reviewable under the High Court’s judicial review procedure. In this regard the Supreme Court noted, that the, “High Court can insist on disclosure of material on which executive authority had acted subject to right of State to claim privilege in respect of an appeal against decision of executive authority.”

145 Mst. Shaheena Nargis v. District Police Officer, Bahawalnagar and another 2006 P.Cr.L.J 33 Lahore High Court.
146 PLD 1990 Karachi 470.
147 PLD 2002 Lahore 194
148 PLD 1968 Supreme Court 313
However, in Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Mrs. Amatul Jalil Khawaja and others the Supreme Court noted, that:

A duty has been cast upon the High Court, whenever a person detained in custody in the Province is brought before that Court, to "satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner". This Constitutional duty cannot be discharged merely by saying that there is an order which says that he is being so detained. If the mere production of an order of detaining authority, declaring that he was satisfied, was to be held to be sufficient also to "satisfy" the Court then what would be the function that the Court was expected to perform in the discharge of this duty. Therefore it cannot be said, it would be unreasonable for the Court, in the proper exercise of its Constitutional duty, to insist upon a disclosure of the materials upon which the Authority had acted so that it should satisfy itself that the Authority had not acted in an 'unlawful manner.

Furthermore, it noted that “the detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide”.

Essentially, the courts determine the cogency of a determination for preventive detention based on whether a reasonable person would be satisfied by the material before him that the individual ought to be detained.

The case law clearly requires a significant threshold of evidence to be met before the deprivation of liberty under Section 11-EEE may be ordered. These decisions also point to the inadequacy of the wording of Section 11-EEE. The section needs to be reworded to provide for a comprehensive and transparent mechanism to impose preventive detention orders. While the State needs to be able to employ intelligence to inform such decisions on preventive detention, there needs to be a review mechanism that tempers the arbitrary nature of this section.

Subsection (2) does afford some protections as it incorporates the provisions of Article 10 of the Constitution of Pakistan. The Constitution mandates that an individual who is detained

149 PLD 2003 Supreme Court 442
150 2013 P.Cr.L.J 1322 para.5.
under a provision for preventive detention beyond 3 months would have to be afforded an opportunity to be heard by a specially constituted Review Board. For the Federal Government, the Review Board would be appointed by the Chief Justice of Pakistan, with a Chairman and two other persons. All individuals would be either serving judges or retired ones of the Superior Judiciary.

A review board, established to oversee preventive detention established by a provincial statute, would be appointed by the Chief Justice of the High Court concerned and consist of a Chairman and two other persons. Each individual would have been or currently is a Judge of the High Court.

It would seem that Article 10 of the Constitution only applies when preventive detention extends beyond 3 months. Therefore, no review board is mandated if the detention is of a lesser period.

Article 10 also mandates that the detaining authority, within 15 days from the date of detention, communicate to the détenu the grounds on which the order is being made and afford him the earliest opportunity of making a representation against the order. However, information that may be against the public interest need not be disclosed to the individual. The Constitution does not make any allowance for the State to claim privilege over certain information or documents in this regard and, therefore, the Review Board would be empowered to view and assess such information.

It is important to note that detention of an individual should be based on recent involvement of terrorist activity. Law enforcement authorities must be able to prove that the individual is currently involved in terrorist activities to be able to detain him under Section 11-EEE. Thus, past activity which led to him being included in the Fourth Schedule, should not be the only evidence cited for the order. The decision should be based on the gravity of the threat the individual poses now.

The inclusion of such sections in special anti-terror legislation is primarily to grant a level of flexibility to law enforcement entities to take proactive measures to prevent individuals involved in terrorism from performing such activities. The flexibility is granted with regards to neutralizing individuals when the law enforcement entities may not have sufficient evidence to successfully prosecute. Viewed in this manner, such provisions are provisional in nature and must be based on cogent evidence that ties the individual to an on-going terrorist
activity. Such provisions of preventive detention cannot be used to incapacitate an individual for long periods of time. Ideally, the preferred approach should be to keep such individuals under surveillance and generate enough evidence to prosecute. Employing Section 11-EEE should be a measure of last resort where an individual is withdrawn from the general population temporarily because there was no other means of preventing his involvement in terrorist activities. This section straddles the line between providing law enforcement bodies with useful tools in combating terrorism and the arbitrary violation of the right to liberty. The section needs to be reworded to allow law enforcement bodies a degree of flexibility without arbitrarily infringing on fundamental rights.

➢ Recommendations – Section 11-EEE:

1. A transparent mechanism needs to be established for authorizing preventive detention of individual listed in the Fourth Schedule.
2. Decisions on detention should be based on recent information of involvement in terrorist activities and not on the information on which the original designation was made to include the individual’s name in the Fourth Schedule.

4.9.1 Preventive Detention for Inquiry – Section 11-EEE

Section 11-EEE is a specific form of preventive detention for the purposes of inquiry into an alleged offence under the ATA. The section is different from the preventive detention provisions in Section 11-EEE which are specific to an individual already on the Fourth Schedule to be detained. Under Section 11-EEE, any individual may be the subject of detention if the criteria are satisfied. Section 11-EEE reads:

11EEE. Preventive detention for inquiry.- (1) The Government may, for a period not exceeding thirty days and after recoding 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:

Provided that the Anti-terrorism Court may, for reasons to be recorded, grant extension in the period of detention for up to thirty days at a time, but the total period of detention shall not exceed ninety days.
(2) The inquiry under sub-section (1) may be conducted by a police officer not below the rank of Superintendent of Police or through a Joint Interrogation Team (JIT) to be notified by the Government comprising a police officer not below the rank of Superintendent of Police and officers of other investigation agencies and the powers of the inquiry officer will be vested as per section 5 of the Federal Investigation Agency Act, 1974 (VIII of 1975).

(3) The detenu shall be produced in camera before the presiding officer of the court or his absence before the District and Sessions Judge or the Magistrate appointed under the Shariah Nizam-e-Adl Regulation, 2009, within twenty-four hours of his detention, and before the presiding officer of the court if and when any extension in the period of detention is requested.

(4) During inquiry the concerned police officer not below the rank of Superintendent of Police or equivalent officer of the law enforcement agencies or the members of Joint Interrogation Team (JIT) as the case may be, shall have all the powers relating to search, arrest of persons and seizure of property, and other relevant material connected with the commission of offence and shall have all the powers as Police Officer has in relation to the investigation of offences under the Code or any other law for the time being in force:

Provided that the detenu shall be kept in a detention centre so notified by the Government and the presiding officer of the court or the Magistrate, as the case may be referred in sub-section (3) shall have the authority to inspect the detention centers to ensure that the custody is in accordance with the law for the time being in force.

Subsection (1) grants the Government the power to detain. Importantly, it requires that reasons for such an order be recorded. This is a positive measure and will promote greater transparency. The period of detention is initially 30 days, extendable by up to 30 days at a time, for a maximum period of 90 days. As mentioned in the previous section this is the threshold beyond which the Constitutional Review Board would have to assess the detention. The Government may order the detention on the grounds that an individual is concerned in an ATA offence relating to national security and sectarianism. Thus, it would seem plausible that not all ATA offences would merit such detention, only those which are of national security significance or which have a sectarian nature.
The detention may also be ordered if there is a reasonable complaint, credible information, or a reasonable suspicion that the individual is concerned with an ATA offence relating to national security and sectarianism. This is somewhat troublesome as it grants a significant degree of discretion to the Government. Much like the discussion made for Section 11-EEE, preventive detention for inquiry should be based on cogent grounds. This form of detention is specifically for the purpose of inquiry and thus allows the collection of evidence against the individual by the Police of a JIT, even after the detention is ordered. It would thus seem that the standard of evidence required to detain an individual would be less than that required for Section 11-EEE. Nonetheless, to obviate the risks inherent to preventive detention the standard of evidence would have to be significant to merit such a deprivation of liberty.

Section 11-EEEEE (3) creates a form of judicial oversight without empowering the judge to make a determination regarding the validity of the initial decision to detain. The détenu is required to be produced before the presiding ATC judge or in his absence the District and Sessions Judge or the Magistrate appointed under the Shariah Nizam-e-Adl Regulation 2009, within 24 hours of his detention. At this stage the judge is not granted any powers under the act to question the validity of the detention order. However, whenever the Government seeks to extend the period of detention, it is the ATC judge that is authorized to grant such an extension. It would seem the only mechanism to challenge the initial order of detention would be through the judicial review jurisdiction of the High Court.

An additional safeguard is granted by the proviso to subsection (4) which states that all detainees must be kept in a notified detention centre and the presiding ATC judge would have authority to inspect such detention centre. The ATC presiding judge would ensure that the custody of the individual is in accordance with the law.

The actual inquiry to be conducted under this section must be done by a Police officer not below the rank of Superintendent of Police or by a duly notified JIT. In this regard, the concerned officer is granted the same search, arrest and seizure powers without warrant as exist for the other ATA offences. Section 11-EEEEE (2), the inquiry officer would be vest with the powers of section 5 of the Federal Investigation Agency Act, 1974 (VIII of 1975). These powers essentially grant the officer jurisdiction to conduct the inquiry and investigation that may ensue. Furthermore, it does not limit the officer’s jurisdiction to the province but allows him to act throughout Pakistan.
Legislative Defects – Section 11-EEEEE:

This section needs to afford human rights safeguards through its wording. Any preventive detention mechanism necessarily encroaches upon fundamental rights, however, the severity of its impact may be tempered.

Recommendations Section 11-EEEEE:

1) The mechanism to impose an order for preventive detention under this section should be made more transparent and evidential requirements should be outlined in the act.
2) Safeguards protecting the individual from torture and abuse need to be strengthened in the ATA and other rights available need to be outlined as well.
CHAPTER FIVE

MONEY LAUNDERING AND TERRORIST FINANCING

5.1 INTRODUCTION

Money provides the essential fuel for terrorism. All terrorist enterprises first and foremost must have money to fund and conduct their terrorist activities. In addition to providing material means for terrorist activities including propaganda, recruitment and infrastructure, money crucially supports the planning and execution of specific terrorist attacks. In the case of Pakistan, money has been the catalyst for turning ‘rag-tag militants’ into a sophisticated Tehrik-e-Taliban Pakistan (TTP) terrorist movement imperiling domestic and international peace and security.

The various sources of finances fueling the syndicate of terrorism in Pakistan, inter alia, include donations from individuals and charities particularly of religious nature, funds transferred through less regulated informal value transfer system (Hawala transactions or Hundi system), funds raised through criminal activities like extortion, money laundering, bank robberies, car-snatching, theft and kidnapping for ransom, and money flowing from narco trade. Significantly, although the terrorist networks in Pakistan collect money from all the usual sources, the money collected for terrorist activities is rarely if ever linked to the country’s formal financial system. This movement of terrorist money through non-traditional channels presents a special challenge to Pakistan’s Government with respect to detecting and interdicting terrorist money through anti-money laundering and countering the financing of terrorism (AML/CFT) tools.

It is imperative that Pakistan’s counterterrorism strategy and legal framework is structured to effectively disrupt and dismantle terrorist financing networks by choking off and interdicting the sources of terrorist funding. Effective and timely prevention, detection and prosecution of

---


152 Id.


154 Acharya, Bukhari & Sulaiman, supra note 1, at p. 104.
money laundering and terrorist financing are crucial to combating terrorist activities in Pakistan. In this context, the state is well-advised to tailor its AML/CFT regime to its international obligations as well as per the relevant global standards.

5.2 INTERNATIONAL FRAMEWORK FOR MONEY LAUNDERING AND TERRORIST FINANCING


In the wake of 9/11 and the ensuing global war on terror, the international legal framework for AML/CFT was strengthened and expanded through United Nations Security Council Resolution 1373 adopted on September 28, 2001. This Resolution essentially encapsulates the response of the global community to counter terrorism and terrorist financing in post 9/11 world where terrorist networks raise funds through channels that transcend national boundaries.

Importantly, as a member state of the United Nations as well as having signed and ratified the abovementioned international instruments, Pakistan is legally bound to give domestic effect to its international obligations contained in these instruments by upgrading its AML/CFT

---

framework accordingly. These obligations must therefore be wholly and effectively reflected in the country’s AML/CFT regime.

Additionally, the Financial Action Task Force (FATF), an inter-governmental body established in 1989 to set AML/CFT international standards, monitors and provides recommendations to its members including Pakistan161 for the effective implementation of legal, regulatory and operational measures for combating money laundering and terrorist financing.162 After 9/11, FATF expanded its initial list of 40 recommendations by another 9, which now collectively lay down the international standards and measures to be adopted by its member states to counter money laundering and terrorist financing.163

In February 2008, FATF warned Pakistan that deficiencies in its AML/CFT system ‘constitute ML/FT vulnerability in the international system.’164 In response, over the years, Pakistan has been making consistent and steady efforts towards upgrading its AML/CFT system in accordance with FATF recommendations. Such efforts have been duly praised in various public statements issued by FATF since 2008. However, some deficiencies remain. In February and June 2009, FATF welcomed the process underway in Pakistan to improve its AML/CFT regime.165 In February 2010, FATF welcomed Pakistan’s efforts to implement a permanent AML law through legislation by enacting Anti-Money Laundering Act, 2010 [AMLA] but in June 2010, October 2010, February 2011 and June 2011, FATF highlighted that Pakistan still needed to fully implement its action plan by (1) demonstrating adequate criminalization of money laundering and terrorist financing; (2) demonstrating adequate procedures to identify, freeze and confiscate terrorist assets; (3) ensuring a fully operational and effectively functioning Financial Intelligence Unit [FIU]; (4) demonstrating effective regulation of money service providers, including an appropriate sanctions regime, and increasing the range of ML/FT preventive measures for these services; and (5) improving and

161 More precisely, Pakistan is a member of FATF’s regional body, the Asia Pacific Group (APG).
165 FATF Statement Concerning Iran, Uzbekistan, Turkmenistan, Pakistan and São Tomé and Príncipe, February 26, 2009.; FATF Statement Concerning Iran, Uzbekistan, Turkmenistan, Pakistan and São Tomé and Príncipe, June 26, 2009.
implementing effective controls for cross-border cash transactions.\textsuperscript{166} In February 2012, FATF noted that although Pakistan had taken significant steps towards improving its AML/CFT regime by enhancing the capacity of its FIU and by ensuring training is provided to relevant stakeholders, Pakistan still needed to demonstrate effective regulation of money service providers and implementing effective controls for cross-border cash transactions.\textsuperscript{167} In October 2012 and February 2013, FATF again noted the significant progress made by Pakistan towards improving its AML/CFT regime but called upon Pakistan to enact legislation to ensure that it meets the FATF standards regarding the terrorist financing offence and the ability to identify, freeze, and confiscate terrorist assets.\textsuperscript{168} In its latest public statement regarding Pakistan issued in June 2013, FATF noted its satisfaction vis-à-vis Pakistan’s criminalization of terrorist financing as largely consistent with international standards as a result of amendments in its Anti-Terrorism Act 1997 (ATA) via the Anti-Terrorism (Amendment) Act, XIII of 2013.\textsuperscript{169} Crucially however, FATF has called upon Pakistan to take additional steps to meet the international standards regarding the identification and freezing of terrorist assets, including by further amending the ATA.\textsuperscript{170} It is thus imperative that Pakistan amend its relevant legislation including the ATA to conform to this latest FATF recommendation.

5.3 \textbf{DOMESTIC LEGAL FRAMEWORK FOR ANTI-MONEY LAUNDERING}

Money-laundering in Pakistan is primarily regulated by the Anti-Money Laundering Act, 2010 (AMLA) whose preamble states that it is enacted to “provide for prevention of money laundering, combating financing of terrorism and forfeiture of property derived from, or involved in money laundering or financing of terrorism and for matters connected therewith or incidental thereto.” Over time, particularly with reference to FATF’s recommendations,


Depending on the nature of the predicate offence involved, AMLA designates the National Accountability Bureau (NAB), Federal Investigation Agency (FIA) or Anti-Narcotics Force (ANF) as the investigating or prosecuting agency for the investigation or prosecution of a predicate offence.\footnote{In this Act, unless there is anything repugnant in the subject or context:- “investigating or prosecuting agency” means the National Accountability Bureau (NAB), Federal Investigation Agency (FIA), Anti-Narcotics Force (ANF) or any other law enforcement agency as may be notified by the Federal Government for the investigation or prosecution of a predicate offence. Section 2 (j), Anti-Money Laundering Act, 2010.}

The ATA also criminalizes money-laundering of ‘terrorist property’ in section 11K, which states:

\begin{itemize}
  \item[(1)] A person commits an offence if he enters into or becomes concerned in any arrangement which facilitates the retention or control, by or on behalf of another person, of terrorist property:-
    \begin{itemize}
      \item[a)] by concealment;
      \item[b)] by removal from the jurisdiction;
      \item[c)] by transfer to nominees; or
      \item[d)] in any other way.
    \end{itemize}
  \item[(2)] It is a defense for a person charged with an offence under sub-section (1) to prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.
\end{itemize}

Where a person is convicted of an offence under section 11K, the relevant court may order forfeiture of the money or other property to which the arrangement in question related\footnote{Section 11Q. (5), Anti-Terrorism Act XXVIII of 1997.} in addition to ordering forfeiture of any money or other property which wholly or partly, and
directly or indirectly, is received by any person as a payment or other reward in connection
with the commission of the offence.\textsuperscript{174}

Section 11K has been incorporated verbatim into the ATA from section 18 the United
Kingdom’s Terrorism Act 2000.\textsuperscript{175} Thus, as also acknowledged by FATF in its public
statements, section 11K in its current form is at least textually in conformity with
international standards on AML. Moreover, the scope of predicate offences for money
laundering listed in the Schedule to the AMLA is broad enough to satisfy the FATF standard
for predicate offences.

However despite the existence of this legal framework, there is a striking absence of any
track-record of successful prosecution for ML under the existing statutes including the ATA.
This demonstrates the overall lack of effectiveness of the investigation and prosecution of an
ML offence. The enforcement and implementation of ML laws remains stymied because the
relevant investigative authorities do not consider the possibility of prosecuting ML as an
autonomous offence and it is not currently the practice in Pakistan to charge legal persons for
ML offences or for the predicate offences. A general lack of understanding of investigative
powers across all relevant investigative agencies and the FMU is responsible for the absence
of investigations into ML or TF. Therefore, a sustained and proactive effort of training the
concerned investigating officers and prosecutors is crucial towards implementation of ML
laws in Pakistan.

5.4 **DOMESTIC LEGAL FRAMEWORK FOR COUNTERING THE FINANCING OF TERRORISM (CFT)**

Pakistan’s domestic legal CFT regime is scattered across different sections of the ATA
including section 11E. (1) (b), which allows the Federal Government to seize or freeze money
or other property of a proscribed organization, section 11E. (1A) (b) which forbids any bank
or financial institution or any other entity providing financial support from providing any
loan facility or financial support to or issue credit cards to the office bearers, activists, or the
members or the associates of a proscribed organization who are found continuing the

\textsuperscript{174}Id. Section 11Q (6).
\textsuperscript{175}Terrorism Act, 2000 c. 11, Part III, Offences, Section 18.
activities of the proscribed organization upon proscription, section 11E. (2) which upon proscription mandates the proscribed organization to submit all accounts of its income and expenditure for its political and social welfare activities and disclose all funding sources to the competent authority designated by the Federal Government, section 11EE. (2) (e) which permits competent investigating authority to check and probe the assets of those whose name has been added to the Fourth Schedule\textsuperscript{176} of the Act or their immediate family members i.e., parents, wives and children to ascertain whether assets and sources of income are legitimate and are spent on lawful objectives, section 11F. (5) under which a person commits an offence punishable on conviction to a term of imprisonment not less than one year and not more than five years and a fine if he solicits, collects or raises money or other property for proscribed organization, section 11H. (1) under which a person commits an offence if he invites another to provide money or other property; and intends that it should be used, or has reasonable cause to suspect that it may be used for the purpose of terrorism or by a terrorist or organization concerned in terrorism, section 11H. (2) under which a person commits an offence if he receives money or other property; and intends that it should be used or has reasonable cause to suspect that it may be used for the purposes of terrorism or by a terrorist or organization concerned in terrorism, section 11H. (3) under which a person commits an offence if he receives money or other property; and if he knows or has reasonable cause to suspect that it will or may be used for the purpose of terrorism or by a terrorist or organization concerned in terrorism, section 11I (1) under which a person commits an offence if he uses money or other property for the purposes of terrorism, section 11I. (2) under which a person commits an offence if he possesses money or other property; and intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism, section 11J. under which a person commits an offence if he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another; and has reasonable cause to suspect that it will or may be used for the purposes of terrorism, section 11L. which requires disclosure of information to a police officer except by a legal professional where a person suspects or believes that any money or other property is terrorist property or is derived from terrorist property, section 11O which permits the Government to freeze, seize or detain any money or other property for a

\textsuperscript{176} A person is entered in the Fourth Schedule where the Federal or Provincial Government notifies his name on an information received from any source that that person is an activist, office bearer or an associate of an organization kept under observation or proscribed, or any way concerned or suspected to be concerned with such organization or affiliated with any group or organization suspected to be involved in terrorism or sectarianism. Section 11EE. (1), Anti-Terrorism Act XXVIII of 1997.
period of fifteen days if there are reasonable grounds to believe that it is a terrorist property; or it is property of a person included in the Fourth Schedule, 11P which allows the authorized officer to apply the court for an order seeking further detention of property frozen or seized under section 11O, section 11Q which allows the court by or which a person is convicted of an offence under sections 11H to 11M to make a forfeiture order, and section 27A (2) under which for any person convicted for an offence punishable under the Act, if having property or assets, which are disproportionate to his known sources of income, it shall be presumed, unless contrary is proved, that the said property and assets were acquired through terrorist activities and would be liable to forfeiture.

Significantly however, there have been no successful prosecutions under these provisions of the Act and their extremely weak implementation and enforcement remains a matter of great concern to FATF and other stakeholders. Moreover, there exist no judicial directions or developed jurisprudence clarifying the application, scope and meaning of these provisions. In 5 cases involving these provisions that were decided at the appellate level, the appellate courts reversed the respective Anti-Terror Courts judgments on procedural and technical grounds without reaching the substantive merits of these provisions.177

The foregoing provisions of the Act largely follow the language and structure of similar provisions in the UK’s Terrorism Act 2000. Recently, they were substantially amended in February 2013 to address most of FATF’s long-standing concerns with respect to Pakistan’s CFT legal regime. Nevertheless, the Act’s CFT provisions need to be further upgraded to meet the international standards regarding the identification and freezing of terrorist assets.

Currently, the CFT provisions do not provide a coherent and unambiguous framework for seizure and freezing of terrorist assets belonging to individual terrorists or to organizations that have not been proscribed. In that context, the following recommendations are made:

- Section 11D may be amended to include “Where an observation order is passed against an organization, the Federal Government may designate an officer of the Government by notification in the official Gazette, or direct any other person without delay to freeze, seize, or detain any money, property, funds or economic resources of the subject organization throughout the observation period.”

New sections may be added to the Act creating a new category of ‘restricted persons’ and granting the Government the powers to probe and check the assets and finances of such restricted persons and their immediate families including their parents, wives and children. These sections may be drafted as:

**Designating a person as a restricted person.** (1) The Government may designate a person as a restricted person by notifying the name of such person or persons in a list entered in the Fourth Schedule where it considers that the notification is necessary for purposes connected with protecting members of the public from a risk of terrorism.

(2) The Government may notify where it has reasonable grounds for suspecting that a person:

(a) who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism;

(b) is an activist, office bearer or an associate of an organization kept under observation under section 11D;

(c) is an activist, office bearer or an associate of an organization proscribed under section 11E;

(d) concerned or suspected to be concerned in any way with such organization or affiliated with any group or organization suspected to be involved in terrorism or sectarianism;

(e) owned or controlled, directly or indirectly, by a restricted person; or

(f) acting on behalf of or at the direction of a restricted person.

**Measures to be taken against restricted persons.** (1) Where a person has been designated as a restricted person, the Government, as the case may be, without prejudice to any other action which may lie against such persons under this Act or any other law for the time being in force, shall take the following measures against such persons:
(a) confiscate any passport allowed to travel abroad and seize the issuance of any passport.

(b) confiscate arms, cancel any arms licenses issued and seize the issuance of any fresh arms license.

(c) monitor and restrict movement to the area of residence of such a person.

(d) make allowance for special permission to visit surrounding areas.

(e) restrict residence of such persons only to non-sensitive areas.

(f) check and probe the property of such persons and their immediate family members.

(g) monitor and keep surveillance over the activities of such persons.

**Prohibitions on dealing with a restricted person.** (1) A person must not deal with funds or economic resources owned, held or controlled by a restricted person if that person knows, or has reasonable cause to suspect, that he is dealing with such funds or economic resources.

(2) In sub-section (1) “deal with” means:

(a) in respect of funds:

(i) use, alter, move, allow access to or transfer;

(ii) deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

(iii) make any other change that would enable use in exchange for funds, goods or services.

(b) In respect of economic resources, exchange or use in exchange for funds, goods or services.

(3) A person must not make funds or financial services available (directly or indirectly) to a restricted person if that person knows, or has reasonable cause to suspect, that he is making the funds or financial services so available.
(4) A person must not make funds or financial services available to any person for the benefit of a restricted person if that person knows, or has reasonable cause to suspect, that he is making the funds or financial services so available.

(5) For the purposes of sub-section (4):

(a) funds or financial services are made available for the benefit of a restricted person only if that person thereby obtains, or is able to obtain, a significant financial benefit; and

(b) “financial benefit” includes the discharge of a financial obligation for which the restricted person is wholly or partly responsible.

(6) A person must not make economic resources available (directly or indirectly) to a restricted person if that person knows, or has reasonable cause to suspect:

(a) that he is making the economic resources so available, and

(b) that the restricted person would be likely to exchange the economic resources, or use them in exchange, for funds, goods or services.

(7) A person must not make economic resources available to any person for the benefit of a restricted person if that person knows, or has reasonable cause to suspect, that he is making the economic resources so available.

(8) For the purposes of sub-section (7):

(a) economic resources are made available for the benefit of a restricted person only if that person thereby obtains, or is able to obtain, a significant financial benefit; and

(b) “financial benefit” includes the discharge of a financial obligation for which the restricted person is wholly or partly responsible.

(9) A person who participates knowingly and intentionally in activities the object or effect of which is, directly or indirectly, to:

(a) circumvent a prohibition in this section, or
(b) enable or facilitate the contravention of a prohibition in this section, is
guilty of an offence.

(10) A person who contravenes the prohibitions in this section commits an offence.

➢ Section 11O of the Act may be amended to allow the Government to freeze, seize or
detain any money, property, funds or economic resources for a period of **thirty**
**days** upon reasonable grounds to believe that (a) it is a terrorist property; or (b) it is
property of a person included in the Fourth Schedule.
The Anti-Terrorism Act of 1997 [ATA] was promulgated in response to the rising tide of sectarian violence in the country – especially in the metropolis of Karachi – and focused on the particular nature of sectarian conflict in the Pakistani context. While terrorism in Pakistan has never been a monolithic entity, with its various iterations the emphasis at the inception of the ATA regime was on combating violence between the two majority sects of Islam in the country – namely the Shi’a and Sunni communities. Since then however, terrorism has metastasized into virulent forms, posing a direct and serious threat to the stability of the State and its national integrity. In this new context therefore, it is imperative that the preexisting antiterrorism legal framework be analyzed and areas of growth and concern highlighted; the purpose of this section of the report, therefore, is to examine the ways in which the old focus of the ATA upon ‘sectarian’ forms of extremism are outdated and to suggest alternatives more apt to the current context of terrorism as evinced in Pakistan.

Given the fact that militancy in Pakistan is described as originating out of ‘religious’ conflicts – particularly out of expressions of particular terrorist organizations’ intent to destabilize the State and impose their own ‘brand’ of Islamic or Sharia governance – it is important to distinguish at the outset between such forms of ‘religious’ violence and broader discussions of religiously-motivated violence, which cover issues pertaining to sectarian or inter-religious expressions of terrorist activity. For the purposes of this section, therefore, the latter forms of violence, i.e. those between sects within a religion or between two distinct religious denominations entirely, will be referred to as “religiously-motivated” violence to differentiate such from the former, i.e. expressions of militancy or violent acts conducted by terrorist organizations for an ostensibly political goal. Furthermore, though the term “inter-communal violence” also incorporates expressions of ethnic or nationalistic conflict it is used in this section to refer more specifically to instances of sectarian or interreligious violence.
6.1 PREAMBULATORY TEXT

An act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences;

Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto;

The preamble of the ATA, as provided above, lays out in broad strokes the overall ambit of the Act itself. The Act is, prima facie concerned with the issues of “terrorism,” “sectarian violence” and “heinous offences”; for the purposes of this section the focus will primarily be upon the second of those three, i.e. the term ‘sectarian violence’ and its role in the current conception of antiterrorist jurisprudence under the ATA regime.

As a preamble, the text above is intended to illustrate the purpose, scope and spirit of the law as expressed in the Act. Such language, therefore, lacks legal enforceability but does, however, provide clarity to judicial officials when interpreting and applying the substantive provisions of the law, acting as an interpretative aid; contextualizing the provisions within the background of parliamentary intent and historical particularity; and affirming the positive content of the law it precedes.

The preamble to the ATA, therefore, informs the reader of the particular politico-legal context within which the proceeding Act was embedded in at the time of its initial promulgation; while the ATA has – in the years since 1997 – undergone significant amendment, the preamble provides insight into the original context from which the Act originated, suggesting how the Act may – going forward – be applied by officials of the law.

Conceived as it was during the upsurge in sectarian strife in the mid- to late-nineties, the ATA frames the antiterrorism legal framework under the act in sectarian terms. While the ATA deals with terrorism in general, its focus was – at its inception – on sectarian forms thereof; in the contemporary context, where terrorist encompasses a myriad of different forms of violence, this focus on sectarianism is myopic and thus needs revision. For a detailed discussion on the legislative defects pertaining to the preamble to the ATA, please refer to Chapter Two of this Report.
As discussed in the section title “Trends in Terrorism”, terrorism in Pakistan arises out of four principal preexisting conflicts, namely: sectarian, racial nationalism, ethno-linguistic, and religious. At the time the ATA was prepared sectarian violence was the predominant form of domestic extremism; in today’s day and age however, while sectarian – and other conflicts – do erupt into extremist activity the major threat to peace and security within Pakistan is religious terrorism – in this context referring specifically to acts conducted by extremist and militant organizations.

This myopic focus largely ignores violence committed upon other, non-Islamic, faiths – i.e. “religiously-motivated” forms of violence – which have also experienced a resurgence of late. Recent incidents such as the attack on a Christian neighborhood in Lahore\(^\text{178}\) in March, 2013 and – more recently –in Peshawar in\(^\text{179}\) September, 2013 highlight the need to expand the ambit of the ATA to incorporate forms of violence perpetrated upon elements of Pakistani society targeted for their faith.

The focus on sectarianism is, therefore, misplaced given the realities of contemporary terrorism in Pakistan; the phenomenon of terrorism has evolved beyond inter-sectarian conflict to include other religious denominations as targets. Furthermore, this focus prioritizes a certain form of conflict – in this case sectarian – over other forms of terrorist activity such as racial nationalistic, racial, ethno-linguistic, and ideological militancy. If the ATA is to competently address the multi-headed hydra of terrorist violence in Pakistan it must first, therefore, address the spectrum of terrorist violence, rather than on a particular expression thereof.


6.2 Definitional Clarity

- Legislative Defect: the inordinate focus on 'sectarianism'

S. 2(u) “sectarian” means pertaining to, devoted to, peculiar to, or one which promotes the interest of a religious sect, or sects, in a bigoted or prejudicial manner;

S. 2 of the ATA provides the definitions for those terms used in the Act; these terms, in contrast to their commonplace usage, are ascribed a particular meaning and usage for the purposes of the Act itself. S. 2(u) of the Act provides the definition of the term “sectarian” and it is important to note that the term – as used in the Act – is defined to refer to actions which engender conflict between sects of a parent religious denomination.

While the term “terrorism” is defined in S. 6 of the Act, the absence of any reference to interreligious violence in the definitional section S. 2 is noteworthy. Given the context within which the ATA was promulgated the focus on sectarian violence was historically relevant; however in the contemporary milieu, terrorism in Pakistan encompasses expressions of violence arising out of several preexisting tensions, of which sectarianism is only one aspect.

This absence of a definition for ‘interreligious’ acts is significant as it informs the remainder of the Act. Again, as discussed above, at the time of its promulgation this absence was not noteworthy given the ATA’s focus on curbing sectarian violence. Now however, given the increased targeting of non-Muslim minorities in Pakistan for terrorist violence, there is a pressing need to incorporate language which operates to curb all forms of religiously-motivated acts, not just sectarian.

By contrast, as per the Crime and Disorder Act [CaDA] of 1998 [for England and Wales] – amended following the events of September 11, 2001 – the term “racially or religiously aggravated” is incorporated into the CaDA. While not a piece of antiterrorism-specific legislation, the CaDA operates within the broader criminal justice system of the UK. As per S. 28 of the CaDA:

S. 28 Meaning of “[racially or religiously aggravated]”.

An offence is [racially or religiously aggravated] for the purposes of sections 29 to 32 below if—

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a [racial or religious group]181; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a [racial or religious group] based on their membership of that group.

As discussed above, this formulation informs the criminal justice system of the UK; what is significant is that the CaDA categorizes offences which are ‘racially’ or – more importantly – ‘religiously’ motivated as ‘aggravated’, distinct from similar offences which, lacking such a racial or religious component, are otherwise proceeded against in the normal manner.

These offences, aggravated or otherwise, fall within the purview of the courts of ordinary jurisdiction. By contrast, the antiterrorism framework has a parallel judicial framework for the prosecution of terrorist cases, operating within the framework of the ATA. Nonetheless, the term “racially or religiously motivated” as used in the UK context provides a useful point of comparison by providing a broad, comprehensive, description of offences originating out of religious motivations. Rather than specify sectarian conflicts as being ‘aggravated’ – paralleling ‘terrorist’ offences in the Pakistani context – the CaDA provides an overarching description subsuming sectarian and interreligious – and even racial – conflicts within itself.

Continuing with an inter-jurisdictional comparison, the definition of the term “terrorist act” in S. 100.1 of the Australian Criminal Code182 is:

terrorist act means an action or threat of action where:

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;

Once again the focus is broader, concentrating upon interreligious actions – or threats thereof; it is arguable that this focus on sectarianism – as distinct from interreligious violence

181 All underlining is added by the author(s) of this section to highlight the key provisions.
– arises out of the particular socio-cultural and politico-legal context. With an overwhelming majority of its population ascribing to two sects of Islam, the conflicts between adherents of Shi’a and Sunni Islam have historically been more overt. By contrast, the conflicts between religions, particularly between the majority Muslim populace and the various other non-Muslim denominations within the country, have received far less domestic attention.

This is, in one’s opinion, a critical oversight; given the recent rise in devastating attacks on the non-Muslim populations of Pakistan it is imperative that the legislation best suited to curbing such excesses – i.e. the ATA – reflects the broader, interreligious, nature of such acts of terrorism rather than myopically focus upon one element thereof.

**Recommendations:**

It is recommended, therefore, that the term “sectarianism” be omitted from the ATA and substituted by the term “religiously-motivated”. This new term would refer not only to acts pertaining to sects, which would limit the ambit of the ATA to violence expressed between two sects of the same faith, but also to acts committed between members of two distinct faiths. To provide a sample of what the new term may be:

“religiously motivated “means pertaining to, devoted to, peculiar to, or one which promotes the interest of a religion, or religions, or a sect of a religion, or sects of a religion in a bigoted or prejudicial manner

Here, the overall language and intent is maintained with the term being used to refer to acts promoting the interests of a particular group which arise out of bigotry or prejudice. The distinction here is that, in addition to merely sectarian expressions of such behavior such as between the Shi’a and Sunni sects of Islam, the term also refers to interreligious expressions of such behavior, such as between the Christian and Muslim communities in Pakistan.

S. 2.(v) “sectarian hatred” means hatred against a group of persons defined by reference to religion, religious sect, religious persuasion, or religious belief;

The concerns arising out of this section are similar to those expressed above vis-à-vis S. 2(u) of the ATA; the distinction here, though, is that the term “sectarian hatred” has been defined for the purposes of the Act to refer to antipathy existing between not only sects of a ‘parent’ religion but also existing between distinct religions entirely.
While the term “sectarian hatred” is defined more comprehensively in the ATA than the term “sectarianism”, the concern is that the common, broader, usage of the term refers to sectarian hatred whereas, as recent events have demonstrated, there is also the threat of interreligious hatred as well. By incorporating ‘religious hatred’ within itself, the definition of the term “sectarian hatred” attempts to subsume the broader range of faith-based conflicts within itself, informing the general through the specific as it were.

This definition, therefore, runs counter to a commonsensical reading of the language of the Act and while the definition establishes the particular meaning the term enjoys within the ATA the Act does, however, need to be interpreted and applied by a wide range of individuals. While members of the judiciary might be able to apply the precise definition of the term but the Act does, however, inform the actions of a wider variety of individuals than those who are legally trained – such as law enforcement officials – and the present formulation of the term “sectarian hatred”, in our opinion, detracts from the overall clarity intended and preferred from an Act such as this.

➢ **Recommendations:**

In order to provide the necessary definitional clarity it is therefore recommended that the term “sectarian hatred” be omitted from the ATA and replaced instead with the term “religious hatred” while retaining the previous term’s definition. This new term would cover all the various permutations of inter- and intrareligious violence but would also provide invaluable clarity to an otherwise complex element of criminal jurisprudence. A sample of the new term, as defined, could read:

> “religious hatred” means hatred against a group of persons defined by reference to religion, religious sect, religious persuasion, or religious belief;

Here the language of S. 2.(v) is retained, along with the substantive definition of the term; while the overall operation of S. 2(v) within the context of the ATA remains the same – as the term as defined earlier still encompassed inter- and intrareligious violence – the new formulation aids in the comprehension of those individuals who might not necessarily be legally trained but who nonetheless are part of the overarching domestic antiterrorism justice system.
6.3 THE DEFINITION OF TERRORISM

S. 6 of the ATA provides the definition of the term “terrorism” and constitutes the core of the ATA itself. As a term which has stubbornly defied definition, incorporating “terrorism” in a statute in an intelligible manner is a challenging task. This difficulty is further compounded by the peculiar focus the ATA framework places on instances of sectarian violence; such an inordinate amount of attention paid to instances of sectarian violence makes it more difficult for those associated with the domestic criminal justice system – judicial as well as law enforcement officials – to prosecute acts which would otherwise constitute terrorism, within the ATA framework. For a more in-depth analysis of the concerns inherent in the definition of ‘terrorism’ under S. 6 please refer to Chapter Two of this Report.

To provide a point of comparison, as per the definition of a “terrorist act” under S. 100.1(1) of the Australian Criminal Code Act of 1995 [CCA] [only the relevant provisions are reproduced below]184:

*terrorist act means an action or threat of action where:*

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

---


(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person’s death; or

(d) endangers a person’s life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:
  
  i. to cause serious harm that is physical harm to a person; or

  ii. to cause a person’s death; or

  iii. to endanger the life of a person, other than the person taking the action; or

  iv. to create a serious risk to the health or safety of the public or a section of the public.

As per the Australian model, acts which harm or threaten harm to a particular community or section of society, when conducted with the intention of furthering a particular ideology – religious or otherwise – constitute acts of terrorism. This conception does not specify the targets nor the weapons used, unlike the Pakistani model which specifies that attacks involving firearms on religious institutions – and no other overt forms of inter-communal violence, constitute terrorism.

The CCA also includes a ‘subdivision’ on ‘Genocide’; as per this portion of the CCA [only the relevant provisions are reproduced below]:

---

202
268.3 Genocide by killing

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator causes the death of one or more persons; and

(b) the person or persons belong to a particular national, ethnical, racial or religious group; and

(c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such...

268.4 Genocide by causing serious bodily or mental harm

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator causes serious bodily or mental harm to one or more persons; and

(b) the person or persons belong to a particular national, ethnical, racial or religious group; and

(c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such...

268.5 Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator inflicts certain conditions of life upon one or more persons; and

(b) the person or persons belong to a particular national, ethnical, racial or religious group; and
(c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and

(d) the conditions of life are intended to bring about the physical destruction of that group, in whole or in part...

These provisions of the CCA provide an illustrating model of criminalizing inter-communal violence; while the CCA – as a general criminal statute – lacks the specificity of the ATA in its description of the offence(s) of genocide comprehensively address the issue of inter-communal violence. Under Australian law genocide is a specific offence, distinct from other criminal offences – even though such offences may be subsumed within it. In the Pakistani context – and specifically within the ATA framework – the offence of genocide itself is not pertinent. What is of value, however, is the way in which the Australian legislative has constructed the offence of genocide. Criminalizing inter-communal violence with a particular focus on curbing attacks perpetrated simply due to the victims’ religious, ethnic, linguistic or other background, is extremely pertinent in the Pakistani context as, as discussed earlier, terrorism manifests itself in a myriad of forms and is motivated along several distinct lines.

It can be argued therefore, that the ambit of the ATA should be focused on terrorism and not inter-communal conflict, with the latter prosecuted under the broader domestic criminal justice system. This point of view, however, does not adequately address the nature of terrorism in Pakistan; the ATA was, in fact, originally promulgated to combat a specific form of inter-communal conflict – i.e. sectarianism – and contemporary expressions of terrorism continue to involve attacks targeting minority religious denominations including the Shi’a and Christian communities.

The offence(s) of genocide under the CCA clearly reflect the nature of a significant element of contemporary terrorism in Pakistan; as discussed earlier, domestic terrorism is not a monolithic entity but is possessed of four broad facets. That said, however, there is a great deal of overlap between each of these facets; on one hand terrorist groups such as Jandullah or Lashkar-e-Jhangvi are actively engaged in militancy and ‘religious terrorism,’ operating to destabilize the mechanisms of the
State. On the other hand, the same groups are actively conducting a pogrom of the religious minorities within the country. In fact, the groups claiming responsibility for the September 2013 attack on a church in Peshawar asserted that the attack was in retaliation to the US drone program conducted in the Western regions of the country.

This highlights the significant overlap between the various forms of terrorism prevalent in the country, necessitating therefore a broader definitional focus for the term “terrorism.” Furthermore, in light of the ‘requirement’ in S. 6(1)(c) of the act being committed in order to further a religious, sectarian or ethnic cause, certain acts which would otherwise constitute terrorism would be excluded from the application of S. 6 and thus not constitute terrorism under the ATA. To use an example, the groups claiming responsibility for the September 2013 attack on a church in Peshawar claimed the attack had been conducted in response to the US drone program in Pakistan. This is not an ideological goal but rather a more microcosmic issue which, while informed by the broader ideological and political goals of such militant groups is, in isolation, not tied to an expression of a particular ideology – religious or otherwise.

Therefore, rather than over-emphasizing ‘sectarian’ violence in the context of terrorism and restricting the definition of terrorism to specific, isolated scenarios it is argued that the law should be amended to criminalize the targeting of a particular community – whether religious, sectarian, ethnic or otherwise.

---


And


6.4 HATE SPEECH AND THE INCITEMENT OF INTER-COMMUNAL HATRED

6.4.1. Section 6 of the ATA

The ATA incorporates the incitement of inter-communal hatred within the definition of the term “terrorism” in S. 6 of the ATA [only the relevant provisions are reproduced below]:

S. 6 Terrorism.

(1) In this Act, “terrorism” means the use or threat of action where:

a. the action falls within the meaning of sub-section (2); and

b. the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect...; or

c. the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause...

(2) An “action” shall fall within the meaning of sub-section (1), if it:

f. incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance...

Here the Act, in a partial departure from its previous focus, describes the incitement of inter-communal hatred as a terrorist act in a far broader manner; as per S. 6(2)(f) such incitement includes interreligious as well as sectarian and ethnic agitation. This formulation is, however, still constrained by the language in S. 6(1).

A detailed analysis of the definition of terrorism in S. 6 of the ATA is provided in section two of this report; a specific point of concern with regards to the ATA’s inordinate focus on ‘sectarianism’ though, is that while S. 6(1)(b) does refer to the intimidation or coercion of “a
section of the public or community” it goes on to specify “sect” as well. While it might be argued that the terms ‘a section of the public’ or ‘community’ can be employed to refer to religious minority groups within Pakistan, the fact that incitement of sectarian inter-communal hatred or contempt was specified – and not others – detracts from the weight placed upon other forms of incitement.

Given the amount of social influence clergypersons in Pakistan wield and the historical victimization of non-Muslim minorities within the country it is clear that the antiterrorism framework under the ATA must comprehensively address instances of inter-communal violence and not focus myopically on one element of the issue – i.e. that of sectarianism.

Instances abound where violence against the Christian or Ahmadi communities in the country has been incited using religious platforms as a vehicle for rhetoric; the problem, therefore, extends beyond the historical focus of the ATA upon sectarian conflict to broader tensions between the various religious denominations within the country and as such the antiterrorism framework needs to accommodate this broader conception of the issue.

Such instances of inter-communal violence are not intended to further a particular religious, sectarian or ethnic cause as per S. 6(1)(c) but are, instead, expressions of pre-existing prejudice and intolerance between the different religious denominations within the country; when viewed in that light, therefore, inter-communal violence as the Christian or Ahmadi communities in Pakistan have witnessed would not fall squarely within the ambit of the ATA though they should, in fact, do so.

➢ Recommendations:

It is recommended, therefore, that the language of these provisions be amended to reflect the broader scope of terror prevalent in Pakistan and, by extension, the broader ambit of the necessary antiterrorism legislation. As mentioned earlier, a detailed analysis of S. 6, with specific recommendations, can be found in Chapter Two of this report.

---

6.4.2. Section 8 of the ATA

S. 8 deals with prohibiting acts which are intended or likely to incite sectarian hatred. This provision, reproduced below, suffers from the same narrow focus which runs throughout the ATA – namely the emphasis on sectarianism to the exclusion of other forms of inter-communal antipathy [only the relevant provisions are reproduced below].

S. 8. Prohibition of acts intended or likely to stir up sectarian hatred.

A person who

(a) uses threatening, abusive or insulting words or behavior; or

(b) displays, publishes or distributes any written material which is threatening, abusive or insulting; or words or behavior; or

(c) distributes or shows or plays a recording or visual images or sounds which are threatening, abusive or insulting; or

(d) has in his possession written material or a recording or visual images or sounds which are threatening, abusive or insulting with a view to their being displayed or published by himself or another,

Shall be guilty of an offence if-

(i). he intends thereby to stir up sectarian hatred; or

(ii). having regard to all the circumstances, sectarian hatred is likely to be stirred up thereby.

Once again, this section of the ATA focuses exclusively on acts or materials which contribute towards sectarian antagonism; the way the section has been phrased attracts the application of these provisions of the ATA to instances where such acts or materials sects within the Muslim community to the exclusion to similar contraventions viz non-Muslim religious denominations.
Additionally, this provision does not provide the necessary clarity when one considers the intersection of this section and the constitutionally-guaranteed right to free speech. As per article 19 of the Pakistani constitution:

*Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, or incitement to an offence.*

As is evident from the constitutional provision above the Pakistani legal system recognizes the need to restrict free speech when the exercise of such would constitute incitement of an offence, a notion which ties in with the provisions of S. 8 of the ATA. When proscribing incitement therefore, the legislature must perform a balancing act, protecting the citizenry’s right to express themselves while, at the same time, preventing individuals from exercising this right to the detriment of others.

It is therefore recommended that, in addition to replacing the term ‘sectarian’ within S. 8 with the term ‘religious, ethnic or sectarian hatred’, a new provision be added which operates to allow for peaceful, non-inimical expressions of religious opinions. To provide an example, as per S. 296(3) of the Canadian Criminal Code [CCC]\(^{190}\) [only the relevant provisions are reproduced below]:

*No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.*

A provision of this nature would balance the necessity of circumscribing incitement of inter-communal violence while, at the same time, recognizing the value inherent in a free and non-antagonistic exchange of ideas.

\(^{190}\)http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html
To illustrate this point, the Pakistan Penal Code of 1860 [PPC] criminalizes acts made with the intent to incite hatred among individuals. As per S. 153-A of the PPC [relevant provisions reproduced below]:

(a) **Whoever** by words, either spoken or written, or by signs, or by visible representations or otherwise, **promotes or incites**, or attempts to promote or incite, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities; or

(b) **Commits, or incites any other person to commit, any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities or any group of persons identifiable as such on any ground whatsoever and which disturbs or is likely to disturb public tranquility; or

(c) **Organizes, or incites any other person to organize, and exercise, movement, drill or other similar activity intending that the participants in any such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained to use criminal force or violence or participates, or incites any other person to participate, in any such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained, to use criminal force or violence, against any religious, racial, language or regional group or caste of community or any group of persons identifiable as such on any ground whatsoever and any such activity for any reason whatsoever cause or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community shall be punished with imprisonment for a term which may extend to five years and with fine.

Explanation: It does not amount to an offence within the meaning of this section to point but, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce,
feelings of enmity or hatred between different religious, racial, language or regional groups or castes or communities.

Similarly, S. 295(A) of the PPC, criminalizes hate speech, providing that [relevant provisions reproduced below]:

Whoever, with deliberate and malicious intention of outraging the 'religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

The criminal justice framework under the PPC, therefore, goes further than the ATA when circumscribing hate-speech and any activities which foment antipathy between members of different groups. It is interesting to note that the PPC also makes allowances for the operation of free speech, allowing ecumenical discourse conducted in good faith and without the mens rea of fomenting inter-communal disharmony – a model similar to that presented in S. 296(3) of the CCC discussed above.

This is problematic as, in the domestic criminal justice framework, the ATA – as a specialized act – supersedes the more general criminal statutes including the PPC. The narrower conception of hate speech and the concurrent offence of incitement of inter-communal antagonism in the ATA makes prosecuting instances of such offences more difficult under the ATA framework and within the antiterrorism courts [ATCs]. The jurisdiction of the ATCs – as discussed in greater detail in Chapter Two of this report – extends only to offences under the ATA and its Schedules; while the offence of incitement of inter-communal hatred is an offence under the ATA the formulation of the offence – as discussed above – pales in comparison to that provided for by the PPC. The ATA’s anti-hate speech regime focuses exclusively on inter-sectarian incitement, ignoring the fact that much of the attempts at inciting inter-communal hatred have been targeted at members of other religious denominations – the Christian and Ahmadi communities in particular, the latter given the fact that in contemporary domestic religious and legal discourse the Ahmadi community is described as being a non-Muslim religious denomination. Similarly, much of the incitement for violence taking place in Karachi is predicated along ethnic and political lines, which might be subsumed within the framework of the PPC but which fails to fall within the ambit of the ATA.
➢ Recommendations:

It is recommended therefore, that the current regime for circumscribing incitement and hate-speech in the ATA be replaced with a broader, more expansive regime similar to that described in the PPC or the CCC. The ATA’s inordinate focus on sectarianism is anachronistic and embedded in the politico-legal context of Karachi in the late nineties, when the civil unrest – primarily sectarian in nature – precipitated the promulgation of the ATA. By contrast, the contemporary face of incitement is far more complex, mirroring the multifaceted nature of contemporary terrorism in Pakistan, and this complexity needs to be addressed within the ATA.

6.4.3 Section 10 of the ATA

This section refers to the capacity of law enforcement officials to conduct searches and – over the course of these searches – to enter premises where it is suspected that certain materials, referred to in S. 8 of the Act, are present. As discussed above, S. 8 pertains to inflammatory materials intended to incite sectarian conflict; the earlier discussion also highlighted the narrow focus of the section which focused exclusively upon materials pertaining to inter-sectarian conflict, and recommended that the ambit of the section be broadened to incorporate similar materials which incite inter-religious and ethnic violence.

This section of the report focuses upon the issue of inter-communal conflict in the domestic antiterrorism legal context, and while no changes to S. 10 are recommended here it is important to note that S. 8 informs the operation of S. 10. In that light, therefore, one must remain cognizant of the fact that changes to S. 8 will effect changes to the way S. 10 is applied by officials of the domestic criminal justice system. For proposed recommendations viz the broader application of S. 10 please refer to the discussion on police powers contained in section three of this report.
6.4.4 Section 11 of the ATA

S. 11 of the ATA pertains – in part – to materials produced with the intention of stirring up inter-communal antagonism; as per S. 11W of the Act [relevant portions provided below]:

11-W. **Printing, publishing, or disseminating any material to incite hatred or giving projection to any person convicted for a terrorist act or any prescribed organization or an organization placed under observation or anyone concerned in terrorism.**

1) A person commits an offence if he prints, publishes or disseminates any material, whether by audio or video-cassettes or by written, photographic, electronic, digital, wall-chalking or any method which incites religious, sectarian or ethnic hatred or gives projection to any person convicted for a terrorist act, or any person or organization concerned in terrorism or any person organization or an organization placed under observation:

Provided that a factual news report, made in good faith, shall not be construed to mean “projection” for the purposes of this section.

2) Any person guilty of an offence under sub-section (1) shall be liable by way of summary procedure, on conviction, to a maximum term of six months imprisonment and a fine.

This section attempts to circumscribe the production and dissemination of materials which incites hatred along communal lines and which ‘glorifies’ terrorism. Much of the substance of this section is derived from the earlier conception represented in S. 153-A of the PPC – indeed much of the language is identical to the provisions of the PPC – and informs the operation of S. 11 as a whole.

S. 11 also makes provides for the power of an ATC to order the seizure and forfeiture of materials referred to in S. 8 of the Act. S. 11(1) enables an ATC to pass such an order vis-à-vis those inflammatory materials, for which a person has been convicted of possession of under Section 9. Section 11(2) provides that, in the instance where the person who collected
the inflammatory material can neither be found nor identified the ATC can still pass such an order upon the application of the law enforcement official who seized these materials.

Firstly, as with S. 10 discussed above, this section is informed by the provisions of S. 8 and thus changes to that section will affect the operation of this one. Furthermore, this section lacks clarity: the section states [only the relevant provisions are reproduced below]:

(2) Where the person who collected the material or recording cannot be found or identified the [Anti-terrorism Court] on the application of the official seizing the material or recording shall forfeit the material or recording to the State to be disposed of as directed by it.

While the provision enables the ATC to pass orders of forfeiture in the absence of a convicted or identifiable accused, it does not specify – beyond ‘the State’ – to whose custody these materials will be delivered unto. To provide a point of contrast, S. 72.24 of the CCA states [relevant provisions:

72.24 Forfeited plastic explosives

(1) If a court:

(a) convicts a person of an offence against this Subdivision in relation to a plastic explosive; or

(b) makes an order under section 19B of the Crimes Act 1914 in respect of a person charged with an offence against this Subdivision in relation to a plastic explosive;

the court may order the forfeiture to the Commonwealth of the plastic explosive.

(2) A plastic explosive forfeited to the Commonwealth under subsection (1) becomes the property of the Commonwealth.

(3) A plastic explosive forfeited to the Commonwealth under subsection (1) is to be dealt with in such manner as a responsible Minister directs.
(4) Without limiting subsection (3), a responsible Minister may direct that a plastic explosive forfeited to the Commonwealth under subsection (1) be:

(a) destroyed...

As per the reproduced provisions of the CCA the forfeited materials – in this case plastic explosives – are the responsibility of the relevant ministry, specifically the Minister whose portfolio encompasses the forfeited materials. The need, therefore, in the ATA context is to specify a particular governmental institution within whose ambit the forfeited materials come; the reasons underpinning this is to ensure that the department best suited to handling the materials in question – and preserving them should they be required in subsequent ATC litigation – be responsible for these forfeited materials.
CHAPTER SEVEN

ANTI-TERRORISM COURTS: POWERS AND CASE MANAGEMENT

7.1 INTRODUCTION

Every Pakistani citizen has certain inherent and fundamental rights which cannot be derogated from. This also holds true of a person who has committed a crime of a grave nature. Under the Constitution of the Islamic Republic of Pakistan, every individual has the right to be dealt with in accordance with the law. In addition, every citizen has the indispensable right to a fair trial and due process. This is further complemented under Article 37(d) which ensures the promotion of social justice and eradication of social evils with regards to inexpensive and expeditious justice. Following the commission of any crime, irrespective of its nature, every individual shall have recourse to the abovementioned rights as a matter of principle.

7.2 THE NATURE OF SPECIAL COURTS

Special courts are often established to counter a particular menace ripe within a system of law – hence, the term special. They cater for a niche of cases which cannot be dealt with by ordinary criminal courts. One such menace which has long had its roots within Pakistan is the prevailing menace of terrorism. Therefore, the Government of Pakistan authorized the establishment of several special courts spread all over the country with the aim to ensure that special trials were conducted fairly, transparently, and most importantly, in a speedy manner. These special courts took the form of Anti-Terrorism Courts (ATC’s) in Pakistan.

The application of a specialized trial system to deal with terrorism cases has precedent in other jurisdictions. Although most countries around the world, including Commonwealth

194 Section 13, Anti-Terrorism Act, 1997.
countries such as the UK, Australia and Canada, hold terrorism trials under their ordinary criminal courts, certain countries such as Israel and India have gone beyond ordinary criminal procedure. These countries have specialized courts in place for terrorism suspects who shall face trial under special procedures stipulated by the State. The purpose behind the establishment of these specialized courts is simple – the recurrence of a menace which cannot be eliminated without taking special measures.

The most prominent example of special anti-terrorism courts in the Western world was the ‘Diplock Courts’ of Northern Ireland. During the early 70’s till the late 90’s Northern Island suffered at the hands of conflicts between the Catholic Nationalists and the Protestant Unionists causing widespread terror amongst the people. Thousands of lives were lost and even more people injured. Consequently, Lord Diplock of the House of Lords commissioned a report which called for courts to try suspected terrorists before a judge, but without a jury. This in turn resulted in the establishment of the ‘Diplock Courts’ – special courts used to legitimize judicial treatment of suspected terrorists. Even though the Diplock Courts were established primarily because of the status quo at the time, their use was discarded a few years thereafter.

As stated in preceding sections, the purpose behind the enactment of the Anti-Terrorism Act (ATA) was to provide a legal mechanism through which acts of terrorism in Pakistan could be dealt with effectively through special procedures that would result in the speedy resolution of these aggravated offences. In this regard, the ATC’s were established under Section 13 of the Act. In order to facilitate the applicability of the ATA, the State used the Criminal Procedure Code, 1898 to ensure that courts maintained their mandate via means of legislative instruments.

7.3 Powers of the Anti-Terrorism Courts

Judges appointed to sit in ATCs are equipped with special powers provided under the ATA which enable them to deal with hard core cases of terrorism and related matters. The ATA

195 Setty, S. (2010), Comparative Perspectives On Specialized Trials For Terrorism, 63 Me. L. Rev. 133.
196 Ibid. pg. 150-155.
stipulates that any *Scheduled Offence* must only be tried by an ATC exercising territorial jurisdiction in relation to such area.\textsuperscript{197}

With regards to the powers an Anti-Terrorism Judge can exercise during a trial, it should be noted that these powers are discretionary and may be executed based on their interpretation of a particular case. As is the case in the ordinary criminal courts however, the onus of proving the accused guilty for an offence of terrorism lies with the prosecution; in the absence of which a judge may make an order acquitting the accused.

Briefly, the main powers of a judge under the ATA are:

- **Power to take cognizance of a case** –
  - The ATC shall, on taking cognizance of a case, proceed with the trial on a day to day basis and shall decide the case within seven days.\textsuperscript{198}

- **Power to order forfeiture** –
  - The courts may seize any material or recording a person acts in a manner which is likely to stir up sectarian hatred.\textsuperscript{199}
  - The courts may seize the money or property of a person convicted of an offence where he uses ‘fund raising’ as a means to raise money to further the cause of terrorism;\textsuperscript{200} where he uses money or other property for the purposes of terrorism;\textsuperscript{201} where he enters into or becomes concerned in an arrangement as a result of which money or other property is made available for purposes of terrorism;\textsuperscript{202} where a person enters into or becomes concerned in any arrangement which facilitates the retention or control of terrorist property (money laundering);\textsuperscript{203} where he fails to disclose information to the police, having believed or suspected that another person has committed an offence under the Act.\textsuperscript{204}

\textsuperscript{197} Section 12, Anti-Terrorism Act, 1997.
\textsuperscript{198} Section 19(7), Anti-Terrorism Act, 1997.
\textsuperscript{199} Section(s) 8, 9 & 11(1), Anti-Terrorism Act, 1997.
\textsuperscript{200} Section 11H, Anti-Terrorism Act, 1997.
\textsuperscript{201} Section 11I, Anti-Terrorism Act, 1997.
\textsuperscript{202} Section 11J, Anti-Terrorism Act, 1997.
\textsuperscript{203} Section 11K, Anti-Terrorism Act, 1997.
\textsuperscript{204} Section(s) 11L & 11M, Anti-Terrorism Act, 1997.
In addition, the court may make a forfeiture order against a person convicted of an offence under any of the above mentioned sections.\textsuperscript{205}

A person shall also be convicted under this Act for the offence of directing terrorist activities, the result of which shall be imprisonment for life and forfeiture or confiscation of his assets within or outside Pakistan.\textsuperscript{206}

- **Power to decide place of sitting** –
  - The ATA provides ATC’s with the autonomy to decide a place of sitting for a terrorism trial if it considers expedient or desirable to do so. This shall entail holding the trial of a case at any place including a mosque other than the ordinary place of its sitting.\textsuperscript{207}

- **Power to try other offences** –
  - ATC’s may also try any offence other than the scheduled offence with which the accused may be charged at the same trial.\textsuperscript{208}

- **Power to grant bail** –
  - An ATC shall have the power or jurisdiction to grant bail or to otherwise release an accused person in any case heard by the ATC.\textsuperscript{209}

- **Power to conduct Joint Trials** –
  - An ATC, while trying any offence under the Act, may also try any other offences with which an accused may be charged at the same trial.\textsuperscript{210}

- **Power to transfer cases to regular courts** –
  - Where, after taking cognizance of an offence, the court is of the opinion that the case put before it is not one related to a hard core case of terrorism, or is not a scheduled offence, it shall transfer the case for trial to any court having jurisdiction under the Code.\textsuperscript{211}

\textsuperscript{205} Section 11Q, Anti-Terrorism Act, 1997.
\textsuperscript{206} Section 11V, Anti-Terrorism Act, 1997.
\textsuperscript{207} Section 15, Anti-Terrorism Act, 1997.
\textsuperscript{208} Section 17, Anti-Terrorism Act, 1997.
\textsuperscript{209} Section 21D, Anti-Terrorism Act, 1997.
\textsuperscript{210} Section 21M, Anti-Terrorism Act, 1997.
\textsuperscript{211} Section 23, Anti-Terrorism Act, 1997.
• Contempt of Court –
  o An ATC shall have the power to punish with imprisonment for a term which may extend to six months and with a fine any person who abuses, interferes with or obstructs the process of the Court or disobeys any order or direction of the Court

7.4 PRINCIPAL DEFECTS PERTAINING TO THE POWER OF ANTI-TERRORISM COURTS UNDER THE ANTI-TERRORISM ACT, 1997

Despite there being several provisions under the ATA which categorically lay down the powers afforded to ATCs when conducting a terrorism trial, there still remains a degree of ambiguity vis-à-vis certain sections. These ambiguities may concern the entire section itself or the wording of a particular section which tends to create a sense of inadequacy with regard to their interpretation.

This segment of the report shall consist of such defects, inadequacies and flaws which are prevalent within the inherent powers of judges under the ATA. It will also explore the possible reasons which affect the workload of ATCs due to weak court management mechanisms currently in place. Following an analysis of these legislative defects, recommendations will be made regarding each aimed at overcoming the latter.

➤ Legislative Defect: Section 19(7) of the ATA

Section 19(7) of the ATA is reproduced below:

“The Court shall, on taking cognizance of a case, proceed with the trial from day to day and shall decide the case within seven days, failing which an application may be made to the Administrative Judge of the High Court concerned for appropriate directions for expeditious disposal of the case to meet the ends of justice.”

After a plain reading of the text under this section, it is clear that a court must dispose of a terrorism trial within 7 days from its commencement. However, in practice, this rarely or almost never happens. Once a trial begins, the defence counsel will always look for an adjournment as a means of delaying the length of the proceedings.
This usually entails employing ‘delaying tactics’ such as arguing that the accused cannot appear in a particular hearing due to security reasons; or because there is no sufficient evidence against the accused in which case the court adjourns the hearing to a further date. Another reason which commonly prolongs trials pertains to witness testimony. Most witnesses are resilient to giving testimony in courts due to threats made to them and their families by the accused. As a result, trials are either delayed or the accused is acquitted on a lack of evidence against them by the prosecution. A large majority of terrorism cases face the same fate, thereby undermining the letter and spirit of section 19(7).

Amongst other reasons for section 19(7) not being implemented are those which focus on its practicality. ATC judges often argue that the provision under section 19(7) creates a false sense of uniformity which, in practice, provides an unrealistic approach for courts to follow. One judge, on the basis of anonymity, stated that lawyers themselves are the ones to blame for delaying a terrorism trial. He spoke out of personal experience, holding that on a number of occasions, prosecutors and defence counsels were too busy to commit to a trial on a day-to-day basis. He said that they agree to appear once a week on a mutually agreeable day which contributes significantly to an increase in the length of a trial. As a result, any trial, even one which has the potential to be disposed of early, suffers at the hands of the lawyers representing the parties. This in turn destabilizes the entire process of trying an accused under a court which is established to dispense with justice in a proactive and speedy manner.

The importance of dispensing justice in a timely fashion in ATA cases was underscored by the Supreme Court of Pakistan in its seminal judgment in the Mehram Ali case. Justice Irshad Hasan Khan emphasized the importance of the efficiency of ATAs in conducting terrorism trials and their speedy disposal:

"...It is, therefore, not undesirable to create Special Courts for operation with speed but expeditious disposition of cases of terrorist activities/heinous offences have to be subject to Constitution and law. Viewed in this perspective, no objection can be taken to the establishment of Special Courts for speedy trials and prevention of terrorist acts/heinous offences under the Anti-Terrorism Act, 1997..."
Thus, having a provision which provides an unrealistic approach towards dispensing justice in an expedited manner may well be determined as a provision operating in vain. Despite the fact that section 19(8) of the Anti-Terrorism Act, 1997 explicitly states that the ATCs shall not give more than two consecutive adjournments during a trial, this almost never happens in practice. Prosecutors will struggle for a speedy trial, yet their prior commitments elsewhere will always impede their best of intentions to conclude an on-going trial on a timely basis. Naturally, this creates a negative impact by slowing down (an intended) accelerated trial.

For the purposes of argument, even if prosecutors are committed to implementing section 19(7) with an aim to determining the fate of a trial within seven days, it may still be impossible to do so. A trial requires concrete evidence in order for a judge to convict and sentence the accused. For obvious reasons, this does not only necessitate building a strong case on behalf of the State, but rather making certain that the investigation was conducted with utmost clarity and transparency; that the evidence found thereafter can be corroborated at a later stage; that the evidence will materially link the accused with the crime; that any witnesses present at the crime scene are willing to testify against the accused and the commission of the crime; and that any threats received by the witnesses must not prevent them from giving their testimony.

Prosecutors, therefore, have an onerous duty towards a terrorism trial, and only once these obstacles have successfully been overcome will a judge decide to make a reasonable assessment of a case. It should, however, be noted that the above mentioned responsibilities will not take place in isolation. They require sufficient time; time which will most likely exceed the seven day period stipulated under section 19(7), and time which is crucial to determine whether or not the accused is guilty of an act of terrorism.

➢ **Recommendations: S. 19(7) ATA**

1. Section 19(7) of the Anti-Terrorism Act, 1997 should be appropriately worded to include a more realistic approach with regards to the timeframe in which a terrorism trial can be

---

215 Section 19(8), Anti-Terrorism Act, 1997: “An Anti-Terrorism Court shall not give more than two consecutive adjournments during the trial of the case. If the defense counsel does not appear after two consecutive adjournments, the Court may appoint a State Counsel with at least seven years standing in criminal matters for the defense of the accused from the panel of advocates maintained by the Court for the purposes in consultation with the Government and shall proceed with the trial of the case.”
concluded. The text could possibly be amended to include a minimum timeline of three months at the very least.\textsuperscript{216} Cases which cannot be concluded under the proposed minimum timeframe should then follow the same rules existing under section 19(7) under which the Administrative Judge of the High Court can make appropriate directions for expeditious disposal of the case to meet the ends of justice in the event that the given timeframe is not met.

2. There should be a mechanism whereby prosecutors are instructed to deal with terrorism cases on a day-to-day basis. Perhaps, the Government can issue a formal notification instructing all Public Prosecutors to ensure speedy trials and appear before the ATC on all hearings. The notification should also stipulate that any other work on their part shall be regarded as ancillary and that the primary focus shall remain the terrorism trial. Failure in discharging their duties under the said notification could possibly result in a transfer elsewhere, or alternatively removal from the case in favor of another prosecutor to be appointed by the Provincial Government under \textit{section 18 of the Anti-Terrorism Act, 1997}.

3. As a preliminary exercise, the Government should undertake in conducting several workshops throughout the country directed to facilitate Prosecutors.\textsuperscript{217} This will not only focus on building their capacity, but also spread a sense of awareness amongst lawyers working in terrorism cases.

4. The application of section \textit{19(8) of the Anti-Terrorism Act, 1997} relating to the appointment of a State Counsel for the accused (as a result of more than two adjournments) is being seriously underutilized. Perhaps, judges should place more emphasis on the section and its implementation. This should entail enforcing strict criteria before the commencement of the trial for the defence counsel and ensuring strict adherence/attendance by way of penalties (preferably by the Administrative Judge of the High Court). Adjournments in general must be kept to a minimum regardless of whether they are at the request of the prosecutors or defence lawyers.

\textsuperscript{216} Replacing the existing text which states, “…and shall decide the case within seven days…”

\textsuperscript{217} Preferably with the help of the international organizations currently working within Pakistan.
Legislative defect: Section 15, ATA

Section 15 of the ATA relates to the place of sitting of the ATC’s. It is reproduced below:

15. Place of sitting. - (1) Subject to sub-section (2) and (3), \(^{218}\) an Anti-terrorism Court shall ordinarily sit at such place or places \(^{219}\) including Cantonment area or jail premises as the Government may, by order, specify in that behalf.

(2) The Government may direct that for the trial of a particular case the Court shall sit at such place including the place of occurrence of an offence as it may specify.

(3) Except in a case where a place of sitting has been specified under sub-section (2) \(^{1}\) an Anti-terrorism Court may, if it considers it expedient or desirable so to do either suo moto or on the application of the public prosecutor sit, for holding the trial of a case at any place including a mosque other than the ordinary place of its sitting.\[^{3}\]

An analysis of case law under the ATA reveals that Section 15 remains an extremely underutilized provision. Based on the interviews with various ATC judges, both in Khyber Pakhtunkhwa (KPK) and Punjab, the overall consensus was that the accused must come to the courts for justice, not the other way round. According to them, it was not the job description of judges to run after the accused and ensure that their comfort is met. ATCs, especially in KPK, already have a plethora of cases creating an unbearable backlog. The application of Section 15 would only serve to add delays to the process and would actually be counterproductive.

Nevertheless, Section 15 may be of use in ‘high profile’ Anti-Terrorism cases, in which the danger to witnesses and other stakeholders, including the accused, may be inordinately high. Such high-profile trials often require more attention – especially if they involve a prominent public figure - and become an important precedent to follow.\(^{220}\) However, due to logistical constraints (amongst other reasons) such trials often take months or even years to conclude in Pakistan.

---

\(^{218}\) Subs. by the Anti-terrorism (Second Amdt.) ordinance, 1999 (13 of 1999), ss. 2 and 12.

\(^{219}\) Ins. by the Anti-terrorism (Amdt.) Ordinance, 2002 (6 of 2002), s. 4.

\(^{220}\) By way of example, one such case currently on-going is that of Pakistan’s Ex-President and former Chief of Army Staff, General (retd.) Pervez Musharraf.
Despite the fact that section 19(10) provides for a trial to move forward in absence of the accused, it is unlikely that each trial will move forward based on security risks to the person of the accused.

Accordingly, it may be expedient if courts were to take advantage of the provisions laid down in section 15 in high-profile terrorism trials which could go a long way towards reducing the length of such trials.

Section(s) 15 & 28 of the Anti-Terrorism Act, 1997 provide the courts with an alternative to hearing cases solely in ATCs. Under section 28 the Chief Justice of the High Court concerned may order for the transfer of any case from one ATA to another, provided there is reasonable cause to do so – “…in the interest of justice, or where the convenience or safety of the witness or the safety of the accused so requires.” Provided there are reasonable grounds for doing so, a court may, therefore, order for the transfer of the case from one court’s jurisdiction to another’s, so long as the trial itself does not suffer – be it from the perspective of impartiality or security.

This means that a trial may take place elsewhere; at a place more suitable for all parties, where both the accused and witnesses can be brought without facing any threat to their person or families.

Similar provisions exist under other jurisdictions which empower the courts to decide on a place of sitting (other than the ordinary place of sitting) if it appears that a trial will be compromised otherwise.

- Section 30 of the Criminal Procedure Code, 1986 – Australian legislation.

---

221 Unless the ATC’s are satisfied that such absence is deliberate and brought about with a view to impeding the course of justice.

222 Section 28, Anti-Terrorism Act, 1997: Notwithstanding anything contained In this Act, the High Court may if it considers it expedient so to do in the interest of justice, or where the convenience or safety of the witnesses or the safety of the accused so requires transfer any case from one Special Court to another Special Court within or outside the area.

(2) (An anti-Terrorism Court) to which a case is transferred under sub-section (1) shall proceed with the case from the stage at which it was pending Immediately before such transfer and It shall not be bound to recall and re-hear any witness who has given evidence and may act on the evidence already recorded.

(Provided that nothing herein contained shall affect the power of the presiding officer of the [Anti-Terrorism Court] to call any witness as is available under the law.)

223 Ahmad Omar Saeed Shaikh and 3 others v The State(2002 SCMR 1562).

224 An undisclosed location which is away from the eyes of the media and the general public.

225 “In any criminal proceeding, if it appears to the court: (a) that a fair or unprejudiced trial cannot otherwise be had or, (b) that for any other reason it is expedient to do so, the court may change the venue, and direct the trial to be held in such other district, or such other place, as the court thinks fit, and may for that purpose make all such orders as justice appears to require.”
• Rule 37.13 of the Criminal Procedure Rules, 2012 – UK legislation.\textsuperscript{226}

• Section 322 of the Crimes Act, 1961 New Zealand legislation.\textsuperscript{227}

• Section 24 of The Prevention of Terrorism Act, 2002 – Indian legislation.\textsuperscript{228}

➢ Recommendations: Section 15, ATA

1. An internal system should be put in place for high-profile terrorism trials. This shall be based on a criterion vis-à-vis the accused’s status, identity, designation before being indicted, association with Pakistan, service rendered, and the nature of the crime. A committee should be established comprising of one Government representative (preferably from the Ministry of Interior or the Federal Investigation Agency), one High

---

\textsuperscript{226}“1) Unless the court otherwise directs, the hearing must take place in a courtroom provided by the Lord Chancellor.
(2) Where the hearing takes place in Wales—
(a) any part or witness may use the Welsh language; and
(b) if practicable, at least one member of the court must be Welsh-speaking.”
(In some circumstances the court may conduct all or part of the hearing outside a courtroom. The members of the court may discuss the verdict and sentence outside the courtroom).

\textsuperscript{227}“(1) Where any person is committed for any crime to appear at any sitting of the High Court or of a District Court (hereinafter referred to as the court of committal), and it appears to a Judge or a District Court Judge (as the case may require) that it is expedient for the ends of justice that the person should be tried for that crime—
(a) where the High Court is the court of committal, at some place or at some sitting other than the place or sitting for trial to which he was committed, or at which he would in the ordinary course of law be tried; or
(b) where a District Court is the court of committal, at some District Court or at some sitting of the court of committal other than the court or sitting to which he was committed, or at which he would in the ordinary course of law be tried,—
the Judge, either of his own motion, or on application made by or on behalf of the prosecutor or the person charged, may by order, either before or after an indictment is filed, direct that the person shall be tried at such place and sitting of the court, or (as the case may require) by such court and at such sitting of that court (hereinafter referred to as the substituted court), as he thinks fit.
(2) Any application for an order as aforesaid may be made to a Judge when sitting in court or in chambers; and it shall not be necessary for the person charged to be brought or appear in person before the Judge, either upon the making or the determination of the application, or to plead to any such indictment in the court of committal.

\textsuperscript{228}“A Special Court may, on its own motion, or on an application made by the Public Prosecutor and if it considers it expedient or desirable so to do, sit for any of its proceedings at any place other than its ordinary place of sitting:
Provided that nothing in this section shall be construed to change the place of sitting of a Special Court constituted by a State Government to any place outside that State.”
Court Judge and one ATC Judge (the same judge who will be presiding over the trial). This committee shall determine whether the case is one which requires immediate attention on a priority basis and the steps which must be taken in order to meet the ends of justice expeditiously.

2. Once the committee is of the view that the case is a priority case, the presiding judge should make use of section 15 of the Anti-Terrorism Act, 1997. This will ensure a fully undisclosed location to the accused which means lesser media attention and lesser public attraction leading to violent behavior outside the court premises (eliminating the security threat). Therefore, all hearings could take place outside the ordinary place of sitting on a day-to-day basis for the prompt disposal of the case. Such a procedure would not only reflect well in the eyes of the public, but also uphold the spirit of the Act by guaranteeing speedy justice for high-profile terrorism cases.

3. It should be noted that the committee may agree on certain terms based on the ATC judge’s prior commitments towards the existing backlog of cases before him. This may include the manner in which such a trial moves forward keeping in mind the latter commitments of judges. Perhaps, a tentative plan can be put in motion after which the judge may make appropriate reservations vis-à-vis their average of daily cases.

➤ Legislative defect: Lack of Appropriate Case Management Mechanisms

This defect does not necessarily have its roots within the ATA, but rather stems from the general lack of robust case management mechanisms in ATC trials.

Most ATC judges in Pakistan face a disproportionate backlog of cases. After having interviewed various ATC judges in Punjab, KPK and the Federal Capital, the overall consensus was that the caseload was much more overwhelming than expected. On average, judges deal with multiple cases per day. 229

As seen in the preceding section relating the scope and ambit of the ATA, an analysis of the major reported judgments relating to the ATA from 1998-2013 reveals that a large majority of cases registered under the ATA were not acts of terrorism per se. Rather, the

229 With the exception of some ATC’s in Punjab where judges have a comparatively lesser backlog of cases resulting in relatively fewer cases per day.
cases registered appeared to be ordinary criminal offences which bore no indication of terrorist intent nor appeared to share any nexus with the ATA. Consequently, the distinction between an ordinary crime and an act of terrorism has been blurred and has placed a considerable strain on this arm of the criminal justice process which has serious implications for resource allocation amongst the police and ATCs. With meager resources, such overburdening of the system has debilitating effects for real terrorism cases. Consequently, ATCs are faced with a tremendous load of cases which are not even remotely connected to terrorism as defined under Section 6 of the ATA.\textsuperscript{230}

Due to the low threshold for bringing cases within the ambit of the ATA and the conflicting jurisprudence that has developed on this area, the majority of cases brought before the ATC’s and the Appellate Courts primarily involve one of the parties contesting the jurisdiction of the ATC under Section 12 and requesting a transfer of the case to the regular courts under Section 23. This is then followed by a lengthy appeals process as a result of which the appeal may be dismissed or the case remanded for a fresh start, or an order requiring the ATC to transfer the case due to lack of jurisdiction. This entire process is not only time-consuming and futile, but negates the entire purpose behind which the ATCs were established – speedy disposal of terrorism trials.

In addition to taking on cases which fall outside the ambit of ATCs, judges regularly have to deal with administrative matters of their courts. This in turn results in overburdening judges who already have an excessive backlog of cases pending before them. Judges are, therefore, under immense pressure having to dispense with a large number of cases on a daily basis, whilst simultaneously managing issues within the court premises.

This process whereby ordinary criminal cases are tried under ATCs proves less efficacious in disposing of cases swiftly. Not only are such cases detrimental in the day-to-day running of ATCs, but also create a backlog of genuine terrorism cases; cases which require strict attention under the ATA.

It is imperative therefore, that sound case management principles are adopted for terrorism trials. The successful conclusion of a case within an appropriate time frame is a

\textsuperscript{230} See for example: Rao Matloob Hussain and others v D.P.O. and others\textsuperscript{(2004 MLD 1075)}; Shamshad Ahmad v The State\textsuperscript{(PLD 2004 Lahore 368)}; Mushtaq and 3 others v The State\textsuperscript{(PLD 2008 Supreme Court 1)}; Shafqat Mehmood and others v The State\textsuperscript{(2011 SCMR 537)}; Muhammad Hafeez v Special Judge, Anti-Terrorism Court, Mirpurkhas and 2 others\textsuperscript{(2001 P Cr. LJ 199)}; Mahesar and others v Federation of Pakistan and others\textsuperscript{(PLD1998 Karachi 311)}; Ahmed Shah and another v The State\textsuperscript{(2003 YLR 1977)}.\n
228
victory in itself. Without good court management, most cases will remain pending on trial, which negates the entire purpose of ATCs to begin with.\(^{231}\)

- **Recommendations: Adequate Case Management and related mechanisms**

1. Given the apparent backlog of cases (discussed above) pending before the ATCs, a ‘pre-trial hearing’ procedure should formally be initiated before the commencement of a terrorism trial. This type of hearing would necessarily mean that all parties privy to the case – the prosecutor and defence counsel - would sit together before a judge to discuss the nature of the crime and determine whether it falls within the scope and ambit of the Anti-Terrorism Act, 1997.

The purpose behind introducing such a procedure is to ensure that cases brought before an ATC are methodically examined before they go to trial. This means that ordinary criminal cases which do not fall within the scope of *section 6 of the Anti-Terrorism Act, 1997* shall not be entertained in ATCs anywhere in Pakistan. It may be regarded as a filtering process – one which appreciates a terrorism case based on its merits as opposed to just any criminal case which can be resolved by ordinary criminal courts.

Other jurisdictions such as Australia,\(^{232}\) New Zealand\(^{233}\) and UK\(^{234}\) also have various pre-trial mechanisms in place. Each country has its own set of rules under which an assessment is made regarding the nature of the crime committed and its potential outcome in a designated court. The judge will determine whether the case is a terrorism case and order accordingly. Any case falling short of the stipulated criteria shall be forwarded to the regular courts for disposal or hearing. A number of noteworthy guidelines can also be found under *Rule 8 & 26* of the Australian legislation on *Magistrates Courts Criminal Rules 1992* which deal primarily with case management techniques and pre-trial

---

\(^{231}\) *Mehram Ali and others v Federation of Pakistan and others*(**PLD 1998 Supreme Court 1445**).

\(^{232}\) Section 40 of the Criminal Procedure Act 1986.


conferences.\textsuperscript{235} Therefore, the idea is to create a mechanism which significantly reduces the backlog of cases and ensures that the potential of ATC judges are being utilized to the fullest. A number of recommendations have been made in Chapter Two of this Report with regards to delineating the boundaries of the ATA by determining what ought to constitute an act of terrorism under the Act. The analysis contained therein should prove to be beneficial for determining which cases primarily fall within the jurisdiction of the ATC.

Once it is established whether or not the ATC has jurisdiction to try the case, a judge can either transfer the case to a regular court under section 23 of the Anti-Terrorism Act, 1997 (ordinary criminal case); or alternatively proceed with hearing it by exercising its own jurisdiction under section 12 of the Anti-Terrorism Act, 1997 (terrorism case).

ATCs can use the procedures adapted in other jurisdictions internationally to form a mechanism (internally) which provides a coherent system of pre-trial hearings in Pakistan. Since both the Code of Criminal Procedure 1898 and the ATA, are silent about pre-trial hearings, recourse to laws under different jurisdictions could be a starting point for devising a preliminary plan.

Most commonly, pre-trial hearings take place after charges have been framed against the accused. Accordingly, it is recommended that ATCs form a procedure whereby after the submission of the ‘challan’\textsuperscript{236} by the Public Prosecutor (PP) to an ATC Judge, the latter orders for a pre-trial hearing.\textsuperscript{237} This hearing should be attended by the PP, defence lawyer and presided over by the judge to whom the initial challan was submitted.

The pre-trial hearing must be a timely exercise.\textsuperscript{238} All those present at the hearing must identify the nature of the crime committed and ascertain as to whether it is a crime which genuinely falls within the ambit and jurisdiction of the ATC and ATA. After deliberating

\textsuperscript{235} Rule 8 & 26 of the Magistrates Courts Criminal Procedure 1994 (Amendment 44).
\textsuperscript{236} Report of police officer as soon as it is completed sent to a Judge empowered to take cognizance of the offence on a police-report (section 173 of the Code of Criminal Procedure, 1989).
\textsuperscript{237} The time period for establishing a pre-trial hearing could vary after the submission of the challan. However, it would make more sense if a pre-trial hearing is held as soon as the challan is submitted so that a speedy determination can be made thereafter.
\textsuperscript{238} Time frames can be derived by studying the rules and procedures prevalent under other jurisdictions.
their arguments before the judge, the latter shall then make a final decision as to the fate of the case and proceed accordingly. As mentioned above, if the case fails to be one which attracts the attention of ATC then it should, on principle, be transferred to regular courts possessing jurisdiction. In the event that the case actually pertains to terrorism, the judge can issue an order requiring the immediate initiation of the trial and move forward with the case.

Pre-trial hearings must not be seen as a deterrent to judges in discharging their duties; nor should they be regarded as burdensome. Judges may require such a hearing if they consider certain cases as trivial and dispose them of based on a lack of affiliation with an act of terrorism. Adapting such a procedure would inevitably reduce the caseload from all ATCs and most likely decrease the backlog of cases, giving more priority to those cases which require immediate action, i.e. cases where crimes committed fall under the category of a Scheduled Offence under the ATA.

2. A number of notable recommendations vis-à-vis court management can be gleaned from the landmark judgment given in the Liaquat Hussain case.

Amongst other findings, the case highlights an important point which shall help facilitate ATCs in conducting trials on a fast track base. These include:

- The need for the Government to appoint more Judges and Judicial Officers. As mentioned above, judges often have to oversee the management of their respective courts, which requires constant supervision in addition to their pending caseload. Appointing more judges would mean less responsibility for existing judges and an equal share of responsibility with regards to managing the court premises. In addition, appointing more judicial officers would mean an organized structure at the lower level, thereby undertaking the extra workload currently maintained by judges.

- The Government could also possibly increase the retirement age for judges presently sitting in ATCs in all Provinces. This would result in sitting judges spending more

---

239 Cases only brought before ATC’s to harden the punishment of the accused under section 7 of the Anti-Terrorism Act, 1997.
240 Liaquat Hussain v Federation of Pakistan(1999 PLD 504).
time in a place where they already have a certain amount of experience and know-how regarding the procedures and general environment. Transferring a judge to another court during the last few months of their service is not only an unrealistic approach towards combatting a common menace but a futile effort in discerning that change will occur in a matter of months. Judges, therefore, must be given their space and time to get acquainted in a particular court and only then can a case for change be brought forward. It is an option to consider which may prove considerably rewarding in the long run if proposed as an amendment.

7.5 Sentencing Powers of the Courts – A comparison between the Anti-Terrorism Act, 1997 and the Pakistan Penal Code, 1860:

Having discussed the inherent powers given to courts under the ATA framework, it is also essential to identify the scope under which the courts provide sentences for crimes committed under both, the ATA and the Pakistan Penal Code (PPC).

The table attached below provides a detailed comparison of punishments of corresponding offences under the ATA and PPC:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Punishment under ATA</th>
<th>Punishment under PPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 <em>Causing Death</em></td>
<td>S. 7 (a): Death or life imprisonment and fine</td>
<td>S. 302: Whoever commits qatl-e-amd(^{241}) shall, subject to the provisions of this Chapter be: (a) punished with death as qisas(^{242}); (b) punished with death for imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof</td>
</tr>
</tbody>
</table>

\(^{241}\) S.300: Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with-the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.

\(^{242}\) means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd in exercise Of the right of the victim or a wali'
| 2 | **Grievous violence against person which may likely cause death or endangers life but death or hurt is not caused** * | S. 7 (b): Not less than 10 years but may extend to life imprisonment and fine | S337 A: **Punishment of shajjah**:

Whoever, by doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, causes—

(i) **Shajjah-I-khafifah** to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to two years as *ta'zir*,

(ii) **shajjah-i-mudihah** to any person, shall, in consultation with the authorized medical officer, be punished with *qisas*, and if the, *qisas* is not executable keeping in view the principles of equality, in accordance with the Injunctions of Islam, the convict shall be |

---

*Italicized offences have harsher punishment under ATA as compared to PPC.*

243 Whoever causes, on the head or face of any person, any hurt is said to cause shajjah

244 without exposing bone of the victim, is said to cause shajjah-i-khafifah

245 by exposing any bone of the victim without causing fracture, is said to cause shajjah-imudihah
liable to arsh which shall be five percent of the diyat and may also be punished with imprisonment of either description for a term which may extend to five years as ta'zir,

(iii) shajjah-i-hashimah\(^{246}\) to any person, shall be liable to arsh which shall be ten per cent of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir,

(iv) shajjah-i-munaqqilah\(^{247}\) to any person, shall be liable to arsh which shall be fifteen percent of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir,

(v) shajjah-i-ammah\(^{248}\) to any person, shall be liable to arsh which shall be one-third of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir, and

(vi) shajjah-i-damighah\(^{249}\) to any

\(^{246}\) by fracturing the bone of the victim, without dislocating it, is said to cause shajjah-i-hashimah

\(^{247}\) by causing fracture of the bone of the victim and thereby the bone is dislocated, is said to cause shajjah-i-munaqqilah

\(^{248}\) by causing fracture of the skull of the victim so that the wound touches the membrane of the brain, is said to cause shajjah-i-ammah

\(^{249}\) by fracturing the bone of the victim, thereby dislocating the bone, is said to cause shajjah-i-damighah
| 3 | **Grievous Bodily Harm or injury** | S. 7 (c): Imprisonment for a term of at least 10 years but may be extended to imprisonment to life in addition to a fine. | S. 332. Hurt
S. 334: *Iltaf-i-udw*\(^{250}\): Shall, in consultation with the authorized medical officer, be punished with *qisas*, and if the *qisas* is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to *arsh*\(^{251}\) and may also be punished with imprisonment of either description for a term which may extend to fourteen years as *ta’zir*.  
S. 336: *Iltaf-i-Salahiyyat-i-udw*\(^{253}\): Shall, in consultation with the authorized medical officer, be punished with *qisas* and if the *qisas* is not executable, keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to *arsh* and may also be punished with |

---

\(^{249}\) by causing fracture of the skull of the victim and the wound ruptures the membrane of the brain is said to cause *shaijah-i-damighah*

\(^{250}\) S.333: Whoever dismembers, amputates, severs any limb or organ of the body of another person is said to cause *Iltaf-i-udw*

\(^{251}\) *Iltaf-i-udw* means the compensation specified to be paid to the victim or his Heirs.

\(^{252}\) It includes punishment of imprisonment, forfeiture of property and fine.

\(^{253}\) S.335: Whoever destroys or permanently impairs the functioning, power or capacity of an organ of the body of another person, or causes permanent disfigurement is said to cause *itlaf-i-salahiyyat-i-udw*.  

---

235
<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td><strong>Grievous Damage to Property</strong></td>
<td>S. 7 (d): Shall be punishable with imprisonment for a term not less than 10 years but may be extended to imprisonment to life in addition to a fine.</td>
</tr>
<tr>
<td>5</td>
<td><strong>Kidnapping for ransom or hostage taking</strong></td>
<td>S. 7 (e): Shall be punishable on conviction with death or imprisonment for life. S. 363: Whoever kidnaps any person from Pakistan or from lawful guardianship shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.</td>
</tr>
<tr>
<td>6</td>
<td><strong>Hijacking</strong></td>
<td>S. 7 (f): Shall be punishable on conviction with death, life imprisonment and a fine. S. 402 B: Whoever commits, or conspires or attempts' to commit, or abets the commission of, hijacking shall be punished with death or imprisonment for life, and shall also be liable to forfeiture of property and fine.</td>
</tr>
<tr>
<td>7</td>
<td><strong>Use of Explosives by any device including bomb blast</strong></td>
<td>S. 7 (ff): Shall be punishable with imprisonment which shall not be less than 14 years but may extend to life imprisonment. S. 286. Negligent conduct with respect to explosive substance: [s]hall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>8</td>
<td><strong>Incites hatred and contempt on religious sectarian or ethnic basis to stir up violence or cause internal disturbance</strong>&lt;br&gt;<strong>Involves stoning, brickbating or any other form of mischief to spread panic</strong></td>
<td>S. 7 (g): Shall be punishable on conviction with imprisonment of not less than two years and not more than 5 years and with a fine.</td>
</tr>
<tr>
<td>9</td>
<td><strong>Involves firing on Religious congregations, mosques churches</strong></td>
<td>S. 7 (h): Punishable on conviction with imprisonment of not less than 5 years but may extend to ten years, or with fine, or with both.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>temples and all other places of worship to spread panic or forcible takeover of any mosque or other places of worship</strong></td>
<td>extend to life imprisonment or fine</td>
<td>three years nor more than ten years, and shall also be liable to fine.</td>
</tr>
<tr>
<td>10</td>
<td><strong>Creates a serious risk to safety of public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil (civic) life</strong></td>
<td>S. 7 (h): Punishable on conviction with imprisonment of not less than 5 years but may extend to life imprisonment or fine</td>
</tr>
<tr>
<td>11</td>
<td><strong>Involves the burning of vehicles or another serious form of arson</strong></td>
<td>S. 7 (h): Punishable on conviction with imprisonment of not less than 5 years but may extend to life imprisonment or fine</td>
</tr>
<tr>
<td>12</td>
<td><strong>Involves extortion of money (bhatta) or property</strong></td>
<td>S. 7 (h): Punishable on conviction with imprisonment of not less than 5 years but may extend to life imprisonment or fine</td>
</tr>
<tr>
<td>13</td>
<td><strong>Is designed to seriously interfere with or seriously disrupt a communications system</strong></td>
<td>S. 7 (h): Punishable on conviction with imprisonment of not less than 5 years but may</td>
</tr>
<tr>
<td></td>
<td>or public utility service</td>
<td>extend to life imprisonment or fine</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>14</td>
<td>Involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties</td>
<td>S. 7 (h): Punishable on conviction with imprisonment of not less than 5 years but may extend to life imprisonment or fine</td>
</tr>
<tr>
<td>15</td>
<td>Involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant.</td>
<td>S. 7 (h): Punishable on conviction with imprisonment of not less than 5 years but may extend to life imprisonment or fine</td>
</tr>
<tr>
<td>16</td>
<td>Any other act of terrorism not falling under clauses (a) to (n) above or any other provision under this Act</td>
<td>S. 7 (i): shall be punishable, on conviction, to imprisonment of not less than five years and not more than ten years or with fine or with both</td>
</tr>
<tr>
<td>17</td>
<td>Acts intended or likely to stir up sectarian hatred</td>
<td>S. 9: punished with imprisonment for a term which may extend to five years, and with fine</td>
</tr>
</tbody>
</table>

---

254 Section 6: (o) involves in acts as part of armed resistance by groups or individuals against law enforcement agencies; or (p) involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments.
<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Section/Clause</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>Violation of any direction or order of the Federal or Provincial Government or any terms of bond referred to in section 11-EE</td>
<td>S. 11-EE(4): shall be punishable with imprisonment of either description for a term which may extend to three years, or with fine or with both.</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Wearing of uniform etc. of any proscribed organization</td>
<td>S.11-G (2): shall be liable by way of summary procedure to simple imprisonment for a term not more exceeding three months or to a fine or to both.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>S. 140. Shall be punished with imprisonment of either description for a term which may extend to three months, or with a fine which may extend to [one thousand five hundred rupees], or with both.</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Preventive detention for inquiry</td>
<td>Shall be punishable with rigorous imprisonment for a term that may extend to two years or a fine or both.</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Fund Raising</td>
<td>S.11 (n):Shall be punishable with imprisonment with a term of no less than five years and not exceeding 10 years and with a fine.</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Use and Possession of money for the purposes of terrorism</td>
<td>Shall be punishable with imprisonment with a term of no less than five years and not exceeding 10 years.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td><strong>Funding Arrangements</strong></td>
<td>S.11 J: Shall be punishable with imprisonment with a term of no less than five years and not exceeding 10 years and with a fine</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td><strong>Money Laundering</strong></td>
<td>S.11 K: Shall be punishable with imprisonment with a term of no less than five years and not exceeding 10 years and with a fine</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td><strong>Directing terrorist activities</strong></td>
<td>S.11 V: shall be liable on conviction to imprisonment for life and to forfeiture or confiscation of his assets within or outside Pakistan</td>
<td></td>
</tr>
<tr>
<td>26</td>
<td><strong>Printing, publishing, or disseminating any material to incite hatred or giving projection to any person convicted for a terrorist act or any proscribed organization or an organization placed under observation or anyone concerned in terrorism</strong></td>
<td>S.11 W: shall be punishable on conviction with imprisonment which may extend to five years and with fine</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>S.153. A: shall be punished with imprisonment for a term which may extend to five years and with fine.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Title</td>
<td>Section(s)</td>
<td>Details</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>27</td>
<td>Responsibility for creating civil commotion</td>
<td>S. 11 (x): shall on conviction, be punishable with imprisonment not less than five years and not more than ten years or with both.</td>
<td>S. 147. Shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.</td>
</tr>
<tr>
<td>28</td>
<td>Knowingly disclosing prejudicing investigation or interference with relevant material</td>
<td>S. 21 A (7): shall be liable on conviction to imprisonment for a term not less than six months and not exceeding two years, and fine</td>
<td>S. 203. Shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.</td>
</tr>
<tr>
<td>29</td>
<td>Weapons Training without lawful authorization</td>
<td>Shall be liable to imprisonment to a term of not less than ten years or with fine</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>Instruction or training without valid authorization</td>
<td>S. 21 C (6): Shall be liable to imprisonment to a term of not less than ten years or with fine or with both</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Weapons training providing unauthorized instructions/training in making or use of firearms, explosives, or chemical, biological or other weapons.</td>
<td>S. 21 C (2): Shall be liable on conviction to imprisonment for a term not exceeding ten years, or fine or with both</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Weapons training to a child without lawful authorization. Child provides or</td>
<td>S. 21 C (5): Shall be liable on conviction to imprisonment to a term of not less than 6 months</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>receives instruction and not exceeding five years</td>
<td>33</td>
<td>Training in terrorism S. 21 C (7)(c): Shall be liable to imprisonment for a term of not less than one year and not more than ten years and a fine</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>Terrorism Training to a Child S. 21 C (7)(d): Shall be liable to imprisonment to either a term not less than one year and not more than ten years and a fine</td>
<td></td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Power to call for information S. 21 EE (3): Shall be punishable with imprisonment which may extend to two years or with fine which may extend to one hundred thousand rupees or with both.</td>
<td>S.202. Shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.</td>
<td></td>
</tr>
<tr>
<td>36</td>
<td>Aid and Abetment S. 21 I: Shall be punishable with the maximum term of same imprisonment provided for the offence or the fine provided for such offence or with both</td>
<td>S. 116: whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by the Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for the offence; or with such fine as is provided for that offence, or with</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>37</strong></td>
<td><em>Harboring any person who has committed any offence under ATA 1997</em></td>
<td>both; and if the abettor or person abetted be a public servant whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Offence has been given under S.216 and S.216 A of the PPC</td>
<td>S. 216. If a capital offence: shall, if the offense is punishable with death, be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to a fine; If punishable with imprisonment for life, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine. And if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine or with both.</td>
<td></td>
</tr>
<tr>
<td><strong>38</strong></td>
<td><em>Accused of any offence under ATA absconding</em></td>
<td>S. 21 L: Shall be liable to imprisonment for a term</td>
<td></td>
</tr>
<tr>
<td></td>
<td>S. 172. Shall be punished with simple imprisonment for a term which may</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

244
and avoiding arrest or evading appearance before any inquiry, investigation or court proceedings or concealing himself and obstructing the course of justice

not less than five years and not more than ten years or with fine or with both.

which may extend to one month, or with fine which may extend to [one thousand five hundred rupees], or with both; or if the summons, notice or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months or with fine which may extend to [three thousand rupees], or with both.

| 39 | Punishment for defective investigation | S. 27: It shall be lawful for such Court or as the case may be, [a High Court] to punish the delinquent officers with imprisonment which may extend to two years, or with fine, or with both by resort to summary proceedings | S. 193. Shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to a fine. S. 196. Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence. |
| 40 | Contempt of Court | S. 37: An Anti-Terrorism Court shall have the power to punish with imprisonment for a term which may extend to six months and with fine |

After a detailed study of the table, it becomes abundantly clear that punishments granted under the ATA framework stand to be more stringent and rigorous as opposed to those granted under the PPC. More importantly, there are seventeen offences for
which the PPC itself is silent as far as punishments are concerned. Those offences are solely catered for by the ATA.\(^{255}\)

It should be noted that there are several offences under which the PPC provides a far stricter criteria for punishments. For purposes of clarity, the offences are produced below:

a) Under the ATA the offence of ‘hijacking’ has a punishment of death, imprisonment for life with fine. *Section 402B* of the PPC has the same punishment, with the addition of forfeiture of property and fine.

b) The offence of ‘inciting hatred and contempt on religious sectarian or ethnic basis to stir up violence or cause internal disturbance’ has a less severe punishment under the ATA as opposed to the PPC. The ATA provides for a punishment of imprisonment not less than two years but not exceeding five years; whereas *section 295* of the PPC provides for imprisonment for a term which may extend to ten years with a fine (or both).

c) Further, an offence which ‘involves the burning of vehicles or another serious form of arson’ is punishable with imprisonment for life or imprisonment not less than five years or fine; however, under *section 11* of the PPC the term of imprisonment is more severe than that provided under the ATA – if not life imprisonment, then not less than ten years with a fine.

d) Lastly, the offence of ‘acts intended or likely to stir up sectarian hatred’ is punishable with imprisonment for a term which may extend to five years with a fine under the ATA. *Section 295* of the PPC provides a harsher version of the same punishment by stipulating a term which may extend to ten years imprisonment, or with a fine (or both).

\(^{255}\) Grievous damage to property; any other act of terrorism not falling under clauses (a) to (n) of the ATA or any other provision under the latter; violation of any direction or order of the Federal or the Provincial Government or any terms of bond referred to in section 11EE; preventive detention for inquiries; fund raising; use and possession of money for the purposes of terrorism; funding arrangements; money laundering; directing terrorist activities; weapons training without lawful authorization; instruction or training without valid authorization; weapons training providing unauthorized instructions/training in making or use of firearms, explosives, or chemical, biological or other weapons; weapons training to a child without lawful authorization – child provides or receives instructions; training in terrorism; terrorism training to a child; contempt of court.
Therefore, even though the ATA does cater for more offences and provides punishments more demanding than the PPC; there are, nonetheless, numerous offences under which punishments awarded under the PPC prove harsher. This is an anomaly since it means that provisions under the ordinary criminal law are more stringent in some respects than those found under a special law relating to terrorism. It is paradoxical, therefore, that a framework that has been specially crafted to deal with the most heinous of offences is more lenient in its penal application than the ordinary criminal law. As a result, the Government must introduce legislative changes on a prompt basis to ensure that sentencing and punishments granted by ATC judges are significantly stricter and rigid than those stipulated under the PPC.

7.6 Conclusion

After having reviewed a number of discrepancies prevalent in the current Anti-Terrorism Act, 1997 vis-à-vis court powers and management, it is not difficult to make an assessment regarding the areas which require immediate tweaking.

As seen above, the implementation of the ATA has been compromised to a large extent by defects within the workings of the ATCs.

Judges must interpret the law and apply it as they think fit. However, in doing so, they also must wear another cap – one which requires them to manage cases on a consistent basis and make certain that all parties appear for their hearings on time. This second cap is what differentiates a speedy trial from a long trial.

It is understandable that judges face a number of obstacles in achieving this goal. They are not required to compromise on their judgments, nor are they meant to dispense with cases on a fast track basis just for the sake of disposing cases as prescribed under the ATA. Justice must be served with due diligence and complete impartiality, and therefore rushing justice may mean ignoring important factors and skipping straight to the finish line. Thus, the legal dilemma that is “justice delayed is justice denied” and “justice rushed is justice crushed” must be handled prudently.

256 Mehram Ali and others v Federation of Pakistan (PLD 1998 Supreme Court 1445).
It is true that prosecutors and defence lawyers evade hearings on a day-to-day basis. It is also true that the prosecution faces difficulty in bringing forward witnesses as most of them are reluctant to testify due to reasons mentioned above. This obviously leaves the judge in a tight spot, either resulting in the inevitable acquittal of the accused or a chain reaction of adjournments at the request of the prosecutors or defence lawyers.

However, even if each recommendation mentioned above is considered and debated amongst the relevant stakeholders, it will be a step in the right direction. Courts are a means to ensure that justice is served to all, but if the system itself is not flexible enough to accommodate certain changes essential for bringing the culprits to justice, then how does one expect to say with certainty that the threat of terror will ever be eradicated? If at all, terrorism trials can simply be viewed as a façade behind a pyrrhic victory for which no one, other than acquitted terrorists, can truly be seen as emerging victorious.
CHAPTER EIGHT

PROTECTING WITNESSES IN TERRORISM TRIALS: DIFFICULTIES PERTAINING TO WITNESS PROTECTION MEASURES UNDER THE ANTI-TERRORISM ACT, 1997

In Pakistan, the threat to witnesses in terrorism cases is particularly acute. Given the fearsome reputation of the militant groups, and the frequency and ease with which they attack high value targets with seeming impunity, it stands to reason why an overwhelming majority of witnesses in such cases refuse to come forward or cooperate with law enforcement and judicial authorities.

The reluctance of witnesses to testify in terrorism trials in Pakistan is not based on a hypothetical threat. Militant groups are mindful of their reputation and have used it to their advantage by frequently intimidating witnesses through threats to their life or those of their family. Mostly, the threat itself is sufficient to make the witness resile from his statement or turn hostile. However, in the few cases where intimidation has not worked, witnesses often have had to suffer by paying the ultimate price for their bravery by losing their lives or those of their loved ones.²⁵⁷

The occurrence of such events has a ripple effect, with a clear message being sent not only to the witnesses in a given case, but to all future witnesses, of the power wielded by those involved in committing the crime. At the same time, the inability of the justice system to offer full protection to witnesses’ lies exposed, and undermines the authority of the State.

²⁵⁷ In 2011, Malik Ishaq, the founder of Lashkar-e-Jhangvi, was released after being acquitted by the courts. He was arrested in 1997 after one Fida Hussein Ghalvi testified that Ishaq killed 12 members of his family. Subsequently, five witnesses and three of their relatives were killed during trial. A similar fate had been met by witnesses, prosecutors and judges in other cases involving Ishaq, which eventually lead to his release, despite been suspected of 70 murders in 44 cases (Amir Mir, Blood flows freely in Pakistan, Asia Times, 5 October 2011).
8.1 Witness Protection: The Legal Position in Pakistan

Pakistan’s criminal justice sector has historically failed to provide adequate safeguards to witnesses. The system has never responded cogently to witness intimidation or provided an atmosphere where witnesses may testify without fear to themselves or their loved ones. The entire criminal justice process from initiation of a Police investigation to the trial stage leaves witnesses vulnerable to intimidation or outright elimination. No mechanisms exist to protect the identity of witnesses when they are not known to the accused nor are adequate measures taken to provide security to such individuals or their families when witness identity is known. It is, thus, no surprise that witnesses often do not come forth and even when they do, are prone to resile or turn hostile on the witness stand. This proves fatal to prosecutions and the most serious criminals with the resources to target witnesses outside the courtroom are let go.

In terrorism cases the courts are empowered to take necessary measures to protect witnesses through Sec. 21 of the Anti-Terrorism Act 1997 (“ATA”). Yet the wording of the section along with a conspicuous absence of an operationalizing procedure makes Section 21 discretionary at best. Such lack of specificity plays into a judicial culture, at the subordinate level, of exercising powers sparingly either out of ignorance or lethargy.

Despite the ATA serving as a special law and thus displacing parts of the Criminal Procedure Code 1898 (“Cr.P.C”) in terrorism cases, the Police culture cultivated by the Cr.P.C. still permeates into ATA investigations and police actions. This culture is a major source of exposing witnesses to the accused and his accomplices. A dysfunctional culture is also observed in court proceedings framed by the Cr.P.C.’s established procedures. Judges have conflated the concept of witness statements/testimony with that of the witness’s identity. The Cr.P.C. reinforces this by requiring disclosure of witness statements in all cases and of the names of witnesses against an accused when a case is instituted upon a complaint.258 Defence lawyers, through cross examination of witnesses and relying on an erroneous concept of due process, insist on identifying the witness to debunk his testimony. Due process considerations must remain paramount and the right of the accused to face his accuser cannot be curtailed. Yet there are legally and morally justifiable means of ensuring the accused his rights while at the same time protecting witnesses. Claims of due process cannot be used as a shield for

---

258 Cr.P.C. – Sec.241 (1), Sec. 241-A (2)(a), Sec. 265-C (1) (c) and Sec. 265-C (2)(a)(i).
blatant misuse of the criminal justice process nor should it allow defence lawyers to employ identity as a means of debunking testimony.

This section aims to outline the legal atmosphere governing witness participation in the criminal justice process with special reference to cases of terrorism. It will focus on various stages of the process where witnesses may face unjustifiable exposure of identity or where they may be at risk of intimidation or harm. This discussion will flow into an overall analysis of the major impediments to implementing a comprehensive plan for protecting witnesses.

A) The Criminal Procedure Code (Cr.P.C) and the Witness

Witness involvement in the criminal justice process begins from the time of commission of the crime. Witnesses become the earliest source of human information, many a time falling victim to the act itself. The nature of terrorist attacks in Pakistan renders this eventuality all too common. Suicide bombings, remote detonated bombs, or indiscriminate firing leave both a physical as well as psychiatric toll on the individual. It is in this state of shock that Police begin taking statements from witnesses. Although the ATA establishes separate procedures for terrorism related investigations and cases, the Police, rooted in a culture fostered by the Cr.P.C., remain the ones implementing it. Furthermore, the Code’s influence is reinforced as it remains applicable insofar as it is not inconsistent with the provisions of the ATA. This section discusses specific provisions of the Cr.P.C. and their impact on witness security. The next section will deal with the potential available in the ATA to overcome the hurdles presented by the Cr.P.C and mechanisms to operationalize the provisions contained therein.

Despite the value of initial and immediate victim/witness statements, the Cr.P.C. under Sec. 162 renders these statements of little evidentiary value and only allows their use at the trial stage to contradict subsequent witness testimony in court. Police powers of investigation under Cr.P.C. Sec. 161(3) require that any statement made to them by a witness may be reduced into writing and if this is done then the officer is to make a “separate record of the statement, of each such person whose statement he records.” Here witness identity is recorded by Police and no special precautions are outlined in the Code to keep this identity secure.

Sec. 32 Anti-Terrorism Act 1997
Police examination of witnesses may itself pose a risk to witness security. Where witness identity needs to be kept confidential, police investigators visiting the residence or calling the witness to the Police Station may expose the witness to subsequent intimidation by those he means to testify against. No procedure in the Cr.P.C or any other law requires police to take precautions at the investigation stage to protect witnesses from such exposure. Information relating to an offence is given to the Police by registering a First Information Report under Sec.154 of the Cr.P.C. Although the Code does not mandate any formal requirements in this report, names of witnesses are often included. The details of the FIR and any witness statements recorded are required to be furnished to the accused along with other relevant information under Sec.241-A and Sec. 265-C. Important to note is the almost identical proviso in each of these sections which reads:

_Provided that, if any part of a statement recorded under Section 161 or Section 164 is such that its disclosure to the accused would be inexpedient in the public interest, such part of the statement shall be excluded from the copy of the statement furnished to the accused._  

This proviso certainly leaves room for protective withholding of witness identity from the witness statement furnished to the accused. Such witness statements could have witness names and addresses redacted to protect their identity. Yet the case law on this article does not indicate that such steps have been taken by the police or the courts in the past. Furthermore, Sec. 173 Cr.P.C. relating to the submission of the investigation report, under subsection (1)(a) requires mandatory disclosure of, “the names of the persons who appear to be acquainted with the circumstances of the case.” In Sec.173 (5) the officer incharge of a police station who submits the police report is required to produce the witnesses in the case whom the Magistrate shall bind such witnesses for appearance before him or some other Court. The Sec. 173 police report is also required to be provided to the accused under Sec. 241-A and 265-C, unfortunately, the proviso to these sections only provides legal cover to redacting witness statements for their identity recorded under Sec. 161 or 164. The Sec.173 police report cannot be redacted under the proviso and this would prove fatal to protecting witness identity from the accused. It is interesting to note that the Pakistan Cr.P.C. and the

---

260 Sec. 265-C Cr.P.C. Proviso
Indian Code of Criminal Procedure of 1973 have a very similar Sec. 173 except that the Indian Code section is lengthier. The Indian Code under Sec.173(6) provides the same proviso for Police Reports that Sec.241-A and 265-C provides for witness statements. If Pakistan were to amend its Cr.P.C. with a similar proviso in Sec.173 then this would grant the Police Officer incharge the discretion to recommend to the Court withholding certain information in the Police Report from the accused.

Before the commencement of any inquiry or trial, a witness’s statement may be recorded as evidence by a Magistrate under Sec. 164 of the Code. Sec. 164(1-A), however, requires the “...presence of the accused, and the accused [be] given an opportunity of cross-examining the witness making the statement.” At the trial stage this is further reinforced by Sec. 360(1) which states that evidence of the witness once recorded by a Magistrate or a Sessions judge, “shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.”

These provisions enshrine the due process right to cross-examine witnesses. Yet modes of cross-examination that do not compromise identity are not employed in the process. Furthermore, no procedure is outlined to reduce the trauma of giving testimony in the presence of the accused. Direct contact with the accused and seasoned defence lawyers can traumatize victim-witnesses and the potential for intimidation greatly increases. Court proceedings do not provide adequate mechanisms to reduce this contact nor do they promote an atmosphere conducive to witnesses giving testimony. Left to the mercy of defence lawyers, giving testimony becomes an ordeal that many would rather avoid. A comprehensive approach to witness protection would involve shielding the witness from potential trauma. Although testifying in court can take a psychiatric toll on the witness, simple screening mechanisms could drastically improve the experience for the witness. The witness could give testimony from a different room via video link or the accused could be part of proceedings through video link. A simple means of achieving the same could be installing a physical opaque barrier between the witness and the accused so that no visual contact is made. These steps could go a long way in reducing the fear that witnesses would naturally feel before an intimidating accused. Such mechanisms would also sit well with due process requirements as they do not erode the right to cross-examine. These same mechanisms could be employed when securing a witness’s identity during trial.
The Cr.P.C. clearly lacks cogent mechanisms to protect and secure witness participation in the criminal justice process. The culture constructed by the Cr.P.C. is even more pervasive as it taints the minds of those applying legal provisions that could potentially be used to protect witnesses. The police operating under the Cr.P.C as well as the judiciary all suffer from this inherent weakness that forms the basis of their activities. Without amending the Cr.P.C and the culture within which the Police and Judges operate, it will be difficult to implement any effective witness protection mechanism.

B) The Anti-Terrorism Act and Witness Protection

Although the Cr.P.C. governs all criminal proceedings, the ATA, as a special law, overrides the Cr.P.C. in terrorism cases. The special procedures outlined in the ATA aim to tackle the unique challenges posed by terrorism to modern criminal justice systems. Unfortunately, although the ATA provides a significant legal framework to deal with these challenges, judicial treatment has been far from satisfactory. Furthermore, the same police flaws in investigation have not allowed the ATA to make any radical difference in how the Police operate or pursue the perpetrators of terrorist acts. That having been said, the ATA itself proves deficient in a number of ways.

Section 21, Anti-Terrorism Act, 1997

Section 21 forms the basis of the discussion in this section as it deals with the protection of witnesses along with other functionaries associated with a terrorism trial. For ease of reference Section 21 is reproduced below:

\[21. \text{Protection to Judges, Counsel, Public Prosecutor, witnesses and persons concerned with court proceedings.-} \]

(1) The Court may, subject to the availability or resources, make such necessary orders or take such measures, as it deems fit, within available resources, for the protection of a witness, judge public prosecutor, counsel and other persons concerned in court proceedings for an offence under this Act, which may also include the following measures –

(a) proceedings may be held in camera, or under restricted entry of members of the public, where necessary for the protection of the judge witnesses or a
victim’s family members or to prevent persons from crowding or storming the court to intimidate the judge\textsuperscript{2}\* or to create a threatening atmosphere;

(b) The names of judges\textsuperscript{2}\* counsel, public prosecutor, witnesses and persons concerned with court proceedings shall not be published; and

(c) During any inquiry, investigation or court proceedings, wherever the matter of the identification of the accused arises, adequate protection shall be provided to a witness identifying any accused, in order to protect the identity of the witness from the accuse.

(2) For purposes of protection of the judges\textsuperscript{2}\* accused, witnesses, prosecutors and defense counsel and anyone concerned with the court proceedings, the Government may adopt such other measures as may be appropriate or may be prescribed\textsuperscript{261} and the Armed Forces shall also provide comprehensive protection and security to the judges,\textsuperscript{262}\* accused, witnesses, prosecutors, investigators, defense counsel and all those concerned in the court proceedings.

(3) The Government shall extend protection to a judge\textsuperscript{2}\* a counsel, public prosecutor and the witnesses during investigation of an offence and proceedings under this Act, and thereafter, as may be considered necessary.]

It is evident that Section 21 lumps together all persons potentially requiring security in a terrorism investigation and trial. Subsection (1) is addressed to ATA Judges trying the case and empower them to take measures that include holding \textit{in camera} sessions, redacting the names of protected persons, and protecting the witnesses identity at the time of identification of the accused. Subsection (2) is addressed to the Government to adopt requisite measures of security and protection and especially mentions the Armed Forces for such purposes. Subsection (3) states that the protective measures may be employed earlier at the investigation stage and even after the conclusion of the trial.

\textbf{Legislative Defect: Vague and discretionary nature of Section 21}

The generality of this section paralyzes its application. Other than the first two protective measures outlined in subsection (1)(a) and (b), there is little of substance to go on. The

\textsuperscript{261}Subs. by the Ordinance No. 39 of 2001, ss. 11 and 12.

\textsuperscript{262}Omitted by the Anti-terrorism (Second Amdt) Ordinance, 2002 (134 of 2002), s. 5.
measure in subsection 1(c) is worthless without a comprehensive strategy to prevent the disclosure of witness identity from the investigation stage through trial and beyond.

Subsection (2) in its entirety is discretionary and seems to be worded so as to provide room for future administrative measures. The subsection’s wording envisages the formulation of a program that the Government would implement at a later stage. This program would complement the judicial powers granted under the previous subsection. Read with the following subsection it would seem that the government is required to take protective measures that exceed the trial stage. However, no notable administrative measures seem to have been undertaken under this sub-section is the past decade.

It is useful to call upon executive authorities for a comprehensive witness protection program and the specific reference to the Armed Forces in subsection (2) tries to carry this further. Yet highlighting the involvement of the Armed Forces may seem a reflection of the lack of faith our legislators have in the law enforcement agencies. Witness protection in other jurisdictions remains an entirely civilian administered area. However, in Pakistan’s current climate, with counter-terrorism being taken on by the military as well as civilian law enforcement bodies, employing the Armed Forces for witness protection may not be as farfetched as the subsection sounds in a vacuum. Temporary relocation of witnesses to protected cantonment areas or garrisons would make getting at them far more difficult. The real concern however, lies in engineering a sustainable relationship between the police, the courts and the Armed Forces for protecting witnesses, of which there is at present no significant indication.

Subsection (3) leaves open the possibility of FBI-style witness protection programs based on relocating the witness or protected person and granting them a new identity. However, in order to be fully effective, such programmes require extensive enabling legislation that caters to their administrative and technical requirements. Further, the wide-ranging nature of the protection afforded to witnesses under such programmes requires substantial funding and technical expertise. Thus in the present environment, it is not feasible to propagate the immediate adoption of witness protection programmes in Pakistan, despite the enabling language of this provision.

It is abundantly clear that Section 21 ATA cannot be made operational without further implementing programs by the Government. The courts on the other hand seem to be
mandated by Section 21(1) but have been reluctant so far to use this authority to secure witness testimony in terrorism cases. Without a credible and cogent mechanism in place, witnesses will have little faith in the court’s ability to protect them.

Seen against this backdrop, it appears that Section 21 as a statutory provision contains few legislative defects. It is meant as an enabling provision for the adoption of appropriate witness protection procedures, provided they comply with the fundamental requirements of due process. Nevertheless there is a need to insert more substance in this provision which will ensure its operationalization.

➢ Recommendations: Towards operationalizing Section 21, Anti-Terrorism Act, 1997

1. In order to provide effective protection to witnesses in terrorism cases, various measures need to be taken by the different institutions of the State at the various stages of a terrorism case so that comprehensive protection can be provided to witnesses in a streamlined and holistic manner. Some of these measures may be provided for in the ATA itself, either by an amendment in Section 21 itself and the use of a separate Schedule. Other measures may be implemented through the mechanism of statutory rules, issued under Section 35 of the Act. Further, guidelines for witness protection procedures in the Anti-Terrorism Courts may take the form of High Court Rules, issued by the Chief Justice of the provincial High Courts in accordance with Article 202 of the Constitution. Mechanisms providing for the enhanced police protection of witnesses may also be introduced in high profile cases of terrorism.

2. Sec.21(1) of the ATA must be operationalized by setting forth procedural mechanisms which grant ATA Judges the ability to withhold witness identity from the accused and make orders for the physical security of the witness.

(e) These procedural mechanisms are set forth in Annex I of this Chapter and introduce the concept of an Identity Protection Order, which may apply at both the investigation stage as well as the trial stage. During the investigation stage, such an order would prevent the identity of the witness from being revealed until the investigation is completed with the forwarding of the police report to the Judge under Section 173, Cr.P.C. Accordingly, the true identity of the threatened witness will not be mentioned
in any document prepared or any statement recorded during the course of investigation. This includes, but is not limited to, documents prepared or statements recorded under Sections 161 and 164 of the Code, the case diary, the police report or charge sheet etc.

(f) Annex I also sets forth the procedure (including due process requirements) for an *Identity Protection Order* at the trial stage in terrorism cases. The effect of such an order by the court would prevent the true identity of an endangered witness from being mentioned in any proceedings or in any document produced before the ATA court or any appellate court in relation to the case. This includes the documents which are required to be supplied to the accused under Section 241-A and 265-C of the Code and the judgment and Order Sheet.

(g) Once an Identity Protection Order for the duration of the trial has been passed by the ATA court, further measures can then be undertaken, with the permission of the court, during the trial which screen the identity of the witness, including the use of shielded testimony and examination of the witness through modern methods such as videoconferencing. These measures are aimed at reducing the potential for intimidation as well as mitigating any psychological trauma that the witness may suffer due to direct contact with the accused. Procedure for the implementation of an enhanced form of such screening is also outlined.

(h) The procedural mechanisms set out in Annex I to this Chapter may be implemented by the Federal Government issuing rules under the ATA. The Federal Government would also then be obliged to apportion funds to ensure that such witness protection measures were implemented.

3. Section 21(1) may further be strengthened by the adoption of softer measures which are primarily aimed at making the testifying process simpler and more conducive to witnesses. Such additional measures, implementable at the trial stage, may be introduced through the mechanism of rules established by the Federal Government under the ATA.

(c) Annex II to this Chapter sets out recommendations for additional witness protection procedures during ATC trials with the objective of creating a witness-friendly court
experience, which will go a long way in securing greater witness participation in terrorism trials.

(d) These recommendations also give courts the option of imposing a prohibition on the accused from contacting a witness. It is further proposed that if any contact does take place in violation of such a Court ordered prohibition, then a presumption of Criminal Intimidation under Sec. 503 of the PPC would be raised. It would then be up to the accused to show that such contact was innocent and did not intimidate the witness on a balance of probability. This approach can be taken further. A decision by the court that the individual did criminally intimidate the witness would make the accused forfeit his right to cross-examine him—a well-entrenched principle of American jurisprudence known as ‘forfeiture by wrongdoing’. This doctrine is based on the equitable principle that the accused should not benefit from his wrongdoing. If he has attempted to intimidate a witness to procure the witness’s unavailability at trial, then he must not be allowed to benefit from this. He would lose his right to confront his accuser and should be denied the right to cross-examine the witness when he does testify. American jurisprudence is wider than this and would also cover situations where the accused has successfully prevented the witness from testifying at trial. In such situations the doctrine would allow for the admissibility of hearsay evidence relating to the intimidated witness.

4. Enhanced police protection – operationalizing Section 21(2).
   1) A list of measures outlined in Annex III of this Chapter provide guidance to law enforcement officials to ensure enhanced protection of witnesses. These measures bring a comprehensive approach to witness protection. If implemented they can significantly counter the culture of witness intimidation and encourage witnesses to come forth to give testimony in the most difficult cases. As witnesses have often proven to be the weakest link in the prosecution’s case, strengthening their ability to perform will go a long way in improving the conviction rate in Pakistan. These measures would also be implemented through Rules notified under the ATA by the Federal Government. The Federal Government in this regard would also have to apportion funds to ensure implementation.
Guidelines for Witness Protection Procedures to be Adopted by the Anti-Terrorism Courts

RECOMMENDED GUIDELINES FOR WITNESS PROTECTION PROCEDURES TO BE ADOPTED AT THE INVESTIGATION STAGE

1. If the Investigating Officer, during the investigation, is of the view that a witness in the case is likely to be threatened or requires protection and without the same it may not be possible to conduct a fair investigation, he may, through the designated Public Prosecutor, make an application under section 21 ATA to the ATA Judge having territorial jurisdiction, seeking an Identity Protection Order for the duration of the investigation.

2. Any such application shall be submitted in person in the Chambers of the ATA Judge.

3. The application shall contain the actual particulars of the witness and also a proposed pseudonym for the witness to be used in the open record of the court.

4. The file and the record of the application in which the true identity of the witness is being retained shall be kept secure, under lock and key, by the Judge separate from the court file and the court Order Sheet.

5. Upon receiving the application, if the ATA court is of the view that it is in the interests of justice to screen the identity of the witness at the investigation stage, he shall pass an order allowing the same.

6. As a consequence of the said order, the identity of the witness shall not to be revealed until the investigation is completed with the forwarding of the police report to the Judge under Section 173 of the Code of Criminal Procedure 1898 (“the Code”).

7. The said Order shall provide that the true identity of the threatened witness will not be mentioned in any document prepared or any statement recorded during the course of investigation. This includes, but is not limited to, documents prepared or statements
recorded under Sections 161 and 164 of the Code, the case diary, the police report or charge sheet etc.

8. The true identity of the witness who is the subject of the application shall not be mentioned or reflected in the Order Sheet made under this application.

**Recommended Guidelines for Witness Protection Procedures after the Investigation Stage**

1. Upon the completion of the investigation, but before the commencement of examination of witnesses at trial, if the designated Public Prosecutor believes that it is necessary to provide for the protection of the witness’s identity in order to ensure a fair trial and due process under Article 10-A of the Constitution, he may make an application to the ATA court under Section 21 seeking an Identity Protection Order for the duration of the trial.

2. Such an application to the ATA court may also be made directly by the threatened witness.

3. The said application shall be submitted in person in the Chambers of the ATA Judge.

4. Such an application can be made irrespective of whether identity protection was sought or ordered at the investigation stage.

5. The application shall contain the actual particulars of the witness and also a proposed pseudonym for the witness to be used in the open record of the court.

6. The file and the record of the application in which the true identity of the witness is being retained shall be kept secure, under lock and key, by the Judge separate from the court file and the court Order Sheet.

7. Upon receipt of the application for an Identity Protection Order for the duration of the trial, the ATA court may conduct a hearing *in camera.*
8. The court shall consider if the request is reasonable.

9. During the hearing, the court should hear the prosecution, and subject to its discretion, the witness who is the subject of the application.

10. The court while conducting the hearing should separately inform the accused or his counsel that an Identity Protection Order is being sought and shall give them a separate hearing.

11. During this hearing, the accused or his counsel may be permitted to submit a list of questions to the prosecution regarding the grounds on which the Identity Protection Order is being sought.

12. If the ATA court is of the view that it is necessary to screen the identity of the witness at the trial stage, it should pass a reasoned judicial order allowing the same.

13. The order by the court would provide that the true identity of the endangered witness will not be mentioned:
   a) in any document produced before the ATA court or any appellate court in relation to the case;
   b) in any proceedings before the ATA court or any appellate court in relation to the case;
   c) in the documents which are required to be supplied to the accused under Section 241-A and 265-C of the Code;
   d) in the judgment and Order Sheet.

14. Once an Identity Protection Order for the duration of the trial has been passed by the ATA court, further measures can then be undertaken, with the permission of the court, during the trial which screen the identity of the witness, including the use of shielded testimony and examination of the witness through modern methods such as videoconferencing.

15. The true identity of the witness who is the subject of the application shall not be mentioned or reflected in the Order Sheet made under this application.
16. After the conclusion of the trial, the said record containing the true particulars of the witness shall be deposited with the Registrar of the High Court concerned for permanent safe custody.

**GUIDELINES FOR WITNESS SCREENING IN COURT DURING TRIAL**

1. Upon the request of a witness made in writing at any time, or on his own, the Judge may order the placing of a screen between the witness and the accused to physically screen the witness from the accused.

2. In this regard, a screen may be placed between the accused and the witness in a manner whereby the accused is unable to see the witness.

3. However, the defence counsel shall be allowed to see the witness and cross-examine him.

4. The court may, if appropriate, assign the witness a pseudonym and all parties shall refer to the witness by such pseudonym.

5. During the trial, the Judge shall take active steps to prevent disclosure of the witness’s true identity, including preventing the defence counsel from posing such questions which compel the witness to reveal his identity.

**GUIDELINES FOR TESTIMONY VIA VIDEO-LINK**

1. On the request of the witness, or on his own, the Judge may order that the witness be allowed to give testimony via two-way video-link from a secure location.

2. If permission is granted for testimony via video-link, technical staff shall set up two-way video-link between the court and a secure location which has been approved by the Judge. This may include a room located within the court or outside.

3. During the testimony, technical and court staff shall be available at both locations.
4. In the courtroom, the camera shall be placed in such a way that the accused shall not be visible on the screen viewed by the witness in the other room, except when so required for identifying the accused.

5. In the courtroom, the screen showing the witness shall be viewable to all the parties present, except the accused.

6. In the other room, the camera shall be placed before the witness that clearly shows the witness’s entire body.

7. The Examination-in-Chief and Cross-Examination shall take place via this two-way video link.

8. Nothing prevents the defence counsel to put any questions to the witness that he would put in the normal course of the routine trial except regarding his true identity.

9. Nothing prevents the prosecutor from carrying Examination-in-Chief in a manner that he would do so of any witness in a routine trial.

10. Nothing prevents the Judge from putting any questions to any witness whose testimony is being taken through video link which he would otherwise put to him in any routine trial.

11. In case of any documents or evidence to be marked as evidence in the oral testimony the court staff will take the said documents to the room where the witness is sitting for his affirmation, thereafter the courts shall give it an appropriate exhibit mark.

12. On request from the designated Public Prosecutor, voice distortion of the witness while giving testimony via video-link may be permitted at the discretion of the court.
ANNEXURE II

Recommendations for Additional Witness Protection Procedures During Trial

Prohibition against approaching, meeting or contacting protected witnesses
1. The court may impose a prohibition on contacting and communicating with a protected witness. This includes direct communications between the accused and the witness (through meetings, conversations, phone calls, e-mail, letters, SMS etc.) or indirect contact via a third person.

2. If any contact is made by the accused towards the witness, in violation of the Court ordered prohibition, then an automatic presumption of Criminal Intimidation under Sec.503 of the Pakistan Penal Code would be raised, reversing the burden of proof onto the accused to rebut at trial. Trial for Criminal Intimidation may be conducted within the same terrorism trial for which the accused was initially charged. This is permitted under Sec.21-M of the ATA.

3. If found guilty of Criminal Intimidation the accused will forfeit his right to cross-examine the same witness against whom the intimidation took place, by virtue of the accused’s own wrongdoing. This principle is entrenched in American jurisprudence and known as ‘forfeiture by wrongdoing’. This proposal would, in all likelihood, require statutory basis.

4. To verify whether the measures imposed by the courts are being implemented, the court may direct the police to interview the witness or summon the witness directly to ascertain whether the accused has attempted direct or indirect contact. The court may also instruct the witness to report any violations directly to the court itself.

Reception and Accommodation of the Witness at the Court

5. The court administration may, at its discretion, organize transportation for the endangered witness to the court.
6. The witness should arrive at the court through a side entrance which is not exposed to the public and the media etc.

7. A separate room should be designated in the courthouse where protected witnesses can be accommodated until they are called into the courtroom, to prevent any contract with the parties, the audience or other witnesses.

8. The witness should wait in this room until the time comes to give testimony. His/her presence should not be required in the court before that. However, the judge should be informed that the witness has arrived and is waiting in a separate room.

**Maintenance of Order during Trial**

9. Immediately upon opening the hearing, the judge may warn all persons present to not interfere with the court’s work. This should also contain instructions to the audience not to disrupt the proceedings by misbehaving or talking, with a description of the consequences of such a disruption. The judge should also warn the parties that they may only address the court when allowed to speak, to stand when they address the court, and to communicate in a civil manner with each other.

10. In the event that the accused disrupts the order in the courtroom, the judge may remove him from the courtroom for such duration as he deems necessary.

**Exclusion of the Public from the Trial (in camera proceedings)**

11. Pursuant to Section 21(1)(a) ATA, proceedings may take place in camera, or under restricted access to the public where this would be necessary for the protection of witnesses. Such measures should also be undertaken where the threat to the witness does not come directly from the accused or persons close to the accused, but from persons not involved in the proceedings that are interested in its outcome and are offended by or take issue with the witness’ testimony.
12. Where proceedings are held *in camera*, the judge should warn all those attending the trial that everything they learn at the trial must be kept secret and any disclosure can result in criminal sanctions.

**Obtaining information about witness intimidation during the hearing**

13. The court should instruct the witness to notify the court immediately of any occurrence which the witness might perceive as a threat.

14. The court should instruct all members of the court administration, police officers and any person who comes into contact with the witness after his arrival at the courthouse, to notify the court immediately about any event which they interpret as a possible threat to the witness.

15. Upon being notified about the threats being received by the witness in the courthouse, the judge should take new measures to prevent similar occurrences in the future. This can include replacing the police officers who were guarding the witness, increasing their number, or ordering that the court room corridors be emptied when the witness is being taken to the waiting room or leaving the courthouse etc.

16. If the threats to the witness consist of a threat to his person, reputation, or property, or to the person or reputation of anyone in whom the witness is interested and is intended to cause harm to the witness or to cause the witness to give false testimony or refrain from giving testimony, the court may initiate proceedings under Section 503 of the Pakistan Penal Code which relates to criminal intimidation. Provision for such a joint trial is provided by Section 21-M ATA.
ANNEXURE III

Guidelines for Enhanced Police Protection for the Witness

Pursuant to Section 21(3) ATA, the Federal or Provincial Government, as the case may be, may undertake administrative measures which improve the physical security of a threatened witness through enhanced police protection. The Government may, at its discretion, only provide for such measures in high profile terrorism cases, where the witness faces an acute threat.

1. The witness may be provided with close police protection, which includes regular patrolling of his/her house and escort to and from the court. Armed policemen dressed in civilian clothing may also be stationed at his/her residence.

2. All telephone calls received by the witness should be monitored.

3. The witness may be provided a cell phone with an unlisted number. This phone should contain the contacts of all relevant persons which the witness can contact in an emergency.

4. The witness should have minimized contact with uniformed police officers.

5. The witness should ideally not be interviewed and debriefed in a police station. Discreet premises may be used for this purpose.

6. In extreme cases, the witness may be relocated for a temporary period of time. This can be within the same city or outside the city and can include relocation to a relative’s or friend’s house. Such temporary accommodation should also be provided with close police protection.

7. Such measures should be proportional to the threat and be of a limited duration due to resource constraints.
CHAPTER NINE

JUVENILE OFFENDERS

9.1 INTRODUCTION

It is an established principle of the law to give lenient treatment to persons of tender age, or ‘minors’. A minor is a person who is below a certain level of age as determined by the law of the land. Under criminal law, they are called ‘juveniles’. The Pakistan Penal Code, the Criminal Procedure Code, the Juvenile Justice Systems Ordinance (2000) and the Probation of Offenders Ordinance are relevant laws that deal with the matters of juveniles. However, at times special laws, which contain statutory provisions pertaining to juveniles, override these laws, for e.g. Section 130 of the Railways Act, 1890 and provisions in the Anti-terrorism Act, 1997.

A common issue that arises is if a juvenile commits a terrorist act, as defined under the ATA, which court will have the jurisdiction to try the case, i.e. whether a juvenile court will have the jurisdiction or an Anti-terrorism Court (ATC). Clarity can only be achieved by assessing whether the courts are engaged in different analytical pursuits on the subject, and by recommending how to eliminate any inconsistencies in judicial approach, which is the aim of this report.

9.2 JURISPRUDENCE PERTAINING TO JUVENILE OFFENDERS

The courts have often shown an inclination towards a lenient approach when dealing with cases involving juvenile offenders. This is evident in judgments where the accused’s sentence was either mitigated or a fresh trial was ordered because the age of the accused at the time of the commission of the offence was unclear.

In the judgment of **Sajjad Ali v The State**\(^{265}\), the court set aside the conviction and sentence passed against the appellant, and stated that the case should be decided in accordance with law again, after determining the question of age of the convict (appellant).

Moreover, if an accused person was a minor at the time of the offence, this factor is at times used as a mitigating factor in favor of the accused. In the case of **Muhammad Rasool v The State**\(^ {266}\), the accused’s sentence was reduced from fourteen years rigorous imprisonment to eight years rigorous imprisonment. Another circumstance that the court took into account was the fact that as the accused in question was a minor at the time, he may have been subjected to the notorious influence of his older brother. Thus, this means that even surrounding circumstances are a vital factor when determining the extent and duration of penal measures that an accused who at the time of the commission of the offence was a minor.

However, the major issue that arises is the issue of jurisdiction, as mentioned above. The jurisprudence on the issue of jurisdiction can be broadly categorized into two categories:

1. The first category includes case law where the courts have deemed that if a minor commits an offence of terrorism as defined under ATA, the case should be tried by a juvenile court. This broad category also encompasses cases in which the judiciary has said that only when the minor/child has committed an offence under items 1 & 3 of the third schedule of the ATA, shall juvenile courts have jurisdiction. This approach can be distinguished from cases which state that any offence under ATA if committed by a minor will be tried by a juvenile court.

2. The second category of cases includes those cases which state that if a minor commits an offence under the Anti-terrorism Act, 1997, the jurisdiction to try the case shall lie with an ATC.

**9.2.1 Case law favoring jurisdiction of juvenile courts**

An issue of jurisdiction not only arises when it comes to the Juvenile Justice Systems Ordinance, 2000 but also the Control of Narcotic Substances Act, 1997. The issue that arises is whether the accused will then be tried by the juvenile court or an ATC established under

\(^{265}\) 2001 P Cr LJ 1005 Karachi High Court
\(^{266}\) PLD 2012 Balochistan 122
the ATA. In the judgment of Qamar Hussain Shah v The State\textsuperscript{267}, the court held that where the accused commits an offence when he/she is below the age of eighteen, the case would be transferred to the respective Juvenile Court comprising Courts of Session and Magistrates in the respective districts. The Juvenile Court comprises Courts of Session and Magistrates in the respective districts where they have been allegedly committed and the case will proceed in accordance with the procedure prescribed in Juvenile Justice Systems Ordinance, 2000. It was, however, stated that such juvenile courts will proceed with the cases from the stage at which they were transferred and no recalling of witnesses or de novo trials will be invoked.

The judgment further states that cases of such persons accused of having committed acts of terrorism in terms of items 1 and 3 to the Third Schedule (and not under item 2 or 4) shall also stand similarly transferred. Items 1 and 3 of the Third Schedule include any act of terrorism within the meaning of this Act including those offences, which may be added or amended in accordance with the provisions of section 34 of this Act. Furthermore, it also includes any attempt to commit, or any aid or abetment of, or any conspiracy to commit, any of the aforesaid offences.

However, cases where children are accused of having committed offences created by the ATA (as distinguished from acts of terrorism in item 1 or those added through item 4 of the third schedule i.e. abduction or kidnap for ransom, use of fire arms or explosives in places of worship and courts), will continue to remain within the jurisdiction of the ATC’s, as per this judgment.

Sabihuddin Ahmad C.J, in the same judgment\textsuperscript{268} stated that the promulgation of the Juvenile Justice Systems Ordinance, 2000 also affects the jurisdiction of the ATC’s. This view is supported by the Supreme Court judgment of Ziaullah v Najibullah.\textsuperscript{269} In this case, the accused was convicted and sentenced to death under Ss. 302/34 of the Pakistan Penal Code by the ATC. This sentence was given before the enforcement of the Juvenile Justice Systems Ordinance. However, the President granted special remission to condemned prisoners who at the time of the commission of the offence were below 18 years of age, before the sentence could be executed. A medical board was constituted by the provincial government to ascertain the age of the respondent at the time of commission of the offence but upon the matter being taken to the Supreme Court, their lordships held that such age ought to be

\textsuperscript{267} PLD 2006 Karachi 331
\textsuperscript{268} PLD 2006 Karachi 331
\textsuperscript{269} PLD 2003 656
determined judicially under Section 7 of the Ordinance and could not be questioned thereafter. It is imperative to note that as the matter was referred to the Juvenile Court and not to the ATC, it indicates that their lordships considered the provisions of the Ordinance to apply to matters which earlier fell within the jurisdiction of the Anti-terrorism Court.

He further stated that it seems that after the promulgation of the Juvenile Justice Systems Ordinance, the legislature did realize that exclusive jurisdiction to try children accused of any offences (including offences under Special Laws, for e.g. the Anti-Terrorism Act) came to be vested in Juvenile Courts. *Thus, while effecting amendments in the Act in 2001, section 21-G was incorporated to re-vest such jurisdiction in the anti-terrorism courts in respect of certain types of offences chosen by the legislature in its own wisdom.* It is equally important to keep in view that as Section 12 is already in the Statute book, there would have been no need to incorporate Section 21-G and indeed redundancy could not be attributed to legislative enactment. He said that this led him to the irresistible conclusion that such Courts can only try children falling under item 2 of the Third Schedule, i.e. those accused of offences under the Act but not under item 1 or item 3.

Furthermore, in the judgment of *Ketno v Judge, Anti-terrorism Court, Special Court for ATA* 270, the petitioner had sought bifurcation of his case from the co-accused on the basis that he was a minor at the time of commission of the offence. The petitioner was examined by a Board of Medical Officers and after physical, chemical as well as radiological examination the Board issued a certificate showing that the accused appeared to be between fifteen to seventeen years of age. The court allowed the constitutional petition and the case was sent to a Juvenile Court, while stating that the ATA had no overriding effect over provisions of the Juvenile Justice Systems Ordinance, 2000.

Thus, these judgments provide us with a particularly useful lens through which to analyze the jurisprudence on the issue of jurisdiction. However, this approach is merely one side of the coin. In recent case law, the courts have stated that the ATC’s have jurisdiction if a minor commits an act of terrorism.

9.2.2 Case law favoring jurisdiction of the ATC’s

---

270 2005 MLD 353
In the case of **Ehsanullah v The State**\(^\text{271}\), the court recognized that ATA holds the status of special law and that it overrides the provisions of general law, as the offence of murder has been provided in the schedule of the special law wherein the offence is punishable with death. No indemnity or concession for any offender being minor in age has been stated.

Furthermore, in the case of **Meraj Hussain v Judge, Anti-Terrorism, Northern Areas, Gilgit**\(^\text{272}\) it was said that an offence of terrorism can only be tried under the ATA, 1997, and the age of the offender has no relevancy to the Court of such jurisdiction. The judgment further stated that the statutory provisions of Sections 2(d)\(^\text{273}\), 21-C(5)\(^\text{274}\), 21-C(7)(e)\(^\text{275}\), 21-C(7)-F\(^\text{276}\) and 21-F of the Act 1997 clearly elucidates that a child below the age of eighteen years can validly be tried by an Anti-Terrorism Court constituted under the said Act of 1997. This view is further strengthened by the provision of Section 32 of Anti-Terrorism Act, 1997 which unambiguously provides that the provisions of the said Act are to have an overriding effect. Furthermore, Section 14 of the Juvenile Justice System Ordinance, 2000 expressly provides that the provisions of the said Ordinance shall be in addition to and not in derogation of any other law for the time being in force. Section 32 of the Anti-Terrorism Court, 1997 and Section 14 of the Ordinance, 2000 are reproduced below:

**Section 32 of Anti-Terrorism Act, 1997**

"32. **Overriding effect of Act.**--- (1) The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code, shall so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before an Anti-Terrorism Court shall be deemed to be a Court of Sessions."

**Section 14 of Ordinance, 2000**

\(271\) 2010 P Cr LJ 1415

\(272\) 2007 P Cr LJ 1011

\(273\) “Child” means a person who at the time of the commission of the offence has not attained the age of eighteen years.

\(274\) A child guilty of an offence under sub-section (4) shall be liable on conviction to imprisonment for a term not less than six months and not exceeding five years.

\(275\) A child commits an offence if he provides, generally or specifically, any instruction or training in acts of terrorism, and on conviction, shall be liable to imprisonment for a term not less than six months and not more than five years.

\(276\) A child commits an offence if he receives, generally or specifically, instructions or training in acts of terrorism, and on conviction, shall be liable to imprisonment for a term not less than six months and not more than five years.
"14. **Ordinance not to derogate from other laws.**

"The provisions of this Ordinance shall be in addition to and not in derogation of, any other law for the time being in force."

A bare reading of Section 14 of the Ordinance, 2000 strengthens our opinion that the later law does not curtail or limit the power of Anti-Terrorism Court pertaining to a child's trial but clarifies that the provisions of the Ordinance *shall be in addition to and not in derogation of any other law for time being in force.*

Moreover, in a seminal judgment\(^{277}\), it was said that by their nature both the laws (ATA, 1997 and the JJJSO, 2000) are special laws. The relevant provisions providing jurisdiction of juvenile court and its effect and relevancy with other laws is reproduced below:--

**Section 4(3) of the Ordinance 2000:** The Juvenile Court shall have the exclusive jurisdiction to try cases in which a child is accused of commission of an offence.

**Section 14:** The provisions of the Ordinance shall be in addition to, and not in derogation of, any other law for the time being in force.

If both the provisions of the Ordinance 2000 reproduced above are analyzed, it appears that the Ordinance 2000 provides exclusive jurisdiction to the Court constituted under the Ordinance 2000 in a case where an accused below age of 18 years. In the meantime this Act being a more recent law, further provides and clears the position that its provisions shall not be in derogation of any law, but shall be in addition of laws prevailing at the moment when the Ordinance was promulgated.

As stated earlier, ATA was enforced in 1997, much prior to the Ordinance 2000 and was fully operative in the related purpose when the Ordinance 2000 was enforced. It is very important to note and mention here that the following two provisions were also contained in the ATA like the rest of provisions but the latter law instead of providing an overriding effect

\(^{277}\) 2011 P Cr L J 1022
over the former law provided Section 14 in the Ordinance. Thus the unambiguous position is that the latter law never affects the following two provisions including any other provisions of Act 1997.

(A) 21-C(7)(f) A child commits an offence if he receives, generally or specifically instructions or training in acts of terrorism and on conviction shall be liable to imprisonment for a term not less than six months and more than five years.

(B) 21-F Notwithstanding anything contained in any law or prison rules for the time being in force, no remission in any sentence shall be allowed to a person other than a child, who is convicted and sentenced for any offence under this Act unless granted exclusively by the Government.

In the circumstances, it will be unfair to presume that the legislature was ignorant about the existence of the above provisions in ATA and committed any mistake by not providing any overriding effect in the latter law. Furthermore, the legislature to further clarify the legal position inserted a new provision of 21 G in the ATA through Act-II of 2005 as reported in PLJ 2005 and Federal Statute 2005 which reads as under:

21-G All offences under this Act shall be tried (exclusively) by Anti-Terrorism Court established under this Act.

This provision 21-G is the latest insertion in the Act 1997 even after the promulgation of the Ordinance, 2000 and undoubtedly overrides all the related provisions and provides exclusive jurisdiction to the Court constituted under Act 1997 over the offences defined in the Act 1997 by an offender including a child/minor.

9.3 CONCLUSION

Thus, having analyzed the jurisprudence on this issue of jurisdiction, it is imperative to reproduce in summary the focal points raised. There is a general approach favored by the Courts to show leniency towards juvenile offenders when sentencing, as evinced by case law
mentioned above.\textsuperscript{278} However, that is not the contentious issue. The case law that favors juvenile courts trying offences when a minor commits a terrorist act (as defined under the ATA), either states that juvenile courts should have jurisdiction for any offence under the ATA, or certain judgments have limited it to items 1 and 3 of the third schedule of the ATA. This latter approach is in favor of items 2 and 4 of the third schedule being tried by the anti-terrorism courts.

There is however, a plethora of judgments which states that although the Juvenile Justice Systems Ordinance, 2000 was enacted after the Anti-terrorism Act, 1997, Section 21-G was inserted in the ATA by way of amendment\textsuperscript{279} to re-vest the jurisdiction for such offences in the ATC’s. The case law also adumbrates that Ss 2(d), 21-C(5), 21-C(7)(e), 21-C(7)(f), 21-F, 32 of the ATA and Section 14 of the JJSO also point towards the ATC’s having the jurisdiction for such offences.

\textbf{Recommendations}

1. Keeping in mind the inconsistency in judicial approach when dealing with the issue of jurisdiction, it is imperative that the ATA should explicitly state that ATCs hold jurisdiction for trying juvenile offenders when it comes to offences under the ATA.

2. Furthermore, Section 32 of the Act could explicitly state that the ATA has an overriding effect over the Juvenile Justice Systems Ordinance, 2000 and the Control of Narcotic Substances Act, if a juvenile has committed any offence under ATA.

3. It is recommended that surrounding circumstances be taken into account when determining the sentence of a minor, or an accused who at the time of commission of the offence was a minor. As explicitly stated by case law, the sentences of minors have been mitigated in certain cases and this could be re-enforced by being placed on a statutory footing.

\textsuperscript{278} 2001 P Cr LJ 1005; PLD 2012 Balochistan 122
\textsuperscript{279} Act-II of 2005.
10.1 Tackling Global Terrorism: Insertion of the Fifth Schedule vide Act No. XIII of 2013

The Anti-Terrorism Act, 1997 (ATA) was amended by Act No. XIII of 2013 and vide section 2 of the Act, sub-section (3A) has been added in section 6, that defines “terrorism”.

A new Schedule has also been inserted vide section 14 of the Act No. XIII of 2013 which read as follows.-

“In the said Act after Fourth Schedule a new Schedule shall be added namely..........”

The Legislature has conferred the authority on the Federal Government to modify or amend the Fifth Schedule by adding any other convention duly notified in the Official Gazette, contrary to fact that unless Pakistan ratifies a convention it cannot be enforced through a notification. In common law states like Pakistan, India, United Kingdom, Australia, Canada etc. the international conventions are implemented through enactment of Parliament.

The relevant sub-clause (i) of the Fifth Schedule is reproduced as follows;

“Such other convention as may be specified by the Federal Government by notification in the official Gazette.”

Section 6 of ATA provides the definition of what is meant by the term “terrorism”. In addition, it also defines what constitutes a “terrorist act” once the conditions under sub-
section (1) are satisfied. Meaning thereby, use or threat of actions shall not be terrorism unless;

a. “the action falls within the meaning of sub-section (2); and

b. the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or

c. the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sector, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies:

Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.”

The text of amendment in section 6 of ATA is given below.-

“3A Notwithstanding anything contained in sub-section (1), an action in violation of a convention specified in **Fifth Schedule** shall be an act of terrorism under this Act”.

The wisdom of introducing a non obstante clause in Sub-section (3A) is unclear and vague from a legal standpoint. The said amendment has not brought required changes in other corresponding provisions of the ATA vis-à-vis the purpose of effective prosecution and conviction of an accused person.

With regard to criminalizing actions in violation of the Fifth Schedule, no modifications have been made in Section 7 of the ATA. Upon conviction an offender can at best be liable to punishment under section 7(1) (i). The said section reads as follow.-
“(i) any other act of terrorism not falling under clauses (a) to (h) above or under any other provision of this Act, shall be punishable, on conviction, to imprisonment of not less than [five years] and not more than [ten years] or with fine or with both.”

10.2 En-listed Conventions and Protocol

The Fifth Schedule specifically establishes the jurisdiction of ATCs to try persons who violate or commit offence(s) under the enlisted UN Conventions and Protocols related to terrorism.

The enlisted Conventions have different depositaries like the United Nations, IMO, ICAO, and member States. Their main function is to maintain the record of state parties which include, inter alia, their respective dates/years of ratification, accession, signature, declaration, reservation etc.

These Conventions include.:


at Montreal on the 24th February, 1988. Pakistan had ratified it on 26/09/00.

e. Convention for the suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on the 10\textsuperscript{th} March 1988. Pakistan had acceded to it on 20/09/00.

f. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on the 10\textsuperscript{th} March, 1988. Pakistan had acceded to it on 20/09/00.


10.3 Nature of Conventions

Conventions are essentially law making treaties and therefore do not cater to serve the purpose of creating bodies which oversee the implementation of these conventions in Member States.

In other words, no such body has specifically been setup for administering and monitoring the effective implementation of the text of the conventions.

At best, the compliance is being monitored through periodic UN General Assembly resolutions in which member states are urged to ratify the convention as much as possible.

The implementation of any international commitments between two or more states pursuant to the provisions of a convention is left at a bilateral level to be decided amongst those states.
Matters pertaining to the administration, interpretation and implementation of the text lie to be decided at the state level. In the unlikely event of a dispute on matters relating to the interpretation of the text of any convention, member states have the option to apply for arbitration. In addition, access has also been provided to the International Court of Justice has also been provided.

In recent times, the United Nations General Assembly has entrusted UNODC the function to provide technical assistance to contracting / member states on their request on two specific instances namely:

- Ratification of treaty; and
- Legislative development.

10.4 Some of the common salient features of Conventions in Fifth Schedule

Each convention contains the definition of an offence(s) specific to the category of unlawful act(s) of terrorism involved in such convention.

Each convention requires state parties for criminalizing unlawful acts and to provide appropriate penalties subject to their grave nature described under the convention.

Each convention also requires criminalizing the threat or attempt to commit unlawful acts described under the convention.

Each convention also requires criminalizing acts constituting participation of a person as an accomplice in the commission of unlawful act described under the convention.

Each convention provides a criteria for a determination upon which the states are expected to opt the choice to exercise their criminal jurisdiction over the unlawful acts described under the convention.
Each convention creates an obligation on a State party, in whose territory an alleged offender is found, to establish and exercise jurisdiction over the offence and commence the prosecution if it does not intend to grant extradition pursuant to provisions of a convention.

Each convention creates an obligation on a State party to criminalize acts of protection, shielding and harboring terrorists.

Each convention creates an obligation on a State party not only to criminalize acts or omissions “by appropriate penalties” but also to cooperate with each other so as to initiate a prosecution in accordance with their domestic laws.

Generally each convention creates an obligation of mutual ‘legal assistance’ on one state with reference to another in order to facilitate investigation and successful prosecution of the offender.

Each convention has a provision of mutual legal assistance which is restricted to the subject-matter that the convention relates to.

Each convention provides guarantees and rights with reference to an offender such as:

a. fair treatment during his prosecution;

b. consular access;

c. permission to the Human Rights Organizations to visit and communicate with offender;

d. keeping the Secretary General of UN informed on facts related to his custody and criminal prosecution etc.

Each convention allows a state party to attach its declaration(s) with respect to a specific Article(s) of a convention at the time of its ratification or accession etc.
Each convention allows a state party to denounce its membership under a convention by means of a written notification to the UN Secretary General.

Each convention generally creates an obligation on a state party to make its domestic laws compliant with the obligations under a convention in letter and spirit.

10.5 Implementation of international conventions related to terrorism in Pakistan

Pakistan has been implementing international conventions either by amending its existing domestic laws or by enacting standalone new laws. For instance, the Chemical Weapons Convention Implementation Ordinance 2000 is a standalone law made to implement international obligations on Pakistan pursuant to the Chemical Weapon Convention.

Likewise, the Convention for the Suppression of Unlawful Seizure of Aircraft has been implemented in Pakistan by amending the Pakistan Penal Code 1860 by the addition of three new Sections through an Ordinance No. XXXI of 1981, promulgated in 1981. This amendment was made to implement the international obligation to criminalize the offence of hijacking, its abetment etc. and award severe punishment for such an offence. The text of added sections i.e. 402A, 402B and 402C are reproduced as follows;

“402-A. Hijacking: Whoever unlawful, by the use or show of force or by threats of any kind, seizes, or exercised control of, an aircraft is said to commit hijacking.

402-B. Punishment for Hijacking: Whoever commits, or conspires or attempts' to commit, or abets the commission of, hijacking shall be punished with death or imprisonment for life, and shall also be liable to forfeiture of property and fine
402-C. **Punishment for harboring hijacking, etc.:** Whoever knowingly harbors any person whom he knows or has reason to be a person who is about to commit or has committed or abetted an offence of hijacking, or knowingly permits any such persons to meet or assemble in any place or premises in his possession or under his control, shall be punished with death or imprisonment for life, and shall also be liable to fine. “

### 10.6 Some legal comments on Fifth Schedule

All conventions and international obligations with reference to terrorism have not been included in the Fifth Schedule. Many important UNSC and UNGA terrorism specific resolutions have not been included. For instance, criminalization of “hate speech” is an obligation on all states including Pakistan under UNSC Resolution 1624/2005. Neither the intent nor the compliance of UNSC Resolution has been included in the Fifth Schedule. Such omissions may not essentially be deliberate; nevertheless, the language of important UNSC Resolutions and conventions should feature in any future draft ATA law in light of United National Security Council Act 1948.

Section 1(2) extends the application of the ATA to the whole of Pakistan, including territorial airspace and sea. Currently, offences of a heinous nature committed beyond the territorial limits are being tried by general courts established under Criminal Procedure Code 1898. But through the addition of the Fifth Schedule in the ATA, it is expected that ATCs will now be responsible for conducting the trial of such offences. We find serious concerns with regard to jurisdiction of ATCs subject to prescribed limitations under Section 1(2) of ATA.

The ATA with a restricted territorial application may not be a useful legal instrument to criminalize unlawful acts as prescribed under the conventions of the Fifth Schedule. This is so because each convention under the Fifth Schedule contains a foreign and/or international element, and only laws with extra-territorial application can serve this purpose effectively. This aspect needs to be addressed in any future legislative endeavors vis-à-vis the ATA.
It is pertinent to mention that Article 4 (3) of the “Aircraft Convention” restricts the application of the convention to cases where the place of takeoff or place of landing of the aircraft on board, where the offence is committed, is situated outside the state of registration of that aircraft. Meaning thereby, only states having laws of extraterritorial application will be able to exercise jurisdiction over the offences committed against such aircraft. Unless an amendment to that effect has been made in Section 1(2), there is every possibility that an accused of international hijacking will be acquitted by an ATC on technical grounds.

Similarly, acts of terrorism subject to Fifth Schedule if committed on the High Seas, again cannot be tried by an ATC unless the prosecution invokes the provisions of Pakistan Penal Code either on the ground of “common intention” or “abetment” or both. The legal challenge for prosecution will be, first to satisfy ATC regarding its jurisdiction over such offence and secondly may request a joint trial, otherwise, the case will be transferred to the Competent General Court which has the jurisdiction to try such an offence.

In case of commission of an offence under Section 6(3A) of ATA, the conditionality of Section 6(1) relating to motive and mens rea has been expressly excluded. In other words, an ATC will be able to convict an alleged offender without considering his intention and motive behind an action. Only the commission of an action in violation of the convention would be sufficient to convict him.

Sub-section (3A) of Section 6 of ATA is not clear whether the referred ‘actions’ are restricted to offences under a convention or include all obligations under it. We find the formulation of sub-section 3(A) legally defective as it may create issues for the Government of Pakistan since violations of actions include;

- e. obligation to criminalize unlawful acts,
- f. effective prosecution of offences; and
- g. procedural compliance of the convention by a state party like, reporting to UN Secretary General, mutual cooperation, extradition of the offender, information sharing, etc.
If a violation under the Fifth Schedule occurs, the ATC will be restricted by section 7(1)(i) of ATA to award lesser punishment for the same act which is liable to capital punishment under the general law. In other words, ATC punishment will serve as an adverse incentive to criminals who are sentenced under the provisions of ATA.

ATA has no enabling provisions to process a request to or for mutual legal assistance or cooperation in criminal matters under the conventions of Fifth Schedule. This is yet another aspect of the ATA requiring legislative attention.

10.7 CONCLUSION:

In view of the above, we find legal and technical issues in the implementation of the Fifth Schedule and it may not serve any purpose unless corresponding amendments in other provisions of ATA are also made. This is particularly true if one considers the observation of the Supreme Court of Pakistan in Shaukat Baig v. Shahid Jamil case (PLD 2005 SC 530) that the ‘scheme of ATA is meant for internal security of the country having no concern with terrorism prevailing at global level’.