
HUMAN RIGHTS AND PAKISTAN'S COUNTER-TERRORISM LEGISLATIVE LANDSCAPE

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RSIL



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This report has been prepared by researchers at the Research Society of International Law, Pakistan (RSIL) with support from the American Bar Association – Rule of Law Initiative (ABA-ROLI). The report is part of a joint project between RSIL and ABA-ROLI on the capacity building of lawyers, prosecutors, and judges in the area of human rights and Anti-Terrorism Court trials. It is the first of two reports to be published on this subject. The second report will focus on providing practical and detailed recommendations on how to improve the functioning of the Anti-Terrorism Courts.

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INTRODUCTION

Context

Terrorism and militancy have had far-reaching political, economic, social, and, importantly, legal consequences for Pakistan. With regard to the legal response to this situation, the evolution of counter-terrorism legislation in Pakistan has followed an ever more draconian trajectory in the past five years. Laws such as the Protection of Pakistan Act 2014 (PPA), followed by the establishment of Military Courts to try civilians under the Pakistan Army Act of 1952 are two glaring examples of this approach. Such laws work in conjunction with and at times completely overshadow the operation of Pakistan's primary counter-terrorism legal tool – the Anti-Terrorism Act of 1997. In 2015 and 2016, Pakistan witnessed three separate tiers of courts empowered to try terrorism suspects – the Anti-Terrorism Courts under the ATA, the Special Courts under the PPA, and the Military Courts. While incidences of terrorism have significantly dropped in the past few years, this is primarily attributable to Operation Zarb-e-Azb conducted in the FATA/PATA region. With no substantive improvements in prosecution capabilities in Anti-Terrorism Courts, the PPA's Special Courts never being operationalized, and Military Courts trying only a fraction of the suspected terrorists, there are no grounds to suggest the legal changes played a role in this reduction in terrorist activity. The sun has set on the PPA and the Military Courts have also ceased to function since January 2017. However, the precedents they have set are deeply concerning from a human rights perspective.

The PPA established new legal classifications such as 'militant' and also made disturbing amendments to existing classifications such as 'enemy alien'. It allowed individuals to be stripped of their nationality and to lose the presumption of innocence in certain circumstances. The Military Courts have suffered from an acute lack of transparency in their procedure and overall workings. The few glimpses of their workings that have been made public through appellate court proceedings have demonstrated a lack of adequate fair trial and due process safeguards being afforded to defendants. While both these statutes had a two-year sunset clause inserted in them, we should not view these as temporary measures only. In 1998 the Supreme Court in *Liaquat Hussain vs. The Federation of Pakistan*¹ had declared Military Courts trying civilians as a usurpation of the civilian judicial function and, therefore,

unconstitutional. Yet, less than two decades later, the Supreme Court found reason to permit their establishment² and approved the non-application of fundamental rights to their working³. This is a disturbing trend and may be repeated in the future if the menace of terrorism continues in Pakistan. Alarming, while these initiatives have endangered human rights safeguards in the country, they have not led to any commensurate improvement in counter-terrorism efforts. In essence, these stop-gap measures seem only to have distracted the Government and Parliament from making the deep impacting changes needed to the Anti-Terrorism Act 1997. In fact, at the time, the Prime Minister's Special Assistant for Law, Mr. Ashtar Ausaf Ali, had noted that the reason for the passage of the amendments to the Pakistan Army Act 1952 and the Constitution allowing the Military Courts, was to provide the temporal space for the Government to make the Anti-Terrorism Courts more effective⁴. Unfortunately, the two-year time period has lapsed and no legislative changes to the ATA have been brought about. Barring any new ad hoc law being enacted, 2017 will place immense pressure on the Government and Parliament to bring about meaningful changes to the ATA, its only remaining counter-terrorism law. With existing conviction rates in Anti-Terrorism Courts below 30% nationwide, it is likely that such amendments would come sooner rather than later. While the legislative trend has been disturbing, this period also offers an opportunity for human rights advocates to pursue proposals which ensure that counter-terrorism efforts in the country are conducted in a transparent manner with due regard being given to human rights safeguards.

The development of such proposals requires the legal community and civil society to undertake an open discourse on the value we ascribe to human rights when fighting terrorism. The debate on human rights versus national security exists in each society and polity. While some are able to find a balance that helps curb the threat of violence while maintaining basic fundamental safeguards, others fail and through their national security apparatus only perpetuate the conditions which breed such violence. Pakistan needs to find a pragmatic and workable balance which recognizes the value of human rights in its overall counter-terrorism strategy. This requires acknowledging the immense resource and capacity gaps the State is faced with, as well as the lack of coherent direction available through Government policies such as the

1 1999 PLD Supreme Court 504

2 District Bar Association Rawalpindi and others v Federation of Pakistan - PLD 2015 SC 401

3 Said Zaman Khan v. Federation of Pakistan – Civil Petition No. 842 of 2016 (Unreported) available at: http://www.supremecourt.gov.pk/web/user_files/File/C.P._842_2016.pdf (last visited Dec 10, 2016).

4 Nasir Iqbal, Military courts get Supreme Court nod, Dawn, 5th August, 2015, <http://www.dawn.com/news/1198533> (last visited Dec 10, 2016).

National Action Plan or the National Internal Security Policy. It also requires State entities to be cognizant of the fact that the rule of law and the protection of human rights enhances their legitimacy in acting against terrorists and militants.

The Spectrum of Violence

An important means to locate and classify domestic counter-terrorism and counter-militancy legislation is the spectrum of violence framework. This basic framework places Pakistan's various criminal laws in the context of escalating violence. In the table below we have included only four categories for the purposes of clarity, though there would undoubtedly be other classifications that could be inserted between and within these categories. The first category relates to ordinary crimes and lists statues such as Pakistan Penal Code, the Code of Criminal Procedure, and various other laws. The second category caters to Sectarian Violence and Terrorism, for which the Anti-Terrorism Act 1997 was initially enacted, the now defunct Protection of Pakistan Act 2014, and the Pakistan Army Act 1952 in relation to the Military Courts. The third category deals with a domestic armed conflict situation, which would apply to the military operations in the Federally and Provincially Administered Tribal Areas (FATA/PATA) governed by the Actions (In Aid of Civil Power) Regulations 2011. The final category is of an International Armed Conflict such as a war between two sovereign States. The law applicable here is both domestic law such as the Pakistan Army Act 1952 and other legislation, as well as International Humanitarian Law found in the Geneva Conventions of 1949. These last two categories fall under the Constitutional rubric of Article 245 which governs the deployment of the Armed Forces.

It is important to note that ordinary crimes and sectarian violence or terrorism

Spectrum of Violence in Pakistan and Corresponding Legislation

Ordinary Crimes	Sectarian Violence/ Terrorism	Domestic Conflict	External Aggression International Armed Conflict
<p>Applicable Law:</p> <ul style="list-style-type: none"> • Pakistan Penal Code • Specific Crime Legislation • Cr.P.C. 	<p>Applicable Law:</p> <ul style="list-style-type: none"> • ATA 1997 • Protection of Pakistan Act 2014 • Pakistan Army Act 1952 • Cr.P.C 	<p>Applicable Law:</p> <ul style="list-style-type: none"> • Article 245, Constitution of Pakistan • Action in Aid of Civil Power Regulations (FATA/PATA) 2011 • Protection of Pakistan Act 2014 • Pakistan Army Act 1952 	<p>Applicable Law:</p> <ul style="list-style-type: none"> • Article 245, Constitution of Pakistan • Pakistan Army Act 1952 • Geneva Conventions 1949

operate within the Constitutional umbrella known as a peacetime paradigm. Under international human rights treaties, in such a paradigm the complete gamut of human rights protections are to be afforded to individuals with only minor derogations permitted. The State is obliged to operate a law-enforcement mechanism to deal with such violence. This paradigm imposes strict limitations on the use of lethal force and the duration of preventive detention amongst various other safeguards. The prime objective here is to capture criminals and bring them before regularly constituted courts for trial.

This paradigm is to be contrasted with a conduct of hostilities framework/paradigm which is triggered when a domestic or international armed conflict takes place. Here international human rights law permits larger derogations from their obligations and allows the State to take action, including military action, against threats to the life of the nation. In fact, international law has an entirely separate but complementary legal framework which applies here – International Humanitarian Law (IHL) or the Law of Armed Conflict. Under IHL, the military necessity to overcome the enemy permits the expanded use of lethal force and detention/internment for the duration of the conflict. The safeguards under IHL are vastly different from the human rights protections available under the peacetime paradigm. Here the focus is on preventing harm to civilians or civilian objects during such a conflict and to minimize the brutality of war relating to combatants or fighters. These provisions of IHL are in large part reflected in Pakistan's Actions (In Aid of Civil Power) Regulations 2011 in relation to the operations being carried out in FATA/PATA.

Maintaining the distinction between a peacetime paradigm and the conduct of hostilities paradigm is essential to a State faced with both terrorism and militancy. The legal architecture should be developed with this fundamental distinction in mind. Unfortunately, as this report will demonstrate, there is little differentiation made between terrorists and militants or the two separate paradigms. Legislation such as the PPA and the Pakistan Army Act 1952 establishing the Military Courts straddle both these paradigms and lead to immense difficulties in relation to the enforcement of human rights protections and IHL safeguards. It is imperative that any legislation developed in Pakistan, henceforth, be sensitive to this legal dispensation.

Purpose of this Report

This report has been prepared to serve as a tool for the capacity building of the legal community and civil society in the area of counter-terrorism law in Pakistan and its impact on human rights. The report will introduce readers to the patchwork of laws which make up the State's legal response to terrorism. In this regard, it looks at how these laws encroach upon human rights and provides workable recommendations to remedy the situation. Ultimately, the report is aimed at fostering discourse on these issues and helping develop constructive debate on the improvement of counter-terrorism law in Pakistan.

Due to limitations of space, this report focusses on a select number of human rights provisions recognized internationally as well as within Pakistan's Constitution. These include the right to life, liberty, and fair trial and due process. These rights are assessed against a number of counter-terrorism laws in Pakistan. The report is structured upon seven chapters. The first chapter discusses International Human Rights Standards and relates them to the global fight against terrorism. The second chapter looks at Pakistan's Constitutional protection of the aforementioned rights in relation to the States response to terrorism. The third chapter looks at provisions of Pakistan's ordinary law – the Pakistan Penal Code and the Code of Criminal Procedure – that can be used to try individuals suspected of terrorism or militancy. The fourth chapter focusses on the Anti-Terrorism Act, 1997 and how Pakistan's primary counter-terrorism tool leaves much to be desired when it comes to both prosecutions and the protection of fundamental human rights. The fifth chapter focusses on the Protection of Pakistan Act 2014, now defunct, but nonetheless a dangerous precedent setting law which has not received adequate analysis. The sixth chapter looks at the Military Courts established under the Pakistan Army Act 1952, to try civilian terrorism suspects, which have now ceased to function. This has been an issue of particular concern in recent years and the chapter helps to provide important analysis of an otherwise opaque system of military justice. The seventh and final chapter looks at the Actions (In Aid of Civil Power) Regulations of 2011, which apply to military operations in the Federally and Provincially Administered Tribal Areas (FATA/PATA) of Pakistan. This is a unique piece of legislation incorporating elements of international humanitarian law into Pakistan's domestic legal system. Each chapter provides recommendations to mitigate the potential for abuse of human rights through these various laws.

CHAPTER 1

COUNTER-TERRORISM AND INTERNATIONAL HUMAN RIGHTS LAW

ZAINAB MUSTAFA

"We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that, in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism."

Kofi Annan, Secretary-General of the United Nations, Speech to the members of the Security Council on 18 January 2002¹.

INTRODUCTION

International human rights law (IHRL) places an obligation on States to take effective measures against terrorism². This must, however, be balanced with the obligation to ensure and respect the human rights of every citizen under IHRL. Counter-terrorism and human rights must be viewed as complementary, mutually reinforcing goals which should not conflict with each other³. This chapter examines the relationship between IHRL and the scourge of terrorism, while paying particular attention to potential violations of human rights that arise due to counter-terrorism measures.

1.1 BACKGROUND

1.1.1 INTERNATIONAL HUMAN RIGHTS LAW (IHRL)

IHRL as a body of law stretches across the entire spectrum of the standard traditional forms of international law, i.e. treaties, customary law including jus cogens or peremptory norms, and other international agreements⁴. It aims to safeguard basic standards of protection for all human beings, at all times, regardless of their location⁵. Core international human rights treaties include, inter alia, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and

1 'Addressing security council, secretary-general calls on counter-terrorism committee to develop long-term strategy to defeat terror Meetings Coverage and Press Releases' (Un.org, 2002) <<http://www.un.org/press/en/2002/SC7276.doc.htm>> accessed 7 October 2016.

2 United Nations Security Council Resolution 1373 (United Nations 2001) <https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf> accessed 7 October 2016.

3 Counter-Terrorism: The EU and Its Member States Must Respect and Protect Human Rights and The Rule of Law (International Federation for Human Rights 2016) <https://www.fidh.org/IMG/pdf/20160301_eu_counter_terror_joint_stat_en.pdf> accessed 3 October 2016.

4 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 19

5 Helen Duffy, International Human Rights Law and Terrorism: An Overview (Edward Elgar Publishing Ltd 2016) <<http://www.elgaronline.com/view/9780857938800.xml>> accessed 9 September 2016 6

its two Optional Protocols, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol and the International Convention for the Protection of All Persons from Enforced Disappearance⁶.

IHRL, as a body of law, is thus observable in a growing number of subject-specific treaties and protocols, as well as being the subject of several regional treaties on an array of related issues. However, IHRL's scope is not just restricted to treaties. Various non-treaty based principles and guidelines i.e. soft law also belong to the body of international human rights standards. It also includes rights and freedoms that have become part of customary international law and thereby binds all States even if they are not party to a particular treaty⁷.

Many of the rights stipulated in the Universal Declaration of Human Rights (UDHR) are said to hold the status of customary international law, in addition to some of the rights contained in the ICCPR. Moreover, there are certain rights which have a status as norms of jus cogens (peremptory norms of customary international law). These peremptory norms cannot be derogated from, under any circumstances. As per the International Law Commission's articles on State responsibility, the rights which are widely recognized as peremptory norms include the prohibitions of genocide, slavery, torture, racial discrimination, crimes against humanity and the right to self-determination⁸. Furthermore, the Human Rights Committee has referred to collective punishment, hostage-taking, arbitrary deprivation of liberty, torture and inhuman and degrading treatment, and violations of certain due process rights as non-derogable⁹.

1.1.2 DUTY TO IMPLEMENT IHRL DOMESTICALLY

In relation to the duty cast on States to implement IHRL, it is pertinent to note that IHRL contains provisions obliging states to implement its rules, whether immediately or progressively. There are various methods, through which, the rights enunciated in international human rights treaties can be implemented domestically. These include adopting a variety of, inter alia, legislative,

⁶ Human Rights, Terrorism and Counter-Terrorism (Office of the United Nations High Commissioner for Human Rights 2016) <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>> accessed 7 September 2016 3

⁷ Human Rights, Terrorism and Counter-Terrorism (Office of the United Nations High Commissioner for Human Rights 2016) <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>> accessed 7 September 2016 4

⁸ Ibid

⁹ Ibid

judicial, and administrative measures. Enacting criminal legislation proscribing acts prohibited under IHRL treaties, in addition to providing effective remedies before domestic courts for infringement of specific rights¹⁰.

1.1.3 TERRORISM AND HUMAN RIGHTS

Terrorism, in common parlance, is deemed as unlawful, politically motivated and coordinated violence against civilians or innocent parties with the aim of terrorizing the population¹¹. There is, however, a lack of an international term for 'terrorism' which can lead to violation of human rights by the State¹². Terrorism has a grave and damaging effect on human rights. The damage that a society or State sustains as a result of terrorism is not merely limited to the loss of life, torture and injuries. There are a myriad of other rights that are affected as a result. Civil and political rights are deeply affected, such as the right of security of homes, correspondence, privacy and freedom of speech¹³.

State responses to terrorism, i.e. counter-terrorism measures have a degrading effect on human rights as well. A terrorist act has a limited time window, whereas, counter-terrorism measures abridging human rights of individuals are stretched over a longer duration, affecting more people overall than the attack causing the response. It is also pertinent to note that States have in the recent past adopted anti-terrorist legislation including offences which carry the death penalty¹⁴, even though this remains a highly contested issue under IHRL. Pakistan is among the States that enforce capital punishment for various terrorist offences¹⁵.

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- 11 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 22
 - 12 Counter-Terrorism and The Protection of Human Rights (Human Rights Advocates 2016) <http://www.humanrightsadvocates.org/wp-content/uploads/2010/05/HRC13_Counter-terrorism_and_Human-Rights.pdf> accessed 9 September 2016 5
 - 13 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 23
 - 14 Pakistan, China and Afghanistan 'The Death Penalty: An International Perspective | Death Penalty Information Center' (Deathpenaltyinfo.org) <<http://www.deathpenaltyinfo.org/death-penalty-international-perspective#interexec>> accessed 2 November 2016.
 - 15 The Express Tribune, 'Pakistan Executed 332 After Reinstating Death Penalty: Report' (2016) <(2016) <<http://tribune.com.pk/story/1028511/pakistan-executed-332-after-reinstating-death-penalty-report/>> accessed 5 November 2016.>

1.2 COUNTER-TERRORISM MEASURES AND HUMAN RIGHTS

1.2.1 RIGHT TO LIFE

Respect for the right to life, ensures respect for all other rights and freedoms¹⁶. The right to life is stipulated in Article 6¹⁷ of the ICCPR and Article 3 of the UDHR¹⁸. As per the United Nations Human Rights Committee, the 'right to life' is a supreme right which cannot be derogated from even under exceptional circumstances such as a public emergencies, which threaten the life of the nation. The Committee has also commented that this right (the right to life) is not to be interpreted narrowly¹⁹.

Furthermore, the Committee has noted that States should not only take measures to prevent and punish deprivation of life, but also have an obligation to prevent arbitrary killing by their own forces²⁰.

The Inter-American Commission on Human Rights has stated, referring to case law, that when the life of a state's population is threatened by violence, the State has an obligation to protect its population and has the right to use lethal force in certain situations²¹. This includes situations, where, for e.g. the use of lethal force by law enforcement agencies becomes unavoidable, in order to, either protect themselves from an imminent threat or other persons. It also becomes necessary, subject to certain conditions of necessity and proportionality, in order to maintain law and order. Other than the situations delineated above, the use of lethal force by law enforcement officials would

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- 16 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 24
- 17 Article 6 ICCPR, International Covenant On Civil and Political Rights (United Nations General Assembly 2016) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016.
- 18 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 24
- 19 'Human Rights Committee, General Comment 6, Article 6 (Sixteenth Session, 1982), Compilation of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies, U.N Doc. HRI/GEN/1/Rev.1 At 6 (1994)' (Hrlibrary.umn.edu) <<http://hrlibrary.umn.edu/gencomm/hrcom6.htm>> accessed 3 November 2016.
- 20 'Human Rights Committee, General Comment 6, Article 6 (Sixteenth Session, 1982), Compilation of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies, U.N Doc. HRI/GEN/1/Rev.1 At 6 (1994)' (Hrlibrary.umn.edu) <<http://hrlibrary.umn.edu/gencomm/hrcom6.htm>> accessed 3 November 2016.
- 21 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 24

be tantamount to the arbitrary deprivation of life²². Capital punishment is also contrary to the right to life and States party to the ICCPR are also under an obligation to take specific measures in order to prevent the disappearance of individuals, which leads to arbitrary deprivation of life. In line with the above, States should also establish mechanisms and facilities to investigate cases of disappeared or missing persons²³.

1.2.2 DUE PROCESS AND FAIR TRIAL

The right to a fair trial and due process, as enshrined under Article 14 of the ICCPR, is a fundamental principle providing an individual the right to a just trial in public, by an impartial or independent tribunal, founded by law, within a reasonable amount of time²⁴. Article 14 of ICCPR²⁵ elucidates that fair trial guarantees include the right to presumption of innocence²⁶; an individual's right to defend themselves or to hire a lawyer, or have the requisite facilities and time to prepare the defense²⁷; the right not to be forced to give incriminating evidence against oneself²⁸; and lastly, the right to appeal to a higher court.

There is no general derogation in times of emergency pertaining to the right to due process and fair trial. Any limitations should be in accordance with the law, and be necessary and proportionate to the legitimate aim pursued²⁹. The Human Rights Committee has pointed that Military tribunals or Special Tribunals are contrary to the principle of impartiality and independence of the

22 Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, See document of the Organization of American States OAS/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002, paras. 86-89, citing *Neira Alegria Case*, I/A Court H.R., Judgment of January 19, 1995 (paras. 74-75) cited in 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 24

23 'Human Rights Committee, General Comment 6, Article 6 (Sixteenth Session, 1982), Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies, U.N Doc. HRI/GEN/1/Rev.1 At 6 (1994)' (Hrlibrary.umn.edu) <<http://hrlibrary.umn.edu/gencomm/hrcom6.htm>> accessed 3 November 2016.

24 Article 14, ICCPR International Covenant On Civil and Political Rights (United Nations General Assembly) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016.

25 Ibid

26 Article 14, Para 2 ICCPR International Covenant On Civil and Political Rights (United Nations General Assembly) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016.

27 Article 14, Para 3(b) ICCPR International Covenant On Civil and Political Rights (United Nations General Assembly) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016.

28 Article 14, Para 3 (g) ICCPR International Covenant On Civil and Political Rights (United Nations General Assembly) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016.

29 Counter-Terrorism: The EU and Its Member States Must Respect and Protect Human Rights and The Rule Of Law (International Federation for Human Rights 2016) <https://www.fidh.org/IMG/pdf/20160301_eu_counter_terror_joint_stat_en.pdf> accessed 3 October 2016 3

judiciary. It also recommended that civilians must be tried in ordinary courts, and any laws which state otherwise should be amended³⁰. The UN Working Group on arbitrary detention observed,

If some form of military justice is to continue to exist, it should observe four rules: (a) it should be incompetent to try civilians; (b) it should be incompetent to try military personnel if the victims include civilians; (c) it should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime; and (d) it should be prohibited imposing the death penalty under any circumstances³¹.

1.2.3 RIGHT TO LIBERTY

If a society is based on the rule of law, then the right of personal freedom has to be its cornerstone. The right to freedom incorporates within it the right not to be arbitrarily arrested or detained by a State without a legitimate motive. Furthermore, it includes that a person should have the right to challenge the legality of their detention, which is enshrined in the principle of *habeas corpus*³². These rights are protected under Article 9 ICCPR³³ and other international human rights instruments. Thus, States that are a party to the ICCPR and CAT, should be aware of their obligations under the Conventions. Each instrument clearly explains how the persons detained are to be treated³⁴. Article 9 (3) of ICCPR stipulates that an individual who has been arrested or detained as a result of a criminal charge should be brought before a judicial officer and has the right to be tried within a reasonable time or to be released under international human rights law³⁵. Pre-trial detention should not be the norm but an exception and should be kept as short as possible³⁶. It

30 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 29

31 Report of the Working Group on arbitrary detention, E/CN.4/1999/63, 18 December 1998, para. 80 as cited in 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 29

32 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 25

33 Article 9, ICCPR International Covenant On Civil and Political Rights (United Nations General Assembly) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016

34 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 120

35 Article 9(3), ICCPR International Covenant On Civil and Political Rights (United Nations General Assembly) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016

36 Research Society of International Law, Pakistan & Oxfam, 'Pakistan's International Human Rights Obligations: Training Module for Capacity Building' (2016) 50

further mentions that preventive detention being carried out in secret may be a violation of the right to not be subjected to cruel, inhumane treatment or torture and Article 9 & 14 of the ICCPR³⁷.

The right to liberty has been strongly affected by the legal and administrative measures that have been taken by States when adopting anti-terrorism legislation. States have increased arbitrary arrests, held detainees for prolonged amounts of time incommunicado, while excluding the possibility of intervention by judicial authorities³⁸. This is often witnessed in regard to preventive detention, where even the right of habeas corpus is flouted. The HRC has stated that the right of *habeas corpus* is a non-derogable right since its aim is to protect an intangible right³⁹. The Committee further observed that in respect of preventive detention, ICRC or other impartial tribunals should be able to review the legality of such detentions and should be allowed by State authorities to access the detention centres⁴⁰.

1.2.4 PROHIBITION AGAINST TORTURE

The prohibition against torture is absolute and has been stipulated in both regional and universal treaties including the specific convention against torture⁴¹. Article 3 common to the Geneva Conventions of 1949 also refers to it⁴². States must ensure that information gathered through torture is not used as evidence in proceedings and all allegations of torture are effectively investigated and the perpetrators punished⁴³.

There is also no ambiguity or conflict when it comes to the issue of questioning detainees. The obligation on States to refrain from cruel,

37 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 25

38 Ibid

39 International Covenant On Civil and Political Rights, General Comment No. 29, States Of Emergency (Article 4) (United Nations Human Rights Office of the High Commissioner) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2F%2F21%2FR ev.1%2FAdd.11&Lang=en> accessed 1 October 2016 8

40 International Covenant On Civil and Political Rights, General Comment No. 35, Article 9 (United Nations Human Rights Office of the High Commissioner) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2F%2FGC%2F35&Lang=en> accessed 1 October 2016 5

41 Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment (United Nations General Assembly 2016) <<http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>> accessed 5 October 2016.

42 Counter-Terrorism: The EU and Its Member States Must Respect and Protect Human Rights and The Rule of Law (International Federation for Human Rights 2016) <https://www.fidh.org/IMG/pdf/20160301_eu_counter_terror_joint_stat_en.pdf> accessed 3 October 2016

43 Counter-Terrorism: The EU and Its Member States Must Respect and Protect Human Rights and The Rule of Law (International Federation for Human Rights 2016) <https://www.fidh.org/IMG/pdf/20160301_eu_counter_terror_joint_stat_en.pdf> accessed 3 October 2016 1

inhumane and degrading treatment has been made clear by virtue of binding legal instruments. This does not leave any room for interpretation⁴⁴. However, the UN Special Rapporteur on Torture and other forms of punishment or cruel treatment, noted in a report submitted to the 57th session of the UN General Assembly that recent domestic anti-terrorism legislation does not necessarily offer legal safeguards against torture and other forms of ill-treatment, contrary to international human rights law⁴⁵. However, a strand of opinion has emerged which advocates that these methods may be used in exceptional circumstances⁴⁶. In respect of the above, the UN Special Rapporteur has commented, that being aware of the threats that States face due to terrorism, the nature of the prohibition on torture and cruel treatment remains absolute. There exist no exceptional circumstances under which the use of torture is justified, even during a state of war, public emergency or internal political stability⁴⁷.

1.3 LIMITATIONS AND DEROGATIONS

Under certain situations, international law permits States to restrict their human rights guarantees, in addition to derogation in respect to some rights. The terms of civil and political rights normally allow limitation, and this is separate from the issue of derogation⁴⁸.

Article 21 of the International Covenant on Civil and Political Rights ICCPR states,

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre

⁴⁴ 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 35

⁴⁵ 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 27

⁴⁶ Ibid

⁴⁷ Report of the Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment or punishment, A/59/324, Sept. 2004, para. 14 cited in 'Counter-Terrorism V Human Rights: The Key to Compatibility' (International Federation for Human Rights 2005) <<https://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>> accessed 2 October 2016 27

⁴⁸ 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 19

public) the protection of public health or morals or the protection of the rights and freedoms of others⁴⁹.

The above article delineates that a restriction on the right to peaceful assembly, is therefore allowed in the interests of inter alia, national security, public safety or public order. This, however, is a regular limitation. Derogations, on the other hand constitute extraordinary restrictions beyond what is normally allowed. The majority of human rights instruments stipulate which rights are derogable and which are not. These non-derogable rights include, inter alia, the right to freedom from torture and cruel treatment, degrading and inhuman treatment, and the right to life⁵⁰. The United Nation's Human Rights Committee has observed that the above list of non-derogable rights is not exhaustive. Non-derogable rights cannot be suspended, even in a state of emergency. The Committee has noted that fundamental requirements of fair trial and the presumption of innocence must be respected even during a state of emergency⁵¹. Moreover, in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide, without delay, on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant⁵².

Article 4 of the ICCPR further illustrates the scope of the derogation clause by providing that States may only derogate from their obligations under the present Covenant if required by the exigencies of the situation. This is subject to the State ensuring that the measures taken are not inconsistent with other obligations under international law and do not include discriminatory measures based on race, language, sex, colour or social origin⁵³.

49 Article 21, ICCPR International Covenant On Civil and Political Rights (United Nations General Assembly) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016.

50 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 20

51 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.iihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 20

52 International Covenant On Civil and Political Rights, General Comment No. 29, States of Emergency (Article 4) (United Nations Human Rights Office of the High Commissioner) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2F%2F21%2Fev.1%2fAdd.11&Lang=en> accessed 1 October 2016

53 Article 4 ICCPR, International Covenant On Civil and Political Rights (United Nations General Assembly 2016) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 November 2016.

1.4 CONCLUSION

As is evident from the above, it is often the case that human rights become the first victim in the war against terrorism. States should strive to balance the rights of individuals with the need to protect the State from terrorist threats. Doing so will help improve the human rights record of a State, which will in turn enhance the ability of the State to co-operate internationally in the fight against terrorism, and be looked upon favourably by the comity of nations⁵⁴. International human rights law applies during peace and conflict. States should adopt international human rights treaties and incorporate it in their domestic legislation. Furthermore, States should ensure that the principles of derogations and limitations are used exceptionally.

⁵⁴ 'Terrorism and International Law: Challenges and Responses', Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law; and Seminar on International Humanitarian Law and Terrorism (International Institute of Humanitarian Law 2002) <<http://www.ihl.org/wp-content/uploads/2015/12/Terrorism-and-IHL.pdf>> accessed 2 October 2016 37

CHAPTER 2

FUNDAMENTAL RIGHTS AND THE COUNTER TERRORISM MECHANISM IN PAKISTAN

MINAHIL KHAN

2.1 OVERVIEW

The fundamental rights provided to the citizens of Pakistan are enshrined in Part II Chapter I of the Constitution of Pakistan. These fundamental freedoms are the bedrock of Pakistan's democracy. These rights and freedoms mirror many of the rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR). The scope and trends of these rights have been subject to judicial pronouncements and Government policies which have highlighted the position of these rights in our jurisprudence. Whereas ordinary rights are subject to change, fundamental rights as enshrined in the Constitution cannot be altered unless the constitution itself is amended.

The purpose of this section is to look at these basic safeguards and assess where and how they have been abridged to fulfill the needs of a more holistic anti-terrorist framework in the country. While there is a positive obligation to protect people by preventing terrorism and holding terrorists responsible for their actions there is also a balance that has to be struck so as not to undermine the rule of law and abridge human rights in meeting this end.

2.2 SCHEME OF THE CONSTITUTION

In the seminal constitutional case of *Benazir Bhutto v. President of Pakistan*¹ it was observed, that while interpreting fundamental rights, the approach of the Court should be dynamic, progressive and liberal to incorporate the spirit behind the Constitution and also the fundamental rights guaranteed by it. The Constitution is a living document which portrays the aspirations and “genius of the people” and aims at creating progress, peace, welfare, amity among the citizens, therefore, while interpreting its different Articles particularly relating to the fundamental rights of the citizens, the approach of the Courts should be dynamic² and should be construed liberally so that its benefit/protective umbrella may be extended³.

The blanket protection to the fundamental freedoms is provided by Article 8 which states that any law in contravention to the fundamental rights is void. Under this blanket provision the freedoms follow and can be divided into personal rights, civil liberties, religious/educational rights, economic rights, equality rights and cultural rights. More specifically they relate to security of

1 Benazir Bhutto v. President of Pakistan PLD 1998 SC 388

2 Arshad Mahmood v. Government of Punjab PLD 2005 SC 193

3 Mushtaq Ahmed Mohal v. Hon'ble Lahore High Court 1997 SCMR 1043

person⁴; safeguards as to arrest and detention⁵; right to fair trial⁶; prohibition against slavery and forced labour⁷; protection against retrospective punishment⁸; protection against double punishment and self-incrimination⁹; inviolability of dignity of man¹⁰; freedom of movement¹¹; freedom of assembly¹²; freedom of association¹³; freedom of trade, business and profession¹⁴; free speech¹⁵; right to information¹⁶; religious rights¹⁷; safeguard against taxation for particular religions¹⁸; safeguards as to educational institutions in respect of religion¹⁹; provision and protection of property rights²⁰; equality of citizens²¹; right to education²²; non-discrimination in respect of access to public places²³; and safeguards against discrimination in services²⁴ and preservation of language, script and culture²⁵.

The articles that require particular attention vis a vis the counter-terrorism regime in Pakistan and its implications on human rights are the security of person (life and liberty), safeguards as to arrest and detention and the right to fair trial. These rights directly correspond to the rights protected under the ICCPR which also contains a blanket provision for derogation and non-derogation of rights²⁶, the right to life²⁷, prohibition against torture, cruel, inhumane or degrading treatment or punishment²⁸, right to liberty and security of a person²⁹, treatment of the accused³⁰ and due process and fair trial guarantees³¹.

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- 4 Article 9 of the Constitution
 - 5 Article 10 of the Constitution
 - 6 Article 10A of the Constitution
 - 7 Article 11 of the Constitution
 - 8 Article 12 of the Constitution
 - 9 Article 13 of the Constitution
 - 10 Article 14 of the Constitution
 - 11 Article 15 of the Constitution
 - 12 Article 16 of the Constitution
 - 13 Article 17 of the Constitution
 - 14 Article 18 of the Constitution
 - 15 Article 19 of the Constitution
 - 16 Article 19A of the Constitution
 - 17 Article 20 of the Constitution
 - 18 Article 21 of the Constitution
 - 19 Article 22 of the Constitution
 - 20 Article 23 & 24 of the Constitution
 - 21 Article 25 of the Constitution
 - 22 Article 25A of the Constitution
 - 23 Article 26 of the Constitution
 - 24 Article 27 of the Constitution
 - 25 Article 28 of the Constitution
 - 26 Article 4 of the ICCPR
 - 27 Article 6 of the ICCPR
 - 28 Article 7 of the ICCPR
 - 29 Article 9 of the ICCPR
 - 30 Article 10 of the ICCPR
 - 31 Article 14 of the ICCPR

All these articles will be looked at individually including scope and interpretation given to them by the courts of Pakistan.

2.3 FUNDAMENTAL FREEDOMS

2.3.1 THE RIGHT TO LIFE AND LIBERTY (ARTICLE 9)

The right to life is perhaps the most fundamental of all rights and has been given the widest possible interpretation by jurists around the world. The general consensus is that the term “life” connotes more than just mere existence. The right to life, not just in Pakistan but internationally has led to a vast extension of substantive rights³².

The duty of the State to protect and safeguard fundamental rights including the right to life and liberty was widely interpreted in the *Shehla Zia* case³³. The liberal interpretation given to the fundamental right to life and liberty is reflective in the case of *Arshad Mehmood v. Government of Punjab*³⁴ where the word 'life' used in Article 9 of the Constitution was interpreted to include all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. Furthermore, in the case of *Shahid Orakzai v. Pakistan*³⁵ with regard to the right to life and liberty it was held that Article 5(2) of the Constitution has mandated that obedience to the Constitution and law is the inviolable obligation of every citizen of Pakistan.

In the Benazir Bhutto case it was held that the right to life not only guarantees genuine freedom, but freedom from wants, illiteracy, ignorance, poverty and above all freedom from arbitrary restraint from authority. All Government Authorities, civil, military or paramilitary are bound by the Constitution to enforce, respect and protect such rights and do not have the authority, power or right to destroy it, trample it or make a mockery of such a right. The right to life includes the right to live with respect, honour and dignity. Even a person, who violates any law, has the right to be treated and dealt with according to law. If a person is denied the right to life, then all rights which emanate from being a living human being, also vanish³⁶.

Despite the wide interpretation given to the meaning of life in the context of the Constitution, Pakistan in 2015 lifted its moratorium on the death penalty

³² Jain, M.P, Indian Constitutional Law, Seventh Edition, 2014, p. 1188

³³ Ms. Shehla Zia and others v. WAPDA PLD 1994 SC 693

³⁴ Arshad Mehmood v. Government of Pakistan PLD 2005 SC 193

³⁵ Shahid Orakzai and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another PLD 2011 SC 365

³⁶ Ms. Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 416

for all capital crimes. This decision was taken in response to the massacre³⁷ that took place on 16th December 2014 at the Army Public School in Peshawar which killed scores of children. The decision was not received well internationally and was considered a knee jerk reaction to a terrible crime rather than a considered response to a legitimate security concern³⁸.

General arguments against death sentences is that in present times it involves fundamental constitutional defects such as unreliability, arbitrariness in application and unconscionably long periods of time spent by prisoners on death row. The system of death penalty that seeks to incorporate procedural fairness and reliability brings with it delays and therefore aggravates the cruelty of capital punishment.

So while on one hand we have the right to life and liberty that the courts have been so protective of, on the other we have 8000 prisoners on death row. This directly puts Pakistan in breach of its international obligations and also in breach of its constitutional obligation to protect the life and liberty of its citizens.

2.3.2 SAFEGUARDS AS TO ARREST AND DETENTION (ARTICLE 10)

Article 10 of the Constitution provides that:

no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his choice and every person, who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

The Constitution of Pakistan explicitly makes provisions for preventive detention and its safeguards. 'Preventive detention' is often called 'administrative detention' for the reason that such detention is ordered by the executive and the power of decision rests solely with the administrative or ministerial authority³⁹. These safeguards are limited in scope in comparison to

37 -, 'Pakistan Taliban: Peshawar School Attack Leaves 141 Dead' BBC news (16 December 2014) <<http://www.bbc.com/news/world-asia-30491435>> accessed 7 December 2016

38 Human Rights Watch, 'Pakistan: Take Death Penalty off the Table' (12 March 2015)

<<https://www.hrw.org/news/2015/03/12/pakistan-take-death-penalty-table>> accessed 7 December 2016

39 Joinet, L., Report on the Practice of Administrative Detention, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1989, p. 7

the international conventions mentioned above. Though there is no real definition regarding preventive detention, the Supreme Court has defined it in the *Government of East Pakistan v. Mrs Rowshan Bijaya* as “detention [is] the object of which is to prevent the doing of an act. Whatever the circumstances under which detention is ordered and whatever the act which is sought to be prevented if the detention is not punishment for what the person has already done, but a means for preventing an act, is preventive detention.”

The purpose of preventive detention is to safeguard national security or public order. A person is detained, not for punishment for a proven transgression of the criminal law, but because the individual is considered a potential threat to state security.

Our Constitution does not make a distinction between preventive detention during war and peace and the protection that it provides is limited in scope. There is no requirement that the individual detained be brought promptly before a person or judicial authority, neither is there a provision that requires detainees to be informed immediately of the grounds for their detention. In fact, certain facts may be withheld for the sake of ‘public interest’⁴⁰.

The safeguards that are, however, required by Art 10 are that the detainee be allowed representation, their family to be compensated accordingly and the right to a fair trial. While our courts have actively attempted to control and safeguard preventive detention by holding that the grounds given by the authority must be ‘complete and full’⁴¹ and that the grounds for such detention must not be irrelevant or vague, they have also in a full bench decision judged the constitutionality of the Protection of Pakistan Act (PPA) and considered it constitutional despite S. 6 of the Act of 2014⁴² which makes room for preventive detention without extending the safeguards provided for internationally or even in our Constitution. This is due to the PPA falling in the list of statutes that are exempt from upholding the fundamental freedoms; the safeguards provided for in the constitution become irrelevant⁴³.

⁴⁰ Khawaja, M., Preventive Detention: Article 10 and the Protection of Pakistan Ordinance, 2014, *Pakistan Review of International Law & Human Rights*, vol. 3, p. 62-63.

⁴¹ *Government of East Pakistan v. Mrs. RB Shaukat* PLD 1966 SC 286

⁴² Protection of Pakistan Ordinance 2013 which was later converted into a full fledged Protection of Pakistan Act 2014

⁴³ See Schedule 1 of the Constitution of Pakistan for laws exempt from being held incompatible with Article 8 of the Constitution.

2.3.3 THE RIGHT TO A FAIR TRIAL (ARTICLE 10A)

The right to a fair trial is a fundamental human right enshrined in several regimes that creates an umbrella providing basic guarantees. On an international level, as has been discussed above, it is guaranteed and protected by the Geneva Conventions during an armed conflict, irrespective of its international or non-international character. In times of peace the same right is protected by international human rights instruments which may be derogated from in times of necessity yet it creates certain minimum standards of protection of life, liberty and the right to free trial⁴⁴.

A broad definition of due process is the legal requirement that the State must fulfill and respect all of the legal rights owed to a person. The State is required to ensure that in the context of a specific setting the process of detention, trial or expulsion is fair, reasonable, non-arbitrary and that any limitation imposed on the rights of the individual is necessary and proportional⁴⁵.

The right of a fair trial was incorporated into the Constitution by the 18th Amendment. Prior to the inclusion of this freedom it was protected and enforced under Article 4 which expounded on the right of individuals to be dealt with in accordance with the law. While the Constitution does not give a sophisticated or very detailed definition of what exactly the due process and fair trial guarantee is, the same can be extrapolated from international conventions that Pakistan has acceded to. This was confirmed by the Supreme Court in the contempt case against Yusuf Raza Gillani⁴⁶ wherein Nasr-ul-Mulk, J noted that “while incorporating Article 10A in the Constitution and making the right to a ‘fair trial’ a fundamental right the legislature did not define or describe the requisites of a ‘fair trial’. By not defining the term the legislature perhaps intended to give it the same meaning as is broadly universally recognized and embedded in our own jurisprudence.”

The universal understanding of these rights as can be elucidated from the ICCPR and, as mentioned in the preceding chapter, is that some of the sub-rights it creates are:

- The right to equality of arms before a court, which has to be competent,

⁴⁴ Poschadel, Kai Ambos and Annika Maleen, Terrorists and Fair Trial: The Right to a Fair Trial for Alleged Terrorists Detained in Guantanamo Bay, *Utrecht Law Review*, Volume 9, Issue 4, 2014, p 109-126

⁴⁵ United Nations Counter Terrorism Implementation Task Force, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, CTITF Publication Series, 2015, p. 4

⁴⁶ *Suo Motu Case No. 4 of 2010 (Contempt Proceedings against Syed Yousaf Raza Gillani) PLD 2012 SC 553*

- independent, impartial and established by law⁴⁷;
- The right to a public hearing and a public pronouncement of the judgment⁴⁸;
 - The right to be presumed innocent until guilt is proven according to the law⁴⁹ and the right not to be compelled to testify against oneself⁵⁰;
 - The right to be informed of the charge and to have adequate time and facilities to prepare one's defense including the right to have access to the proceedings and to the relevant documents supporting the charges, to choose a lawyer and to communicate with him confidentially⁵¹;
 - The right to be tried without undue delay within a reasonable time⁵²;
 - The right to have a convicting judgment reviewed by a higher court and to demand compensation for miscarriages of justice⁵³;
 - The right not to be tried twice for the same offence and the prohibition of retrospective legislation⁵⁴.

The right to a fair trial even before its inclusion in the Constitution of Pakistan held a seminal position and was regularly referred to by the courts. Some of the sub-rights created by the right of fair trial and due process were explained and applied by the courts.

In the case of *Govt of Balochistan v. Azizullah Memon*⁵⁵ with reference to the cases of *Sharaf Faridi v. Islamic Republic of Pakistan*⁵⁶, *Syed Abul A'la Maudoodi*⁵⁷ and the *Benazir Bhutto case*⁵⁸ it was held that the right of access to justice to all is a well recognized and inviolable right enshrined in the Constitution and is found in the doctrine of due process which includes the right to be treated according to law, the right to have a fair and proper trial and the right to have an impartial Court or tribunal. Reliance was placed on the observation of Willoughby in the Constitution of United States, Second Edition, Vol. II at p. 1709 where the term 'due process of law' was summarized as follows:

- (1) He shall have due notice of proceedings which affect his rights
- (2) He shall be given reasonable opportunity to defend

⁴⁷ Article 14(1) ICCPR

⁴⁸ Article 14(1) ICCPR

⁴⁹ Article 14(2) ICCPR

⁵⁰ Article 14(3) ICCPR

⁵¹ Article 14(3)(a)(b)(c)(d) and (e) ICCPR

⁵² Article 14(3)(c) ICCPR

⁵³ Article 14(6) ICCPR

⁵⁴ Article 14(7) ICCPR

⁵⁵ Government of Balochistan through Additional Chief Secretary v. Azizullah Memon PLD 1993 SC 341

⁵⁶ Sharaf Faridi and 3 others v The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar 404

⁵⁷ Saiyyid Abul A'la Maudoodi and others v The Government of West Pakistan and another PLD 1964 SC 673

⁵⁸ Miss Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 416

- (3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and
- (4) That it is a court of competent jurisdiction

In the early nineties following the wave of terror that necessitated the need for alternate courts and a specialized anti-terrorism law, Mehram Ali was convicted on twenty three counts of murder and sentenced to death⁵⁹. He filed an appeal before the newly constituted Anti-Terror Appellate (ATA) Tribunal in Lahore. The ATA upheld his conviction. The petitioner then filed a writ petition before the Lahore High Court claiming, among other things, that the formation of the special courts violated the provisions of the Constitution. The Lahore High Court claimed jurisdiction to hear the appeal, but held that the conviction should still stand. Mehram Ali then filed an appeal to the Supreme Court of Pakistan. In its decision, the Court upheld Mehram Ali's conviction and he was later executed. While the court did not find anything inherently unconstitutional in the establishment of special courts, they did declare certain sections of ATA 1997 to be unconstitutional and in need of amendment. It was declared that the newly constituted anti-terror court would be subject to the rules and procedures of the existing constitutionally established judicial system, including: (1) the judges of such courts would have fixed and established tenure of service; (2) such special courts would be subject to the same or similar procedural rules as regular courts, including rules of evidence, etc; and (3) decisions of special courts would be subject to appeal before the relevant constitutionally mandated regular courts. Namely, the appeal against the decision of the special court would lie with the respective High Courts and ultimately with the Supreme Court. Therefore the idea was that no parallel legal system could be constructed that bypasses the operation of the existing regular courts was decided with the underlying need to ensure due process⁶⁰.

Shortly after, the courts in the case of *Liaquat Hussain v. Federation of Pakistan*⁶¹ dilated upon the validity and constitutionality of the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance 1998 on the touchstone of the fundamental rights enshrined in the Constitution. It was held in a

⁵⁹ Mehram Ali and others v Federation of Pakistan and others PLD 1998 SC 1445

⁶⁰ Kennedy, H.C., The Creation and Development of Pakistan's Anti Terrorism Regime 1997-2002 in Limaye, S., Robert Winsing, Mohan Malik, Religious Radicalism and Security in South Asia, Hawaii, Asia Pacific, Centre for Security Studies, 2004, p. 387-411

⁶¹ Sh. Liaquat Hussain and others v Federation of Pakistan PLD 1999 SC 504

unanimous decision that a fair trial is a fundamental right and the right of 'access to justice to all' is a well recognized and invariable right enshrined in Article 9 of the Constitution. Fundamental guarantees were given precedence over the so called 'doctrine of necessity' and the Court contended that 'doctrine of necessity' cannot be invoked if its effect is to violate any provision of the constitution'.

In matters of anti-terrorism the focus is on drawing a balance between the interests of the individual, his integrity and the need for a fair trial, with the interests of the State in ensuring the existence of an effective criminal system⁶². It is in the face of dismal law and order conditions and the growing threat of terrorism with its grave implications that Pakistan has resorted to a law that not only derogates from the fundamental freedoms provided for in the Constitution but also codifies a parallel system of law by creating military courts. To meet the need to ensure that the citizens of Pakistan are not deprived of their right to life and liberty, the legislature has in fact created a law that abridges and flagrantly ignores the right to due process and a fair trial.

2.4 THE PRINCIPLE OF DEROGATION AND THE THREAT OF TERRORISM

The principle of derogation or deviation from fundamental rights is accepted in our Constitution. The very article that states that any law or custom inconsistent with the rights conferred by the Constitution shall be void also makes room for emergency situations and special acts that can derogate from the fundamental freedoms.

As per Article 8 of the Constitution any law inconsistent with or in derogation of fundamental rights is void unless it falls in Part 1 of the First Schedule of the Constitution. In August 2015 a full member bench of the Supreme Court dilated upon the constitutionality of the inclusion of the PPA in the First Schedule⁶³. After months of deliberation and arguments it was decided that the PPA was in fact constitutional and its derogation from fundamental rights was legitimate. The wide jurisdiction of military courts under the Pakistan

62 Cameron, The ECHR, Due Process and UN Security Council Counter Terrorism Sanctions, Council of Europe, 2006, p. 2-28

63 District Bar Association Rawalpindi and others v Federation of Pakistan PLD 2015 SC 401

Army Act, 1952 also falls within the same category of laws that are exempt from compliance with fundamental rights. That too was considered constitutional. Furthermore, the Actions (in Aid of Civil Power) Regulation 2011 that deals with emergency situations and the requisitioning of the Armed Forces in FATA and PATA was also the subject of debate as it derogates from Article 10 of the Constitution. The matter was and continues to be sub-judice before the Supreme Court of Pakistan and therefore was not argued upon. Such findings of the apex court are indeed troubling for our jurisprudence as suspected terrorists and militants can now be tried under a separate system of military courts and interned for the continuation of the armed action without having to comply with fundamental rights *sensu stricto*.

2.5 CONCLUSION

From what has been discussed above it becomes apparent that fundamental rights hold a seminal position in our Constitution and have been interpreted widely by the superior courts of the country. However, the current conundrum that Pakistan is in vis a vis the surge of terrorism and the military operations in FATA and PATA have to a great extent undermined the importance of these freedoms. Laws such as the (now defunct) Protection of Pakistan Act, 2014, the Pakistan Army Act, 1952 and the Actions in Aid of Civil Power) Regulation, 2011 undermine the right to life, liberty, due process and the freedom from arbitrary detention.

CHAPTER 3

**TERRORISM AND THE WAGING OF WAR
UNDER THE CODE OF CRIMINAL PROCEDURE,
1898 AND THE PAKISTAN PENAL CODE, 1860**

MOGHEES UDDIN KHAN

The Pakistan Penal Code, 1860 (PPC) is Pakistan's primary criminal law and it provides the basis for all other criminal offences codified in domestic law. Though the law was issued in 1860, it was amended repeatedly to reflect updated criminal offences.

The Code of Criminal Procedure, 1898 (CrPC) supplements the PPC by providing a comprehensive procedural structure by which criminal trials are held. The CrPC was also amended continuously over the course of time as new procedures were developed.

3.1 THE CODE OF CRIMINAL PROCEDURE, 1898

The CrPC lays down the basic procedure for the police and the courts to arrest, investigate, collect evidence and eventually present it in a court of law. The object of the CrPC is to supplement the PPC with rules of procedure that outline the criminal justice process.

3.1.1 FAIR TRIAL AND DUE PROCESS RIGHTS

(a) *Habeas Corpus*

Traces of *habeas corpus* can be identified in the CrPC under Section 61 and Section 491. Under Section 61, no police officer shall detain in custody a person arrested without warrant for longer than 24 hours. Under Section 491 the accused is to be brought before the Court to be dealt with according to law. The sections are reproduced as follows:

S. 61: Person arrested not be detained more than twenty four hours. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

S. 491: Power to issue directions of the nature of a Habeas Corpus. Any High Court may, whenever it thinks fit, direct:

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law:

- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
 - (c) that a prisoner detained in any jail situated within such limits be brought before Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
 - (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively.
 - (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and
 - (f) that the body of defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.
- (2) The High Court may, from time to time, frame rules to regulate the procedure in the cases under this section.
- (3) Nothing in this section applies to persons detained under [any other law providing for preventive detention.]

(b) Remand

In the CrPC there are two sections that deal with remanding an accused to custody, Section 167 and Section 344. The former section deals with grant of remand to police custody and the latter deals with grant of remand to judicial custody. Section 167 states that if an investigation is not completed within 24 hours, the period fixed by Section 61 of the CrPC, the Station House Officer shall transmit a copy of the entries in the case diary to the nearest magistrate and shall at the same time forward the accused to such Magistrate. The order remanding the accused to police custody shall also be passed in the presence of the accused.

Section 344 lays down that if a court thinks fit to postpone or adjourn the inquiry, it shall do so by stating in writing the reasons therefore, and "may by a warrant remand the accused if in custody" for not exceeding 15 days. This section also requires the presence of the accused while remanding him to judicial custody.

When a court is moved for remanding an accused to custody it is the duty of the court to inform him about the grounds of his arrest and the accused has a right to oppose his remand and also ask for his release on bail (personally or through a counsel of his choice) and this right is enshrined in Article 10 of the Constitution of Pakistan 1973.

S. 167: Procedure when investigation cannot be completed in twenty-four hours. (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the [nearest Magistrate] a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or [send] it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Provincial Government shall authorize detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

S. 344: Power to postpone or adjourn proceedings. (1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

(1) Remand. Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the Presiding Judge or Magistrate.

(c) Right to access legal counsel

Article 9 of the Constitution of Pakistan states that it is the duty of the State to protect, respect, safeguard, ensure and facilitate the exercise of fundamental

rights, therefore the State is duty-bound to provide assistance to accused persons, especially to those who cannot afford it. It is hence, the obligation of the state to ensure that there is no infringement of the rights of a citizen to life and liberty and due process except in accordance with the procedure established by law. Section 340(1) of the CrPC guarantees a right to counsel for every person accused of a crime.

S. 340(1): Right of person against whom proceedings are instituted to be defended and his competency to be a witness. (1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader

In the case of *Muhammad Hashim Raza v. The State*, the concept of a fair trial necessarily included the right of an accused person to be defended by a counsel of his choice if he can afford one and if he cannot, he should be provided with counsel at the State's expense. Having access to competent counsel as a right demonstrates that justice should not only be done but manifestly be seen to have been done and where on account of any attending circumstances a suspicion or distrust had occurred resulting in a loss of confidence in the administration of justice which was essential to social order and security, it was better that it should be done by a court whose impartiality could not be doubted and was above suspicion¹.

(d) Discovery

Pakistan's evidence law, Qanoon-e-Shahadat Order 1984, covers the majority of the rules related to evidence collection and admissibility. Section 353 of the CrPC nonetheless provides for the following:

S. 353: Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under [Chapters XX, XXI, XXII and XXIIA] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

(e) Appeal

The powers of appeal are conferred upon the superior courts by the CrPC, so the right of appeal is provided by law to a person who is not satisfied by the

¹ Muhammad Hashim Raza v. The State, MLD 1997 Lahore High Court 1130.

decision of the trial court. The sections that deal with the right to appeal are given under Chapter XXXI of the CrPC starting from Section 404 to 431 and are summarized in the following:

- No appeal shall lie from any judgement or order of a Criminal Court except as provided for by the CrPC or by any other law for the time being in force. (S.404)

An appeal can be derived from the following orders:

- Order rejecting application for restoration of attached property. (S.405)
- Order requiring security for keeping the peace or for good behavior. (S.406)
- Order refusing to accept or reject a surety. (S.406-A)
- Order of forfeiture of a bond. (S. 514)
- Order to pay compensation. (S.250)
- Order for disposal of property. (S. 517)
- Order to pay an innocent purchaser or property. (S. 516)

In the following scenarios the court will refuse the accused to an appeal:

- Where any accused person has pleaded guilty. (S.412)
- No appeal for a convicted person in cases in which a High Court passes a sentence of imprisonment not exceeding six months only or of fine not exceeding two hundred rupees only. (S. 413)
- In which a Court of Sessions passes a sentence of imprisonment not exceeding one month only. (S.413)
- In which a Court of Sessions or a Magistrate of First Class passes a sentence of fine not exceeding fifty rupees only. (S. 413)
- No appeal lies by a convicted person in any case tried summarily in which Magistrate passes a sentence of fine not exceeding two hundred rupees. (S.414)
- An appeal may be brought against any sentence referred to in S.413, 414 above by which any punishment is combined with any other punishment. (S.415)

3.2 THE PAKISTAN PENAL CODE, 1860

3.2.1 TERRORISM AND THE WAGING OF WAR

Pakistan is in its second decade of fighting terrorism under the legal umbrella of the Anti-terrorism Act, 1997. The definition provided under that Act is not sufficient as it encapsulates almost every crime that is already provided under

PPC. Post 9/11, the Act has gone through multiple amendments and is yet to prove a successful tool in providing justice.

The PPC criminalizes the waging, attempting to wage or abetting waging of war against Pakistan under chapter 6 Section 121. This chapter relates to offences against the state involving the interruption of internal peace as well as the disruption of sovereignty. The following four principle offences are covered under this chapter:

- Waging war against the state (S. 121, 121-A, 122 and 123)
- Waging war against an ally (S. 125, 126 and 127)
- Overawing the Government (S. 124 and 124-A)
- Permitting or aiding the escape of a State prisoner or a prisoner of war (S.128, 129 and 130)

S. 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.

Under the PPC, the waging of war, the attempt to wage war and the abetment to wage war are all put on the same footing by this section, meaning the attempt or abetment is punished the same as the waging of war itself. The waging of war is not further defined and there is no specific number of persons required to commit an offence under this section. The number concerned or the manner in which they are equipped or armed is not material. Assembled to gather with that intention alone would be sufficient to apply this section. The essence of the offence under this section lies in the violation of the allegiance which is owed to the sovereign powers, i.e. the Government of Pakistan, which is mandatory upon all the citizens of Pakistan.

The accused under S. 121 is not subject to arrest without warrant. It is non-bailable, non-compoundable and entails punishment of death or imprisonment for life and fine, triable by the Court of Sessions.

S. 121-A: Conspiracy to commit offences punishable by Section 121: Whoever within or without Pakistan conspires to commit any of the offences punishable by Section 121, or to deprive Pakistan of the sovereignty of her territories or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Federal Government or any Provincial Government, shall be punished

with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Section 121-A of the Code simply provides punishment for the offence of criminal conspiracy found punishable under S.121. Any conspiracy to change the form of the Government of Pakistan or of any Local Government, even though it may amount to an offence under another section of the Code, would not be an offence under section 121-A unless it is a conspiracy to overawe such Government by means of criminal force or show of criminal force.

S.122: Collecting arms, etc., with intention of waging war against Pakistan: Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against Pakistan, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Section 122 of the Code is meant to cover cases where men, arms or ammunition are collected with the intention to wage war against the Government. It provides that whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against Pakistan, shall be punished with imprisonment for life or imprisonment of either description to the extent of ten years and shall also be liable to fine. The act/s of collecting men, arms and ammunitions are sufficient to attract the provisions of this section even if in the stages of preparation. The prosecution is required to prove the following:

- That the accused collected men, arms and ammunition etc.
- That the intention of collecting ammunitions etc. was to wage war or to prepare to wage war.
- That such war was to be waged against Government of Pakistan.

Since the expression “wages war” occurring in Section 121 has to be construed in its ordinary meaning, the overt acts, envisaged by the present section do not amount to waging war but they are part of and go on to constitute the offence under Section 121-A. That is why the general rule of procedure is that when a person is convicted for the offence of conspiracy to wage war under Section 121-A, he is not to be separately convicted, much less punished, for the acts under this section if they relate to the conspiracy charged.

Section 123 of the Code deals with the offence of concealment of intent to assist and facilitate design to wage war. It states that whoever, by any act, or by any illegal omission conceals the existence of a design to wage war against Pakistan, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate the waging of such war shall be punished with imprisonment of either description to the extent of ten years and also a fine.

S.123: Concealing with intent to facilitate design to wage war: Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against Pakistan, intending by such concealment to facilitate or knowing it to be likely that such concealment will facilitate the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

A conspiracy to wage war (S.121-A) will necessarily amount to a design to wage war and the concealment of such conspiracy will fall under this Section. It is not necessary under this section that persons who design a conspiracy to wage war and the persons who conceal such design must be different persons. The same persons may form a conspiracy to wage war and may also conceal the existence of such conspiracy intending thereby to facilitate the waging of war. Persons guilty under Section 121-A may also be convicted under Sections 122 and 123. Thus in the case of a conspiracy to wage war the conspirators may be held guilty under this section also for concealing the existence of the conspiracy.

Other important sections in Chapter VI are summarized as follows:

- Section 125 of the Code deals with punishment for the offence of waging war against any power in alliance with Pakistan.
- Section 126 is a further provision providing punishment for committing depredation on territories at peace with Pakistan.
- Section 127 provides punishment for recovering property taken by war or depredation mentioned in Sections 125 and 126 of the Code.
- Section 124 of the Code deals with assaulting the President, Governor, etc. with intent to compel or restrain them in the exercise of any lawful power.
- Section 124-A is directed against seditious activities. This section provides legislative measures to protect Government from seditious activities, actual or attempted, disaffection, oral advocacy or overthrowing the Government by force or violence.

- Section 128 deals with a public servant voluntarily allowing prisoner of State of war to escape.
- Section 129 is a supplementary provision to Section 128 and provides for a public servant negligently aiding such prisoner to escape.
- Section 30 aims to provide punishment for offenders aiding escape or rescuing or harboring such prisoners.

3.3 RECOMMENDATIONS

- I. With regards to habeas protections, the CrPC provides that the accused must be brought before the appropriate judicial authority within 24 hours presumably from the time of arrest. However, it is not clear when that time begins or where it is recorded.
- II. The CrPC allows both police remand and judicial remand if an investigation cannot be completed within the time stipulated. Further clarification is required as to whether these measures may be used individually or consecutively. Allowing for continuous or consecutive remand may violate the rights of the accused and amount to an arbitrary deprivation of liberty.
- III. Under Section 340(1) of the CrPC, the word “pleader” must be updated to a term or terms that more accurately represent competent counsel.
- IV. The right to counsel as provided within Article 10 of the Constitution and Section 340(1) of the CrPC is too vaguely written. The accused must be made aware of his right to counsel immediately upon arrest and offered the services of competent counsel if he cannot afford such representation.
- V. The CrPC should be amended to require law enforcement to disclose grounds for arrest at the actual time of arrest.
- VI. The CrPC should also be amended with a provision that both defines and prohibits torture and cruel and unusual punishment in police custody.
- VII. Under Section 121 of the PPC, for example, the act, attempt and abetting of the same act are punished equally. This proposition is problematic as lack of variation in punishment does not prohibit an escalation in criminal behavior from minor attempts to serious acts.
- VIII. Under Section 121-A, it is unclear whether intent is sufficient or an act of criminal force is required to demonstrate conspiracy to wage war punishable under Section 121.

CHAPTER 4

HUMAN RIGHTS AND THE ANTI-TERRORISM ACT 1997

MUHAMMAD OVES ANWAR

4.1 INTRODUCTION

Pakistan's primary legal tool to counter terrorism for the past two decades has been the Anti-Terrorism Act of 1997 (ATA). This law was enacted against the backdrop of sectarian, ethnic violence, and the phenomenon of 'target killings' or assassinations in Karachi and elsewhere in the country. It aimed to enhance powers of law enforcement agencies in the prevention and investigation of terrorism offences and created special courts to try terrorism suspects. Till date it has been amended 18 times. As it stands today, the ATA has come under significant criticism for an overly broad definition of terrorism, denial of bail to terrorism suspects, extended remand of suspects, preventive detention, enhanced police powers, and trials by special courts with expedited trial procedures.

The ATAs special courts, referred to as Anti-Terrorism Courts (ATCs), try almost all terrorism suspects today¹. ATC performance has been a critical area of concern, with some arguing that ATCs lack the ability to effectively convict terrorism suspects and make an impact on the terrorism scenario². From 2008 to June 2014 the ATC conviction rate across Pakistan stood at 23%³. Of the 7565 decided cases only 1733 convictions were secured. However, these statistics do not represent the disparities in conviction rates amongst the different provinces. Balochistan, has a conviction rate of 88% or 51 convictions out of a total 58 cases. Khyber Pakhtunkhwa has the lowest rate of 7.2% or 169 convictions out of a total 2317 decided cases. Punjab and Sindh have rates of 27.7% and 28.8% respectively⁴.

It is worthy of note that Special Courts for terrorism offences are not a novel concept in Pakistan. Prime Minister Zulfikar Ali Bhutto had enacted the Suppression of Terrorism Activities (Special Courts) Act of 1975. The Nawaz Sharif government of the early 1990s introduced the Terrorist-Affected Areas (Special Courts) Ordinance of 1990 and the Terrorist-Affected Areas (Special Courts) Act 1992. Despite these enactments, by the mid-1990s the violence in

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- 1 The Military Courts established under the Pakistan Army Act 1952 were permitted to try civilian terrorism suspects till January 2017. However, these Courts have tried only a fraction of all terrorism suspects in Pakistan.
 - 2 U.S. State Department, Office of the Coordinator for Counterterrorism, Country Reports on Terrorism 2010, August 2011, p.122-23, www.state.gov/documents/organization/170479.pdf.
 - 3 Statistics presented before the Supreme Court of Pakistan by the Attorney General of Pakistan collected from Inspector General of Police - Islamabad Capital Territory; Home Department Punjab; Home Department Sindh, Additional Inspector General of Police (Investigations), KPK; Capital Police Officer, Balochistan. Available on file with the author.
 - 4 The number of convictions in Punjab stood at 895 out of a total 3228 decided cases. The number of convictions in Sindh stood at 521 out of a total 1808 decided cases.

Sindh and Punjab had only increased. The ineffectiveness of the extant legal framework failed to ensure convictions of those arrested, increasing pressure on the Nawaz Sharif government to enhance the powers of the Police and investigating agencies. It was also felt that the Armed Forces and Civil Armed Forces needed to be deployed in terrorism affected areas with a formal law enforcement role. This led to the enactment of the ATA.

The years 2015 and 2016 witnessed three tiers of Special Courts existing simultaneously, all dealing with terrorism related crimes⁵. The Protection of Pakistan Act 2014 (PPA) Special Courts were never effectively operationalized and with the PPA's sunset clause triggering in July 2016, these courts were still-born. Barring any further Constitutional amendments, the Military Courts, established by the 2015 amendments to the Pakistan Army Act 1952 have ceased to operate. This will bring renewed focus on to the ATCs and their performance. It would also raise the need to bring about cogent reforms to ensure that the ATCs function effectively while at the same time safeguarding fair trial and due process rights of suspects.

This chapter looks at select provisions of the ATA with a view to assessing their potential for violating the right to life, liberty, fair trial and due process. It aims to highlight how the ATA possesses the potential to violate these rights and recommends reforms to address these issues.

4.2 THE DEFINITION OF TERRORISM UNDER THE ANTI-TERRORISM ACT 1997

4.2.1 BREADTH OF THE DEFINITION OF TERRORISM UNDER THE ANTI-TERRORISM ACT 1997

A major criticism of the ATA is the breadth of the definition of terrorism. Successive amendments to the ATA have turned the original two-paragraph definition of terrorism in Section 6 to one that today contains 28 subsections and paragraphs, much of this being redundant language adding little of substance. There are two main concerns with the definition which will be discussed below. The first relates to certain self-defeating language of the ATA

⁵ The Anti-Terrorism Courts under the Anti-Terrorism Act 1997, the Special Courts envisaged by the Protection of Pakistan Act 2014 (which were never effectively operationalized), and the Military Courts under the Pakistan Army Act 1952.

which essentially erodes the concept of mens rea for terrorism and also has the effect of supplanting the general criminal law. The second relates to how the judiciary has oscillated in its interpretation of the definition of terrorism leading to a definition without any substantive threshold requirements, again expanding the ambit of the terrorism law to numerous ordinary crimes. To understand these two concerns, we must first examine the architecture of the definition found in the ATA.

The ATA's current structure of the definition of terrorism was adopted through amendments made in 2001⁶. The 2001 amendments to the ATA reproduced, almost verbatim, the definition of terrorism found in the United Kingdom's Terrorism Act of 2000⁷. This definition divided terrorism into actus reus (actions) and mens rea (guilty mind) elements both of which needed to be fulfilled to support a charge of terrorism. While this general structure is in large part still maintained in Pakistan, subsequent amendments to the ATA have drastically reduced the similarities between the UK and Pakistani terrorism acts.

Actus reus of Terrorism

Section 6 of the ATA, as it stands today, provides for an actus reus element found in Section 6(2) coupled with a mens rea element found in Section 6(1)(b) and (c). The actus reus elements are rather straight forward, though they do raise some concern regarding their extent and relevance to terrorism at times. The actus reus of Section 6(2) is reproduced below:

- (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;
 - (c) involves grievous damage to property including government premises, official installations, schools, hospitals, offices or any other

6 Anti-Terrorism (Amendment) Ordinance 2001 (39 of 2001).
 7 United Kingdom Terrorism Act 2000 (as originally enacted) Available at: <http://www.legislation.gov.uk/ukpga/2000/11/section/1/enacted>

Section 1 Terrorism: interpretation

- (1) In this Act “terrorism” means the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it—
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (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.

- public or private property including damaging property by ransacking, looting or arson or by any other 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;
 - (ee) involves use of explosive by any device including bomb blast 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;
 - (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 civil life;
 - (j) involves the burning of or any 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;
 - (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;
 - (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

This subsection is problematic on several fronts. Firstly, it is difficult to couple certain actions mentioned above with the specific mens rea requirements mentioned in Section 6(1)(b) and (c) discussed below. This would relate to kidnapping for ransom (6(2)(e)) or bhatta (6(2)(k)). Many argue that these two offences are linked to terrorism as they help fund terrorist organizations and, therefore, should be included here. This, however, is an indirect link. It is difficult to conceive that kidnapping for ransom of an individual is done with the design to coerce, intimidate, or overawe the government or the public. Similarly, it is difficult to attribute such kidnapping to the purpose of advancing a religious, sectarian, or ethnic cause, if such kidnapping is merely done to raise money. This applies equally to bhatta or extortion money. In fact, having to make this link to a terrorist design or purpose becomes more onerous for prosecutors in court. Certainly, kidnapping of government officials or other prominent individuals as part of a strategy to spread fear and terror could amount to such terrorism, however, that is not the bulk of such cases. It would be better to take these two offences out of the definition of terrorism and re-insert them elsewhere in the ATA in sections relating to terrorism financing. For such a case to be tried in an ATC, all that would have to be proven is a link between the kidnapping and a terrorist organization or a specific plot. In all other cases, kidnapping for ransom ought to be tried by the regular courts.

Secondly, Section 6(2)(p) above is far too vague to offer any cogent understanding of the term in relation to terrorism. Any and all persons with an opinion on a matter are engaged in the dissemination, preaching of ideas, teaching as per their own interpretation. If construed literally, this would have the effect of eliminating television talk shows, academic discussions, etc. and significantly, violating freedom of speech. While this inclusion was aimed at Swat's Mullah Fazlullah (Mullah Radio) who used FM stations to preach his version of Islamic teachings, the language needs to be significantly more precise to prevent any unintended encroachment on fundamental rights.

Thirdly, Section 6(2) is unnecessarily heavy in specificity. Much of the wording could be omitted and like the UK Terrorism Act 2000 be subsumed into more general categories such as "serious violence against a person" or property. Each and every result of terrorism need not be enumerated in the section.

Mens Rea of Terrorism

The actions mentioned in Section 6(2) must be coupled with the mens rea

element to ensure a terrorism conviction. Section 6(1)(b) and (c) outline this mens rea element by dividing it into two categories – the design and the purpose. Unlike the UK Terrorism Act 2000 where the design and purpose are cumulative requirements, Pakistan's ATA has made the design and the purpose alternative options, i.e. either one of these, if proven in court, would suffice for the perpetrator to be convicted of terrorism.

Design

Section 6(1)(b) outlines the design of a perpetrator by stating:

“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;”

This means that the perpetrator must have as his intention for committing the terrorist action to coerce and intimidate or overawe the various entities, groups or organizations mentioned in the subsection. The last part relating to creating a sense of fear or insecurity in society is also an independent intent that the perpetrator of the action may have. In other words, we can divide the design into two parts:

- i) To coerce and intimidate or overawe, or
- ii) To create a sense of fear or insecurity in society.

Domestic case law suggests that either one of these, if proven, will suffice to prove that the perpetrator had the 'design' to commit terrorism. Under Pakistani law this would suffice to prove the mens rea.

Purpose

Section 6(1)(c) of the ATA is most problematic in that it introduces action or actus reus elements into an otherwise mens rea concept of purpose. The subsection is reproduced below:

“the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, 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.”

Purpose may be defined as the motivation behind an act. Therefore, if the motivation of the perpetrator for his actions is to advance a religious, sectarian or ethnic cause then this shall suffice to prove the necessary mens rea (under Pakistani law). Alternatively, if the purpose/motivation for the action is to intimidate and terrorize the public, social sectors, media persons, business community then this too shall be enough to prove the necessary mens rea required for terrorism under the ATA.

The last element is problematic in that it states that the mens rea element will also be fulfilled if the perpetrators purpose or motivation was the attacking of “civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies”. This is not a mens rea element at all, rather an actus reus element. In other words, if your purpose is to attack civilians or a building, etc., then it does not matter whether you wished to advance a religious or sectarian cause or intimidate or terrorise the public. Since the word, 'or' disaggregates this part of the 'purpose' element, essentially, the ATA makes terrorism a strict liability offence which can be committed without any specific intention to commit terror as long as the intent to attack is present. Such poor drafting not only undermines the entire structure of the definition of terrorism under the ATA but also displays a disturbing lack of understanding of basic concepts of criminal law by legislative drafters.

Section 6(3) of the ATA

This lack of understanding extends to Section 6(3) of the ATA as well. When the new structure of the definition of terrorism in the ATA was introduced in 2001, the Pakistani legislative drafters thought it wise to disaggregate the design and purpose elements adopted from the UK Terrorism Act 2000. In the UK, as the definition of terrorism stands today, the mens rea requirement is only fulfilled if both the design and the purpose can be proven, as the language of Section 1 of the UK Terrorism Act 2000 states below:

- (1) In this Act “terrorism” means the use or threat of action where—
 - (a)...
 - (b) 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, and
 - (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

The 'and' at the end of subsection (b) makes the design and purpose cumulative requirements for the mens rea to be proven. However, to ensure that this was not too onerous to prove in court for prosecutors in certain types of cases, the UK law included Section 1(3):

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

This meant that if firearms or explosives were used, then it did not matter if the perpetrator intended to influence the government and the other entities/groups mentioned in subsection (1)(b). However, he still had to have committed the action for the purpose of advancing a political, religious, racial, or ideological cause as found in subsection 1(c).

In Pakistan, the legislative drafters copying this definition reversed this by using the following language:

(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 subsection (1) (c) is satisfied.

In essence, in Pakistan, if firearms, explosives or any other weapon is used then it will be considered terrorism regardless of whether the purpose for the action was to advance a religious, sectarian or ethnic goal. Alarmingly, since Pakistan's ATA does not require design and purpose to be cumulative requirements, therefore, it is conceivable that even the coercion, intimidation or overawing the Government and other entities or groups is not required when weapons are used. Section 6(3) of the ATA has the potential of making any use of firearms, explosives, or any other weapon, an act of terrorism, as long as it results in one of the acts mentioned in Section 6(2). Thus no intent to commit terrorism would be required at all. This is exceptionally disturbing and must be remedied through a thorough review of the definition of terrorism in the ATA.

Recommendations

- I. The vague wording of some of the actions which amount to the actus reus for terrorism found in Section 6(2) should be omitted or at the very least made more precise.

- II. Certain actions should be omitted from Section 6(2) as they do not have a direct nexus with terrorism as understood through its mens rea elements in Section 6(1)(b) and (c). These include kidnapping for ransom or bhatta which would better be included as offences of terrorism financing. They can still be included within the ATA but not within the definition of terrorism as they dilute the mens rea element.
- III. The actus reus element must be removed from Section 6(1)© to ensure that it remains a mens rea element only.
- IV. Section 6(3) ought to be deleted altogether as it creates immense confusion and does not add any significant value to the definition of terrorism.
- V. A new definition of terrorism should be adopted closer in line with the definition provided in the UK's Terrorism Act 2000 with relevant contextualized amendments. Due to the severe limitations of prosecutorial capabilities, evidence collection and investigations, the disaggregation of the design and purpose may be retained for the time being as long as Section 6(3) is omitted in its entirety.

4.2.2 THE JUDICIAL INTERPRETATION OF THE DEFINITION OF TERRORISM

Given the immensely confusing statutory definition of terrorism, it is no surprise that the Courts have had oscillating interpretations of terrorism and a general lack of appreciation of the need to limit the application of the ATA. Terrorism has generally been understood as a superior genus of crime, requiring a higher mental element (mens rea) in addition to the physical element (actus reus). This additional mens rea requirement is what separates terrorism from ordinary crimes. The ATA does indeed provide for such an additional mens rea requirement with wording such as "designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect...". Similar language is present in the anti-terrorism laws of numerous other common law countries. If all offences tried in ATCs had to meet this threshold, there is little doubt that the number of cases would significantly drop.

Jurisprudence in Pakistan on the definition of terrorism is divided into two categories – the 'mens rea' based approach⁸ and the 'action based' approach. The 'mens rea based' approach looks at whether an act was committed with the aim or intention to spread terror or intimidate and overawe the

8 Jamal Aziz, Muhammad Oves Anwar et al., *The Case for Change: A Review of Pakistan's Anti-Terrorism Act*, Research Society of International Law, Pakistan 1997 32-33 (2013), <http://rsilpak.org/the-case-for-change-a-review-of-pakistans-anti-terrorism-act-of-1997-2/> (last visited Nov 22, 2016).

Government, etc.. The 'action based' approach looks at the impact of the particular act committed regardless of the perpetrators aim or intent. This is a threshold issue and has immense impact on the types of crimes which come within the fold of the ATA. Supreme Court judgements exist supporting both these approaches and there is little clarity on the matter. A recent Supreme Court judgement grappling with this issue has offered some encouragement by adopting the 'mens rea based' approach⁹. This is a departure from several previous judgements backing the 'action based' approach.

The pitfalls of adopting an 'action based' approach are two-fold, firstly it incorporates a strict liability element into the offence of terrorism. Regardless of the perpetrators intent, he may be liable for terrorism depending on the impact of his offending actions. This is arguably not the intent of Parliament when developing the ATA. An act should not become an act of terrorism simply by the location of perpetration, the number of people present there, or the amount of media attention it receives. This approach means that an act may be terrorism based entirely on external factors and not the perpetrators intent.

Flowing from this issue is the second problem with the 'action based' approach. With no substantive threshold requirement, other than causing public fear and panic, the definition of terrorism is unduly widened. This brings far more suspected offenders within the ambit of the ATA. Thus, applying extraordinary or special laws to what should be ordinary crimes. This has the effect of the ATA supplanting Pakistan's ordinary criminal justice system.

While it is certainly easier to prosecute based on the 'action based' approach, as the additional mental element required in the mens rea approach is not required to be proven in court, this should not be the reason for abandoning the threshold requirements of the ATA. As discussed, the impact of such an approach is deeply problematic and applies the ATA to situations it was not intended for.

Recommendations

- I. Pakistan's superior judiciary should take cognizance of the problems associated with a wide interpretation of the definition of terrorism and address them through uniform decisions at the High Court and Supreme Court levels.
- II. Parliament should amend Section 6 of the ATA to ensure that a mens

9 Malik Muhammad Mumtaz Qadri vs. The State [2016 SC 17 PLD]

rea based approach is adopted as a threshold test to allow offences of terrorism to be differentiated from ordinary crimes.

4.2.3 FAILURE OF THE DEFINITION OF TERRORISM TO TRIGGER POWERS OF LAW ENFORCEMENT BODIES.

Another failure of the ATA is its inability to effectively signal to Police and Law Enforcement personnel when their additional powers under the ATA are triggered. A vague definition of terrorism causes confusion not only amongst the judiciary but also members of law enforcement bodies in terms of their special powers. These powers exist in relation to the collection of evidence (Sec. 19A), arrests without warrants (Sec. 5(2)(ii)), the arrest of suspects without warrant (Sec. 5(2)(iii)), as well as the recording of confessions (Sec. 21H), among others. Furthermore, in relation to preventive detention powers under the ATA, it is paramount that the legal power to detain must exist with the detaining authority. If the definition of terrorism does not adequately signal to law enforcement personnel whether the cause of detention is terrorism related, then this power can be a source of serious abuse.

Adequate mechanisms need to be inserted in the ATA or through administrative mechanisms which allow law enforcement personnel, especially investigators and detaining authorities to be able to determine when a terrorism offence has been committed early on in the process. A clear determination of when a terrorism offence has been committed must be made lest the extraordinary policing powers under the ATA are utilized in non-terrorism cases.

Recommendations

- I. A clear and unambiguous ATA powers triggering mechanisms needs to be developed to signal to law enforcement personnel when they can and cannot use their additional powers of investigation and arrest.
- II. This triggering mechanism is important also in cases of preventive detention under the ATA and, therefore, such a mechanism may also

be used to signal to detaining authorities in what situations they may exercise their powers of detention.

4.3 THE ANTI-TERRORISM ACT 1997 AND THE RIGHT TO LIFE

This section reviews three elements of the ATA which touches upon the right to life. These include the death penalty for ATA offences, powers of Law Enforcement personnel to use lethal force, and indemnity provisions of the ATA.

4.3.1 DEATH PENALTY IN ANTI-TERRORISM CASES

As noted in previous chapters of this report, the right to life is of specific concern in terrorism trials by Special Courts. Expedited procedures with differing evidentiary requirements increase the chances of miscarriages of justice occurring. When these factors are coupled with the Court's power to impose the death penalty, the potential for irreversible damage to the cause of justice is immense. Therefore, we begin with a discussion of the death penalty for terrorism offences under the ATA.

Section 7 of the ATA makes the death penalty available for a range of acts mentioned in Sec. 6. This includes any act of terrorism causing death (Sec. 7(a)), the offence of kidnapping for ransom or hostage-taking (Sec 7(e)), and the offence of hijacking (Sec. 7(f)). It is evident that kidnapping for ransom, hostage-taking or hijacking may not entail the loss of life, yet the death penalty may be imposed in such situations. There is a strong need to bring an element of proportionality in punishment for offences under the ATA. Punishments must be commensurate to the seriousness of the offence. Unfortunately, there does not seem to be any cogent thinking in terms of the aims of sentencing behind these punishments. These sentencing aims need to be a core element of the ATA to ensure that a coherent and holistic approach to countering extremism is demonstrated through the application of the Act.

There is little need to restate the numerous deficiencies identified regarding the investigatory and prosecution mechanisms in Pakistan. A 2010 US State Department Report noted that Pakistan was assessed to have "a legal system

10 U.S. State Department, Office of the Coordinator for Counterterrorism, Country Reports on Terrorism 2010, August 2011, p.122-23, www.state.gov/documents/organization/170479.pdf, p.121-122

almost incapable of prosecuting suspected terrorists.¹⁰ This is supported by the 77% acquittal rate across the country. Given these structural deficiencies, added pressure by various State entities and public opinion, would only amount to an increase in the conviction rate at the expense of suspects' rights. It becomes even more dangerous an equation when the death penalty is added to the tools available to ATC judges.

Recommendations

- I. Sentencing Aims be deliberated upon. They should be part of a coherent and holistic counter-terrorism response addressing violent extremism as well.
- II. The death penalty should be limited in its application. The rarest of the rare standard may be applied to the imposition of the death penalty. Pakistan may re-impose its moratorium on the death penalty in light of the numerous deficiencies which exist in the Pakistani criminal justice system.

4.3.2 'SHOOT TO KILL' POWERS UNDER THE ANTI-TERRORISM ACT 1997

Section 5 of the ATA grants powers to the Police, Armed Forces and Civil Armed Forces to “use the necessary force to prevent the commission of terrorist acts or scheduled offences”.¹¹ These powers are further defined in Sec. 5(2) which imposes certain limits on the power to use force exercised by law enforcement personnel. Primary among them is the requirement that the empowered personnel must give prior warning before using force and then use only 'necessary and appropriate' force against a person who is committing a terrorist act or scheduled offence. In addition to this, these use of force provisions have now been equated with powers of private defence (self-defence) under the Pakistan Penal Code (Sec. 96-106), where if there is a 'reasonable apprehension that death or grievous hurt' may be caused by an act, then force may be used or ordered. While this does add an element of subjectivity to the use of force, judicial interpretation of the right to private/self defence has clarified this area to a large degree. However, it is yet to be seen whether the courts will interpret the provisions of the ATA in line with the jurisprudence developed by the courts on private/self defence.

¹¹ Section 5(1) of the Anti-Terrorism Act 1997: “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.”

As a check on the use of force by law enforcement personnel, the ATA includes three provisos. The first states an order to fire may only be given by a Police officer not below the rank of BS17 or equivalent rank in the case of the armed forces or civil armed forces personnel using these powers. What is to be noted is that the power to order firing lies with an officer of the aforementioned rank, however, an individual member of law enforcement personnel may still be permitted to use force subject to all the limits on this power in this section of the ATA. This is because the language of Section 5(2) creates two legal bases to use force. One lies with personnel whereas the second lies with officers of BS17 or equivalent who may 'order' the firing upon a person or persons.

The second proviso states that the firing or order to fire shall only be taken by 'way of last resort' and shall not extend to the inflicting of 'more harm than is necessary to prevent the terrorist act' giving rise to the reasonable apprehension of death or grievous hurt. This is an important limiting provision. It requires that all reasonable alternatives to prevent the terrorist act have to first be exhausted before the use of force would be justified. Secondly, the element of proportionality of force is inserted through this provision requiring the use of force not to extend beyond what is necessary, under the circumstances, to obviate the danger posed by the terrorist act.

Unfortunately, the language employed in the ATA regarding the limits on the use of force by law enforcement personnel is far from clear. A revision of these terms may be useful for giving clarity to those who would have to utilize these powers.

The third proviso relates to an internal inquiry for 'all cases of firing which have resulted in death or grievous injury'. There is good reason to require such an

12 Section 5(2) of the Anti-Terrorism Act 1997: "(2) In particular and without prejudice to the generality of the provisions of subsection (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 after forming reasonable apprehension that death or grievous hurt may be caused by such act or offence to fire, or order the firing upon any person or persons against whom he is authorized to use force in terms hereof:

Provided that an order to open fire in such circumstances shall be given by a police officer not below the rank of BS17 and equivalent rank, in the case of a member of Armed Forces or civil Armed forces or by a Magistrate on duty:

Provided further that the decision to fire or order firing shall be taken only by way of last resort, and shall in no case extend to the inflicting of more harm than is necessary to prevent the terrorist act or scheduled offence which has given rise to the reasonable apprehension of death or grievous hurt:

Provided further that all cases of firing which have resulted in death or grievous injury shall be reviewed by an internal inquiry committee constituted by the head of the law enforcement agency concerned."

inquiry to be undertaken by an independent entity to ensure that the power to use force is not misused.

A history of questionable police encounters leading to the death of suspects further raises the need for independent inquiries to eliminate any impunity amongst the ranks of police officials. The need to target the tacit acceptance of a police encounter culture is imperative to ensure a legitimacy driven counter-terrorism policy.

Recommendations

- I. The ATA provisions on the use of force should be drafted in clearer language.¹³
- II. The inquiry of all police related deaths should be undertaken by an independent body established by the government.

4.3.3 INDEMNITY PROVISIONS AND IMPUNITY OF LAW ENFORCEMENT PERSONNEL

The issue of impunity of law enforcement personnel involved in counter-terrorism raises deep concern. Two provisions relating to indemnity of law enforcement personnel exist in the ATA. Section 39 of the ATA relates to indemnity and states, “No suit, prosecution or other legal proceedings shall lie against any person in respect of anything which is in good faith done or intended to be done under this Act.” As noted above the indemnity can serve as a cover for police brutality, custodial torture, false encounters, among various other issues. The need for independent checks on the police, armed forces, and civil armed forces has become imperative. While the need to prevent unnecessary prosecution of law enforcement personnel is understandable to allow them to perform their functions effectively, this should not be transformed into a shield to protect them in cases of grave human rights violations.

A further provision giving protection to law enforcement personnel is found in Sec. 5(3) which incorporates by reference section 132 of the Code of Criminal Procedure. Section 132 states that no prosecution for anything done under the Code/ATA shall be instituted except with the sanction of the Provincial Government. This applies equally to magistrates, police officials, and members of the armed forces and civil armed forces.

¹³ Please see guidance provided in Section 5.3.1 below in this report.

The approach to holding law enforcement personnel accountable for their actions will further legitimize the State's response to terrorism. It will ensure a more effective counter-terrorism strategy that does not alienate the local community. It will also play a positive role in encouraging greater community participation in counter-terrorism operations by building trust with locals and helping to elicit vital intelligence and evidence.

Recommendation

- An independent commission should be established to review all counter-terrorism related activity to ensure it complies with Constitutional fundamental rights and Pakistan's human rights obligations.

4.4 THE ANTI-TERRORISM ACT 1997 AND THE RIGHT TO LIBERTY

The impact of the ATA on the right to liberty is significant. With provisions regarding arrest without warrant, extended remand, preventive detention, and restrictions on movement, the ATA can have an immensely detrimental impact on rights. As explained in earlier chapters the right to liberty is an expansive right and the ATA similarly affects its many sub-elements.

4.4.1 ARREST WITHOUT WARRANT

Sec. 5(2)(ii) provides powers to police, the armed forces and civil armed forces deployed under the ATA to "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...". Warrants for arrest remain an important safeguard against arbitrary arrest and abuse. Provisions for warrantless arrest exist in relation to terrorist suspects in several jurisdictions. The provision may be retained without amendment as long as executive and judicial checks exist to ensure this provision is not abused.

4.4.2 EXTENDED REMAND

Physical remand is the authority granted by a Magistrate to keep a suspect in police custody for the purposes of inquiry into a crime. The Code of Criminal

Procedure through Section 167 provides for a suspect to be produced before a magistrate within 24 hours of his arrest. The Magistrate, upon the request of the Police, may allow physical remand of the suspect for a maximum period of 15 days. Section 21E of the ATA states that the minimum time for remand will be 15 days up to 30 days at a time. The ATA allows for a maximum of 90 days of remand. This is an exceptional extension of the provisions of physical remand in the Pakistan criminal justice system.

The purpose of physical remand is to utilize the time to obtain evidence from the suspect in Police custody. In reality this time is when most Police torture takes place and confessions are extracted. Allowing for potentially 90 days in Police custody simply increases the time for Police personnel to subject the suspect to undue pressure and torture.

Additionally, such a long period of detention without charge borders on preventive detention. The ATA has provisions dealing specifically with preventive detention and the extended remand provisions only go to blur the lines. This is especially concerning as the ATA in Sec. 11EEEE allows for preventive detention specifically for the purposes of inquiry for a period of 90 days. While a sunset clause for these sections exists in Section 11EEEE (2A), the argument still stands that there have existed multiple mechanisms to deprive an individual of their liberty without charge. It is, therefore, problematic that two forms of deprivation of liberty are available under the ATA for the same purpose – inquiry. It is conceivable that law enforcement authorities may utilize both the remand provisions as well as the preventive detention provisions to extend a suspect's period of detention for as long as possible in violation of constitutional safeguards (Article 10).

Recommendation

- It is recommended that the remand provisions in the ATA be reduced in length and brought in line with the Cr.P.C. limit of 15 days.

4.4.3 PROSCRIPTION OF PERSONS

The ATA allows for the proscription of persons by virtue of Sec. 11EE. Proscription entails the entering of the individual's name in the fourth schedule of the ATA and involves extensive limitations on the individual's freedom of movement and association. Such proscription can take place ex parte or without the individual being present or heard. It is an executive

determination made by the Federal Government.

Proscription is imposed on an individual if reasonable grounds exist regarding the individual's involvement in terrorism, with an organization under observation (Sec. 11D), with an organization proscribed under the ATA (Sec. 11B), or in any way concerned or suspected to be concerned with such organizations suspected to be involved in terrorism or sectarianism.

The effects of such proscription are significant in terms of movement. The proscribed person is prevented from changing his place of residence without permission from the officer in-charge of the local Police Station, he may be required to change his place of residence to one specified under the order of proscription, and he is prevented to visit places involving the education, training or housing of anyone below the age of 21 years or women. In addition, he may be prevented from visiting most public places such as theatres, cinemas, hotels, restaurants, and tea shops. The federal government may also impose a prohibition on the individual using any airport, railway or bus stations or even visiting public or private parks. The individual is also subject to the check or probe of his assets and those of his immediate family members to assess the source of income and expenditure.

It is evident that proscription involves an immense limitation on an individual's liberty based merely on reasonable suspicion. The potential impact on an individual's quality of life and freedom of movement cannot be overstated. However, the provisions of this section are unworkable, as there are no practical means of enforcing most of these curbs. While counter-terrorism efforts may require the limitation of an individual's movement, these should be imposed only where necessary and subject to strong judicial oversight. The individual concerned should be provided an opportunity to be heard before his proscription.

Recommendations

- I. Proscription should only be imposed after the individual concerned has been provided an opportunity to be heard regarding why he should not be subject to a proscription order.
- II. The curbs imposed by Section 11EE are too broad and impose an unnecessary burden on proscribed persons. The consequences of proscription should be limited and imposed only when necessary.
- III. The Proscription should involve strong judicial oversight to ensure an individual's rights are not arbitrarily curbed.

- IV. Proscription should entail consequences which can be easily policed. The existing curbs are impractical from a law enforcement point of view.

4.4.4. DETENTION REGIME

The ATA has one of the most elaborate and widely used preventive detention regimes found in Pakistani law. There are two layers of preventive detention. The first relates to the detention of a person already proscribed under Section 11EE (above). The second relates to detention for the purposes of inquiry. Article 10 of the Constitution applies, in any case, to both these provisions. In relation to persons proscribed under Section 11EE and thus placed on the Fourth Schedule of the ATA, the Act permits their detention under Section 11EEE for a period of 12 months subject to the limitations on such detention imposed by Article 10 of the Constitution. This section is poorly worded and does not provide any guidance on when and on what basis such detention can take place. The section notes:

“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.”

The section mentions that the government has to be satisfied with a view to prevent any person, unfortunately, it does not say what the person is to be prevented from. Secondly, whatever is to be prevented, the standard is wholly subjective, namely, 'the Government's satisfaction'. Such language invites an arbitrary application of the law and is dangerous when an individual may be deprived of his liberty for a period of 12 months.

The danger of these provisions is only partially mitigated by Article 10 of the Constitution which requires that a Supreme Court mandated review board review the cases of detention every three months. It is hoped that such reviews would lead to the release of persons arbitrarily detained. Unfortunately, these reviews take place at three month intervals and so individuals can be subjected to arbitrary and wrongful deprivation of liberty for at least 3 months.

If individuals are suspected of being concerned with terrorism, then alternative mechanisms exist under the law to deal with them short of deprivation of liberty. These include the use of surveillance and interception warrants under the Investigation for Fair Trial Act 2013.

Recommendations

- I. Section 11EEE ought to be drastically reformulated through an amendment which provides for clear grounds for detention. It should also be required that the government gives reasons as to why an individual was arrested and why proscription under section 11EE is not enough to deal with the potential threat he poses.
- II. The total period of detention under section 11EEE should be reduced. If an individual continues to pose such a grave threat.

4.5 THE ANTI-TERRORISM ACT 1997 AND FAIR TRIAL AND DUE PROCESS SAFEGUARDS

4.5.1 BROAD DEFINITION

As discussed above in Section A, the broad definition of terrorism has the effect of supplanting the ordinary criminal laws of Pakistan with a set of laws designed specifically for exceptional circumstances. The adoption of a permanent state of exception by such means violates due process and fair trial rights, as crimes which should be tried by ordinary criminal courts are instead tried by specialized Anti-Terrorism Courts. The ATC trial process which, as we shall see below, has certain systemic deficiencies as well as specific problems and thus cannot provide international standards of fair trial or due process.

4.5.2 DENIAL OF BAIL

The ATA has been an attractive option for unscrupulous complainants and corrupt police officials due to its provisions on the grant of bail. By including an ATA charge within a suspect's charge sheet or challan, the chances of him or her receiving bail is drastically reduced or delayed. Section 21D (1) notes that only an ATC or the High Court or Supreme Court may grant bail of a suspect charged with an ATA offence. Section 21D (2) notes that all ATA

offences carrying the death penalty or imprisonment for more than three years will be non-bailable. Non-bailable offences are further dealt with by Section 497 of the Criminal Procedure Code (Cr.P.C) which provides grounds for the release on bail of an individual charged with non-bailable offences. The proviso to Section 21D (2) of the ATA is presumably written with this in mind and is reproduced below:

Provided that if there appear reasonable grounds for believing that any person accused of nonbailable offence has been guilty of an offence punishable with death or imprisonment for life or imprisonment for not less than ten years, such person shall not be released on bail.

A basic textual understanding of this proviso suggests it refers to prior convictions. However, this would lead to absurdity in the case of those who have been punished with the death penalty for a terrorism offence and is also unlikely to apply to individuals who have received imprisonment for life. In any case these elements would be verifiable through court, jail, and police records – the question of 'reasonable grounds' for believing that such a person 'has been guilty' of an offence does not need to arise. Alternatively, the proviso could potentially refer to the offence at hand for which the individual has been charged. The language may be referring to the fact that if the court has reasonable grounds to believe the individual is guilty of the offence based upon a preliminary assessment of the evidence provided to it, then the individual should not be released on bail. A minor modification of the language could clarify this and avoid any confusion.

In other cases, the accused may be admitted to bail, unless there are substantial grounds for believing that the person, if granted bail would do any act stipulated in Section 21 D (3). These acts include failure to surrender to custody, commit an offence while on bail, interference with a witness; otherwise obstruct or attempt to obstruct the course of justice, whether in relation to himself or another person; or fails to comply with the condition of release (if any).

Furthermore, the Act in Section 21 D (4) also lays out the considerations that the Court has to keep in mind when exercising its powers in relation to a person seeking bail. These include the nature and seriousness of the offence with which the person is charged; the character, antecedents, associations and community ties of the person; the time which the person has already spent in custody and the time which he is likely to spend in custody if he is not

admitted to bail; and the strength of the evidence of his having committed the offence.

It can be gleaned from case law that courts place reliance on a number of factors when determining whether to grant bail or not. The Courts look at whether the accused poses a particular threat to society, whether the accused resisted arrest, whether the mens rea for the offence can be established and whether an FIR was lodged promptly or not. However, what the Courts do not seem to be taking into account is the nature of the offence with which the person is charged. The cases analyzed were normally cases involving murder, which makes the offence non-bailable under the ATA as mentioned above. Even then, the Courts have found a myriad of reasons to grant bail to the accused.

As noted above, a major determining factor is whether the case fell within the prohibitory clause of S 497 Cr.P.C. Section 497 Cr.P.C. is divided into two parts. One part deals with those cases which are called offences falling under the prohibitory clause and the other part deals with those offences which do not fall within the prohibitory clause. Consideration for both classes of cases is different from each other. The court has to be more vigilant and slow in granting discretionary relief of bail.¹⁴ Therefore, if a case fell within the prohibitory clause of s 497, bail was normally denied. It was also denied in those cases where force was used against police officials.

Below are some of the reasons furnished by courts for the grant of bail:

- (i) the accused posed no particular threat to society;
- (ii) had not resisted arrest;
- (iii) no weapons found on arrest;
- (iv) the prosecution could not establish a case against the accused...accused had been found to be innocent during investigation;
- (v) no injury on the person of the deceased could be attributed to the accused. Accused had taken plea of alibi at the time of occurrence by stating that they were present in a court in connection with a criminal case;
- (vi) mere presence at the spot with co-accused with no overt act played by him was a factor requiring further probe to his involvement;
- (vii) mens rea for offence had not been established;
- (viii) FIR was lodged after a considerable delay;
- (ix) bail is not to be refused as a punishment merely on the allegation that

- the accused had committed an offence punishable with death or imprisonment for life unless reasonable grounds appeared;
- (x) No identification parade of accused was ever held;
 - (xi) Case under S 497(2) Cr. P C had been made out and bail was therefore granted;
 - (xii) Accused was neither found possessing the explosive substances nor making such explosive substances and because of explosion, suffered injuries. This cast doubt on the case and so bail was granted;
 - (xiii) Accused had been kept at police station for five days where the complainant (police official) and his witnesses were posted. Identification parade was conducted after a delay of five days for which the prosecution provided no explanation;
 - (xiv) Accused were in custody for six years, but their trial had not been concluded and only the evidence of the complainant had been recorded. Trial Court had refused bail even though there were no valid reasons. Keeping a person in custody without trial for more than six years and that too by a court, which by law, was enjoined to conclude trial within a specified period of time, was nothing but an abuse of the process of law as well as of the court;
 - (xv) Registration of case under the provisions of ATA 1997, by itself was not sufficient to decline bail in the absence of sufficient incriminating evidence.

The following are some reasons given by the judiciary for rejecting bail:

- (i) Resisted police on duty and attacked the main gate of the High Court. The accused were named in the FIR and a specific role was assigned to them and they were apprehended right on the spot. Case against accused did not fall within the propitiatory clause of s 497 Cr. P. C but circumstances in which accused had acted, could not clothe them with absolute right of admission to bail.
- (ii) Accused were named in the FIR, which resulted in death of five persons. Bail was granted initially due to a dishonest investigation by a police officer. The bail was subsequently cancelled.
- (iii) The court granted bail to the accused because there had been great delay in conclusion of the trial. It was a kidnapping for ransom case. Furthermore, the abductee had exonerated the accused in a statement.
- (iv) Search of house led to arrest of accused persons duly armed with weapons. Accused persons had a long history of involvement in

- criminal cases. It also attracted prohibitory limb of s 497 Cr.P.C.
- (v) Bail in non-bailable offences falling in prohibitory clause of S.497 Cr.P.C are not to be granted as a matter of course.
 - (vi) Attacked and murdered police officials. Bail was denied.

4.5.3 EXPEDITED PROCEDURES

Section 19 of the ATA relates to 'Procedure and Powers of the Anti-Terrorism Court'. Section 19(7) imposes a total time limit of seven days for the conclusion of an ATC trial, to be heard on a 'day-to-day' basis. If these time limits are not maintained, then the matter has to be brought to the notice of the Chief Justice of the relevant High Court for appropriate directions. Section 19(8a) states that non-compliance with the provisions of sub-section (7) may render the presiding officer of the Court liable to disciplinary action by the concerned High Court. In reality ATC trials last many months if not years. However, with a greater emphasis being placed on ATCs to perform, it is likely that these provisions could be enforced more strictly. This would have the effect of unduly pressurizing ATC judges to wind-up cases without affording adequate time to the defence to plead their case. This would violate both domestic and international standards on fair trial and due process.

The ATA also provides for trials in absentia through Section 19(10). The provisions are somewhat tempered by sub-sections (11), (11A), and (12). Sub-section (11) states that a court appointed advocate would be provided to defend an accused in his absence and that this will not impair the defendant's right to consult or be defended by a legal practitioner of his own choice (sub-section 11A). Sub-section 12 states that if the accused appears before the courts within sixty days of his conviction, the ATC shall set aside his conviction and proceed to try him afresh. The ATA also grants the ATC the discretion to try him afresh if he appears after the sixty day period.

4.5.4 CONFESSIONS BEFORE A POLICE OFFICER

Section 21H of the ATA allows for the conditional admissibility of a confession before a police officer. This deviates from the general criminal procedure

found in section 164 of the Cr.P.C. which requires such confessions to be made before a magistrate. This provision has been problematic and case law suggests that without corroborating evidence, it is unlikely that the ATCs will accept such a confession on its own. This judicial reasoning should be incorporated in the statute.

4.6 CONCLUSION

This chapter discussed deficiencies within the ATA which result in the abuse of the rights to life, liberty and fair trial and due process, among various others. This analysis has aimed to highlight areas requiring immediate reform to ensure that Pakistan's fight against terrorism does not undermine the freedoms guaranteed by the Constitution. The need to overhaul the definition of terrorism will help to limit cases brought before the ATCs and dealt with through special policing powers. This will go a long way in ensuring that the exceptional provisions of the ATA only apply to situations of elevated violence unique to terrorism and not supplant the general criminal law. The various other recommendations made in this chapter, aim to bring the ATA in line with international standards of human rights protections through the use of domestic legal precedents. With the sun having set on the Military Courts in January 2017, the need to revisit the ATA becomes imperative. The ad-hocism evident by legal measures such as the Protection of Pakistan Act 2014 and the Military Courts under the Pakistan Army Act 1952 cannot serve as a sustainable solution to the problem of terrorism trials in Pakistan. The ATA's overhaul must look towards a long-term solution to this issue.

CHAPTER 5

THE PROTECTION OF PAKISTAN ACT, 2014

ZAINAB MUSTAFA

5.1 INTRODUCTION

From 2011 to 2014 Pakistan witnessed a disturbing surge in terrorism. There was thus a dire need for effective counter-terrorism legislation, which would improve the disappointingly low conviction rates under the Anti-Terrorism Act 1997 (ATA)¹, in addition to strengthening the overall counter-terrorism framework. This was thus the motive behind drafting the Protection of Pakistan Act, 2014 (henceforth referred to as PPA or the Act). The Act has since then expired². The International Commission of Jurists (ICJ) had requested the Government of Pakistan not to renew PPA. Sam Zarifi, ICJ's Asia Director stated that not a single suspect has been convicted under PPA, and thus the legislation has failed in protecting people from terrorism and has instead abridged basic human rights protections³.

The preamble of the Act provides the rationale behind the promulgation of the law. It states that it is expedient to provide for protection against 'waging of war', threats to the security of Pakistan and to provide for the speedy trial of offences under PPA. The Act established special courts for prosecution of the accused through 'in camera' trials and gave a wide range of powers to military and law enforcement officials. It provides these officials with the authority to search and seize property without a warrant. Furthermore, military and law enforcement officials may choose to withhold information regarding the location, and grounds of detention. The Act also allows for proceedings to be conducted before Special Courts, which increases the possibility of incommunicado detention, enforced disappearances, torture and inhumane treatment⁴. Moreover, this Act must be viewed in the context of continuing unresolved enforced disappearances and uninvestigated allegations of torture and extrajudicial executions. Seen from this angle, it seems that the Act has been drafted in order to provide a shield for such blatant human rights violation in the name of counter-terrorism⁵, and thus violates fundamental international human rights principles. The purpose of this section is to highlight the provisions of PPA that are in contravention to fundamental human rights and constitutional freedoms.

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- 1 Dawn, 'Low Rate of Terrorists' Convictions Worries Military' (2011) <<http://www.dawn.com/news/636094/low-rate-of-terrorists-conviction-worries-military>> accessed 20 September 2016.
 - 2 The Express Tribune, 'Already Expired: Federal Govt Not to Re-Enact Protection of Pakistan Ordinance' (2016) <<http://tribune.com.pk/story/1172708/already-expired-federal-govt-not-re-enact-protection-pakistan-ordinance/>> accessed 21 September 2016
 - 3 Dawn, 'ICJ Terms Protection of Pakistan Act as 'Oppressive And Ineffective' (2016) <<http://www.dawn.com/news/1268211>> accessed 23 September 2016
 - 4 International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 2 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016
 - 5 International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 2 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

5.2 BACKGROUND

The PPA was preceded by the Protection of Pakistan Ordinance 2013 promulgated by the President of Pakistan on 31st October 2013. The law was poorly drafted and subjected to much criticism. The Ordinance was amended within 3 months on 22nd January 2014, which some have argued was to evade the Supreme Court judgement in the case of *Muhabat Shah*⁶. The case involved allegations pertaining to the unauthorized removal of 35 people from an internment center in Malakand by the armed forces. The Court passed several orders to produce these individuals, however, the army authorities only produced seven people. The remaining persons remain unaccounted for⁷. By July 2014, Parliament took up the law and made amendments to the text of the Ordinance, which were included in the final text of the Act.

Pakistan's Supreme Court, in December 2013, held that enforced disappearance includes the unacknowledged and unauthorized removal of detainees from internment centres and that, "no law enforcing agency can forcibly detain a person without showing his whereabouts to his relatives for a long period⁸." The court further elaborated that there was no legislative framework in Pakistan that allowed the armed forces to detain undeclared detainees without authorization and that officials of the armed forces who are responsible for enforced disappearances should be dealt with strictly in accordance with law⁹. PPA, as mentioned above, allows secret unacknowledged detention and in certain situations, non-disclosure of the grounds of detention.

The Ordinance was challenged in the Supreme Court of Pakistan and the petitioners sought a declaration from the court that the legislation is draconian in nature and thereby contrary to the fundamental rights of citizens¹⁰. However, the Supreme Court of Pakistan in the summer of 2015 judged the constitutionality of the Protection of Pakistan Ordinance and considered it constitutional¹¹. The following sections analyze various provisions of the PPA which give rise to potential human rights violations.

⁶ HRC. No 29388-K/13, 10 December 2013.

⁷ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 5 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

⁸ p 12 of HRC. No 29388-K/13, 10 December 2013.

⁹ p 20 HRC. No 29388-K/13, 10 December 2013.

¹⁰ Dawn, 'Ordinance Challenged in Supreme Court' (2014) <<http://www.dawn.com/news/1083169>> accessed 26 September 2016

¹¹ District Bar Association Rawalpindi and others v Federation of Pakistan - PLD 2015 SC 401

5.3 OVERVIEW OF LEGISLATIVE PROVISIONS OF THE PPA

S 3 of PPA provides security forces with unparalleled power to use force in order to prevent the commission of a scheduled offence.

S3(2)(c) authorizes arbitrary interference with the right to privacy¹².

S 6 violates the right to liberty by virtue of allowing preventive detention without adequate safeguards and authorizes previous arbitrary or unauthorized detentions carried out before the PPA.

S 9 of the Act authorizes unacknowledged and secret detention and in certain situations, the non-disclosure of grounds for detention¹³.

S 10 permits the exclusion of the public from hearings on the grounds of public safety on the prosecution's application¹⁴.

Sections 15¹⁵ and 5 (5)¹⁶ of the Act constitute reverse onus provisions and effectively reverse the burden of proof on the person accused, inconsistent with the presumption of innocence enjoyed by accused persons.

S 20 of the Act provides immunity from prosecution for actions carried out in good faith during the performance of duties¹⁷.

5.3.1 SECTION 3 OF THE PPA

The text of Section 3 of PPA is reproduced below,

Use of armed forces and civil armed forces to prevent scheduled offences. – (1) Any police Officer not below BS-15 or member of the armed forces or civil armed forces who is present or deployed in any area

¹² The Protection of Pakistan Act 2014 (4) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

¹³ The Protection of Pakistan Act 2014 (6) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

¹⁴ The Protection of Pakistan Act 2014 (7) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

¹⁵ Ibid

¹⁶ The Protection of Pakistan Act 2014 (5) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

¹⁷ The Protection of Pakistan Act 2014 (8) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

may, on reasonable apprehension of commission of a scheduled offence after giving sufficient warning, use necessary force to prevent the commission of a scheduled offence, 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 generality of sub-section (1), an officer of the police not below BS-15 or member of the armed forces or civil armed forces in the above situation may,-

- (a) After giving prior warning use such force as may be deemed necessary or appropriate, keeping in view all the facts and circumstances of the situation, against any person who is committing or in all probability is likely to commit a scheduled offence, it shall be lawful for any such officer after forming reasonable apprehension that death or grievous hurt may be caused by such act., to fire, or order the firing upon any person or persons against whom he is authorized to use force in terms hereof:

Provided that the decision to fire or order firing shall be taken only by way of last resort, and shall in no case extend to the inflicting of more harm that is necessary to prevent the scheduled offence which has given rise to the reasonable apprehension of death or grievous hurt

Provided further that all cases of firing which have resulted in death or grievous hurt shall be revised in an internal inquiry conducted by a person appointed by the head of the concerned law enforcement agency

Provided further that all cases of firing which have resulted in death may, if the facts and circumstances so warrant, be also reviewed in a judicial inquiry conducted by a person appointed by the Federal Government

S 3 of PPA provides security forces with unparalleled power to use force in order to prevent the commission of a scheduled offence. Under this provision, law enforcement officers should have reasonable apprehension that death or grievous injury may be caused and should give sufficient prior warning before the use of force. Furthermore, the use of force should only be used as a last resort and any death or injury caused by such use of force can be subjected to an inquiry, thereby attempting to restrict the damage that such a legislative provision can cause.

An analogy can be drawn with Section 102 of Pakistan Penal Code which states, "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." Case law under Section 102 is ambiguous and so is the wording of the section¹⁸. It is also questionable as to what would constitute lawful force under S 3. Furthermore, there is no way to gauge whether prior to the use of force 'sufficient warning' was given or whether force was actually used as a last resort, thereby, reducing these restrictions to mere paper tigers. Moreover, whether or not an inquiry was carried out after injuries or deaths caused by the use of force is not public knowledge, which makes the efficacy of these so-called safeguards in order to curb the illegal use of force questionable.

The UN Human Rights Committee has stated that States should take measures to prevent arbitrary killing by their security forces¹⁹. The legal framework of a State should be such that it only allows State forces to use lethal force in exceptional circumstances, where it complies with the principles of necessity and proportionality²⁰. Furthermore, the use of lethal force should also comply with the principle of proportionality. States must make sure that their law enforcement forces provide individuals suspected of committing scheduled offence every opportunity to surrender and use a graduated resort to force.

18 Anwar O, 'When Fired Upon...' Dawn (2013) <<http://www.dawn.com/news/1048043/when-fired-upon>> accessed 26 September 2016

19 Human Rights, Terrorism and Counter-Terrorism (Office of the United Nations High Commissioner for Human Rights 2016) 35 <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>>

20 Ibid

Moreover, the exceptions to the right of life must be interpreted narrowly. The extent of force used should be necessary to achieve the goal and must be a proportionate response to the threat involved²¹.

Merely asserting the prevention of a scheduled offence, or prevention of terrorism should not be sufficient to justify the use of fatal force²². In the case of *McCann*²³, in which three unarmed members of IRA were shot in Gibraltar, who were genuinely suspected of being about to detonate a bomb, the European Court of Human Rights held that careful scrutiny should be applied where deliberate lethal force is to be used. This applies to both the actions of the armed forces who will be administering the force, and the people responsible for the planning and control of the actions. Thus, in *McCann*, the people who shot the terrorists were not deemed to be in violation of the right to life, but the individuals who had planned the operation were held responsible. This is so because the persons who shot the terrorists did not believe they had any other option, whereas the people who had planned the operation had missed various opportunities to arrest²⁴. Therefore, when planning military/security counter-terrorism operations, there are certain factors which should be taken into account, *inter alia*, the right to life of the general population and suspects; trainings of those involved; calculations of the risk involved and precautions taken to minimize incidental loss of civilian life²⁵.

Permission to law enforcement officials to use lethal force can be used as a shield for target killings thereby violating the right to life and due process. Such practice is not only a blatant violation of the right to life but it also undermines the credibility of the State's counter-terrorism policy²⁶. Where there is a claim that loss of life has taken place caused by law enforcement agencies, this by itself is sufficient to give rise to an obligation to carry out an investigation²⁷. A failure on the part of the State to investigate such a killing is contrary to a State's procedural obligations pertaining to the right to life. This

21 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 107 <<http://www.osce.org/odihr>> accessed 20 October 2016

22 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 109 <<http://www.osce.org/odihr>> accessed 20 October 2016

23 *McCann and others v UK* (1995) ECHR

24 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 109 <<http://www.osce.org/odihr>> accessed 20 October 2016

25 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 109 <<http://www.osce.org/odihr>> accessed 20 October 2016

26 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 105 <<http://www.osce.org/odihr>> accessed 20 October 2016

27 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 103 <<http://www.osce.org/odihr>> accessed 20 October 2016

will be in addition to any violation found in respect of the killing itself²⁸. This is in line with a State's obligation under ICCPR²⁹.

The investigation mechanism should include procedural safeguards. The inquiry should be carried out in a rigorous, speedy and thorough manner by an independent body which has a degree of public scrutiny. Furthermore, the investigating body should have the ability of attributing responsibility for the death/injury. If State law enforcement agencies were responsible, a determination as to whether the killing was justified should be made. Additionally, if the investigation commenced on the basis of a complaint, the proceedings should involve the complainant³⁰. The investigation must be able to highlight any systemic failures that caused the death such as the preparation or planning of anti-terrorist police/military operations³¹.

Recommendations

- I. The use of force should be necessary and proportionate to the aim intended to be achieved.
- II. Force should be used as a last resort after giving sufficient prior warning.
- III. A person suspected of committing a scheduled offence should be given every opportunity to surrender.
- IV. Where there is a claim that loss of life has taken place due to the force used by law enforcement agencies, it should be sufficient to give rise to an obligation to carry out an investigation.
- V. The investigation should be carried out in a thorough, speedy and rigorous manner by an independent body which has a degree of public scrutiny.
- VI. The investigating body should have the ability of attributing responsibility for the death/injury.
- VII. A determination as to whether the killing was justified should be made, if in fact, the State is responsible.
- VIII. The complainant should be involved in the proceeding.
- IX. The investigation should highlight any systemic failures that caused the death for e.g. planning of the operation.
- X. When planning an anti-terrorism operation, the right to life of the

²⁸ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 103 <<http://www.osce.org/odihr>> accessed 20 October 2016

²⁹ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 106 <<http://www.osce.org/odihr>> accessed 20 October 2016

³⁰ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 106 <<http://www.osce.org/odihr>> accessed 20 October 2016

³¹ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 107 <<http://www.osce.org/odihr>> accessed 20 October 2016

general population and suspects should be kept in mind, in addition to any measures that can be taken to minimize incidental loss of civilian life.

5.3.2 SECTION 9 OF THE PPA

It can be said that the provisions of S 9 of PPA aim to legitimize secret detention. Secret detention violates myriad of international human rights standards that serve to protect individuals who have been deprived of their liberty from arbitrary detention, torture or other inhumane treatment or enforced disappearance. These human rights standards are enshrined in the International Covenant on Civil and Political Rights (ICCPR), the International Convention for the Protection of All Persons from Enforced Disappearance (Convention on Enforced Disappearances)³² and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

The above standards include the prohibition of secret detention³³; the place of detention where individuals are held should be officially recognized³⁴; detainees should have the right to notify family members (or others) promptly after their arrest, detention, or transfer from one location to another³⁵; the relevant authorities should have detailed official records of all detainees under their control; and the authorities should share information with human rights bodies, the detainees' lawyers, family and courts³⁶.

The authority to withhold information about the grounds for detention under S 9 is a violation of Pakistan's obligation under Article 9 (2) of ICCPR³⁷ in respect to the right of detainees to be notified upon arrest of the reasons for arrest and to be promptly informed of any charges against them. Furthermore, S 9 enables arbitrary detention, prohibited under Article 9 (1) ICCPR³⁸. Additionally, Article 9 (4)³⁹ provides the right to the detainee or others on their behalf to challenge the legality of the detention, which is undermined under this section.

32 In the Supreme Court *Muhammad Shah* case the apex court stated that even though Pakistan has not ratified the Convention on Enforced Disappearance, principles enshrined under it are applicable in Pakistan when interpreting rights such as the right to life

33 Article 17 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance

34 Article 17 (2) (c) of the International Convention for the Protection of All Persons from Enforced Disappearance

35 Article 10 (2) of the Declaration on the Protection of All Persons from Enforced Disappearance

36 Article 17 (3) of the International Convention for the Protection of All Persons from Enforced Disappearance

37 Article 9 (2) ICCPR

38 Article 9 (1) ICCPR

39 Article 9 (4) ICCPR

These violations make the detainee even more vulnerable to other human rights violations such as torture and inhumane treatment. Furthermore, S 9 should not be viewed in isolation. S 5 (1) of the Act states that all Scheduled offences are non-bailable. Therefore, in practice, every person charged with a Scheduled offence will be detained before the trial and will be subject to the provisions of Section 9 which permits secret and unacknowledged detention⁴⁰.

5.3.3 SECTION 6 OF THE PPA

S 6 (1) of the PPA authorizes the government to carry out preventive detention for a period of up to 90 days for individuals who are acting in a manner, “prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services.” S 6 further elucidates that any person who is “connected or reasonably believed to be connected” with the commission of a Scheduled Offence under the law may be preventively detained⁴².

S 6 also permits the Government to determine the detention period of “Enemy Aliens” from time to time, subject to Article 10 of the Constitution. Article 10 of the Constitution provides for judicial supervision of preventive detention. However, it explicitly excludes “enemy aliens” from this safeguard, in addition to the right to be defended by a lawyer or to have access to one⁴³. This is contrary to Article 16 of ICCPR which provides for the right of all people to recognition as a person before the law⁴⁴.

Section 6 (3) further stipulates that any time during the period of detention, detainees may be handed over to the Police or other law enforcement agencies for investigation and prosecution⁴⁵. This leaves detainees vulnerable to the threat of violence, torture and enforced disappearance.

40 International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 9 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

41 The Protection of Pakistan Act 2014 (5) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

42 International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 15 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

43 International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 15 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

44 International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 18 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

45 The Protection of Pakistan Act 2014 (5) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

Preventive detention (also known as administrative detention) not only facilitates arbitrary detention but also other human rights violations. The Working Group on arbitrary detention concluded:

...its concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights. It notes a further expansion of States' recourse to emergency legislation diluting the right of habeas corpus or amparo and limiting the fundamental rights of persons detained in the context of the fight against terrorism. In this respect, several States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time for very long periods, without charges being raised, without the detainees being brought before a Judge, and without a remedy to challenge the legality of the detention⁴⁶.

The UN Special Rapporteur on Torture has recommended that countries should abolish all forms of administrative detention in accordance with international standards. Administrative or preventive detention should only be allowed in limited and exceptional circumstances, for e.g. an officially declared emergency or by virtue of lawful derogation from human rights treaty obligations⁴⁷.

The grounds stipulated in S 6, in addition to the Scheduled offences under the Act are ambiguous and their ambit is too wide, which thereby equips the authorities with immense power to detain individuals for long periods of time on mere suspicion. This leads to arbitrary detention⁴⁸.

S 6 (5) provides retrospective legal authorization for arrests and detentions before PPA came into force. This goes against the efforts of the Supreme Court and civil society groups to hold officials accountable for arbitrary detentions and enforced disappearances⁴⁹.

⁴⁶ Report of the UN Working Group on arbitrary detention, doc. E/CN.4/2005/6, 1 December 2004, para. 61 cited in Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 157 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁴⁷ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 16 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

⁴⁸ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 16 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

⁴⁹ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 19 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

Safeguards enshrined in the Constitution of Pakistan elucidate that the detainee should be allowed representation; and that the detainee has a right to fair trial under Article 10. However, the Constitution of Pakistan does not have a requirement which states that a detainee has to be brought promptly before a judicial authority, and neither is there a provision that requires that detainees be informed of the grounds of detention, thus clearly falling short of international standards and breaching the right to liberty. Pakistan's judiciary, on the other hand, has held that grounds given by the authority must be complete and full⁵⁰ and that the grounds of detention should not be irrelevant or vague.

As evident from the wording of PPA and the lack of constitutional safeguards pertaining to the requirement that a detainee should be brought before a judicial authority promptly, the rights pertaining to detainees under the Constitution and jurisprudence of Pakistan are not very clear-cut and do not safeguard the right to a fair trial and liberty effectively. It is however important to note that under counter-terrorism measures, the ability of law-enforcement agencies to arrest and detain suspects quickly is seminal. Since this is a common method used in counter-terrorism strategies, and is being used in Pakistan as well, measures should be taken to ensure that every aspect of the strategy is legal⁵¹. However, provisions such as Section 9 of PPA are without justification since allowing the location of the detainee to be kept secret leaves the detainee vulnerable to torture.

It is important to consider the possible safeguards that can be adopted by the State of Pakistan in future legislation in order to make an arrest without a warrant and preventive detention measures legal.

The legislation should make clear that arrests without a warrant and preventive detention will only be considered lawful in the scenario where:

- The offence the individual is being detained for is an offence existing in domestic law;
- The purpose of the detention is to produce the detainee before a judicial authority;
- The legislation should cast an obligation on the law enforcement agencies to act diligently in this regard; and
- The arrest must be based on a reasonable suspicion. A past criminal record of an individual should not serve as a basis for this suspicion.

⁵⁰ Government of East Pakistan v Mrs. RB Shaukat PLD 1966 SC 286

⁵¹ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 147 <<http://www.osce.org/odihr>> accessed 20 October 2016

Reasonable suspicion should be based on objective justification. However, information provided by anonymous informants can be used as well. Furthermore, honesty and good faith is required from the law-enforcement officers⁵².

There are further requirements under international human rights law that the State should comply with in relation to detainees under the counter-terrorism framework. The detainee should have access to a lawyer, as well as access to the court to challenge/review the legality of the detention. The reasons for the arrest and the grounds for the charge should be conveyed promptly to the detainee⁵³. Moreover, there must be a continued legal basis for the detention⁵⁴.

What amounts to promptness when providing grounds for detention to the detainee should depend on the circumstances of the case. It does not necessarily mean 'immediate' and a few hours can suffice in terrorism cases. The European Court of Human Rights did not find a delay of 12 hours objectionable where national security was at stake⁵⁵. A delay of more than 18 hours should be considered an exception and not the general rule⁵⁶. Without being informed of the reason for detention, the detainee will not be able to challenge the legality of detention. The reasons for detention do not need to be in writing. However, it is insufficient to inform someone that they have been detained under the framework of emergency legislation and without providing a specific reason⁵⁷.

Additionally, the general presumption is that detainees should be brought before a court promptly. The court should also have the power to order release of the detainee. Mere authority to recommend release is not sufficient⁵⁸. In the case of *Brogan*, the detainee was produced before a judicial authority after

52 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 154 <<http://www.osce.org/odihr>> accessed 20 October 2016

53 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 147 <<http://www.osce.org/odihr>> accessed 20 October 2016

54 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 152 <<http://www.osce.org/odihr>> accessed 20 October 2016

55 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 157 <<http://www.osce.org/odihr>> accessed 20 October 2016

56 ECtHR, *Murray v UK*, Application no. 14310/88, 28 October 1994, para 72. Onwards cited in *ibid*

57 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 157 <<http://www.osce.org/odihr>> accessed 20 October 2016

58 Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 158 <<http://www.osce.org/odihr>> accessed 20 October 2016

four days and six hours which was held to be too long, even when there was a threat to national security⁵⁹. Furthermore, a delay of 14 hours was held to be unlawful even where the life of the nation was under threat⁶⁰. In relation to Article 9 of ICCPR, the meaning of 'promptly' has been referred to as more than a "few days" as set forth by Human Rights Committee in General Comment 8. It held that keeping a detainee incommunicado for five days without bringing him before a judge is a violation of article 9, paragraph (3)⁶¹. Continuing detention must be authorized by a judicial authority or an officer authorized by law⁶². A challenge should be able to be made before a formally constituted court or tribunal with the power to order release of the detainee. As per the Human Rights Committee, a military officer does not have a 'judicial character' of a court hearing. Furthermore, the authority should make a prompt decision⁶³.

Recommendations

- I. All detention procedures must comply with Article 10 of the Constitution of Pakistan.
- II. An arrest must be based on reasonable suspicion.
- III. The purpose of the detention should be to produce the detainee before a judicial authority.
- IV. The detainee should be informed of the grounds of detention promptly.
- V. Reason for detention should be an offence under domestic legislation.
- VI. The detainee should be informed of his rights under domestic law.
- VII. The detainee should be given access to counsel so that they may challenge the legality of their detention.
- VIII. The detainee should be brought before a judicial authority promptly.
- IX. The authority should make a prompt decision regarding the detainee.
- X. The individual detained or arrested should have the right to notify or require the competent authority to notify any person of his choice about his arrest, detention and whereabouts.
- XI. An individual or their counsel should have the right to make a request

⁵⁹ ECtHR, *Brogan v UK*, para. 62 cited in *Countering Terrorism, Protecting Human Rights: A Manual* (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 158 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁶⁰ ECtHR, *Aksoy v Turkey*, para. 78 cited in *ibid*

⁶¹ *Countering Terrorism, Protecting Human Rights: A Manual* (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 158 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁶² *Countering Terrorism, Protecting Human Rights: A Manual* (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 158 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁶³ *Countering Terrorism, Protecting Human Rights: A Manual* (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 161 <<http://www.osce.org/odihr>> accessed 20 October 2016

or complain about the treatment, where for e.g. there has been use of torture, to the authority in charge of the place of detention.

- XII. If the above request is not heard, the complainant (detainee) should have the right to have his complaint heard before a judicial authority.
- XIII. An individual who has been later found not to be guilty should be able to seek compensation⁶⁴.
- XIV. There should be a continued legal basis for detention.
- XV. The court should have the power to order release of the detainee, & not to merely *recommend* release.

5.3.4 SECTIONS 15 AND 5 (5) OF THE PPA

S 15 of the PPA states that all persons charged with committing a Scheduled Offence shall be presumed to be engaged in “waging war against Pakistan” unless they prove their non-involvement in the offence⁶⁵. S 5 (5) further stipulates that a person arrested or detained under the Ordinance whose identity cannot be ascertained shall be considered to be an Enemy Alien and therefore presumed to have joined waging war or insurrection against Pakistan⁶⁶.

The Chairperson of the UN Working Group on Arbitrary Detention and the Special Rapporteur on the Independence of Judges and Lawyers have stressed on the right to a fair trial. He noted,

the essence of a democratic society includes the right to challenge the lawfulness of detention before a court (ICCPR, Art 9 (4)) and the right to a fair trial by a competent, independent and impartial court of law (ICCPR, Art 14); they protect every person from arbitrary detention and unjust punishment and safeguard the presumption of innocence⁶⁷.

Section 15 of PPA effectively reverses the burden of proof in respect of the persons mentioned above, thereby removing the presumption of innocence. The separate ingredients of the right to a fair trial may be restricted in certain situations, provided that the right to a fair trial as a whole is not compromised⁶⁸. The right to be presumed innocent is a norm of customary

⁶⁴ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 150 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁶⁵ The Protection of Pakistan Act 2014 (7) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

⁶⁶ The Protection of Pakistan Act 2014 (7) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

⁶⁷ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 166 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁶⁸ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 168 <<http://www.osce.org/odihr>> accessed 20 October 2016

international law and is applicable at all times, even during times of war or a state of emergency⁶⁹. Low conviction rates in terrorism trials seems to have been the reason for reversing the burden of proof to ensure convictions of those accused and to provide authorities and prosecutors an unprecedented advantage⁷⁰.

Section 15, also known as a 'reverse onus' provision is a violation of Article 10A of the Constitution of Pakistan and it goes against the fundamental principle of the right to a fair trial which elucidates that every person charged with a criminal offence should be presumed to be innocent unless and until they are proven guilty in a fair trial⁷¹. In the Supreme Court *Suo Motu Case No. 5 of 2012*⁷², Jawwad S. Khawaja, J elucidated,

Indeed, it is the cornerstone of the administration of justice in this country that all people, whether they appear to us innocent or guilty, are entitled to the due process of law and *are to be deemed innocent until proven guilty after a fair trial*...Article 10A of the Constitution has now codified this principle of due process in the form of a fundamental right. It says: "For the determination of his civil rights and obligations in any criminal stage against him a person shall be entitled to a fair trial and due process.

The presumption of innocence casts the burden of proof on the prosecution, thus if there is reasonable doubt, the accused cannot be found guilty⁷³. The members of the Court should not commence proceedings with a pre-conceived notion that the accused has committed the offence that he is charged for⁷⁴. Thus, it is evident that the reversal of burden of proof is a flagrant and unnecessary violation of this inherent right.

Ensuring a fair trial is not only necessary for the reasons enumerated above but also important so that a suspected terrorist does not attain the status of a martyr for the cause. Thus, providing a fair trial will prevent the danger that an

⁶⁹ UN Human Rights Committee General Comment 29, para 11; UN Human Rights Committee General Comment 32, para 6

⁷⁰ Anwar O, *Legislating Away Innocence: Assessing The Reverse Onus Provisions of the Protection of Pakistan Ordinance* (The Center for International Law and Human Rights 2014) 1

⁷¹ Article 14 (2) ICCPR

⁷² *Regarding Allegation of Business Deal Between Malik Riaz Hussain and Dr. Arsalan Ifitikhar at Para 12 cited in Anwar O, Legislating Away Innocence: Assessing The Reverse Onus Provisions of the Protection of Pakistan Ordinance* (The Center for International Law and Human Rights 2014) 7

⁷³ *Countering Terrorism, Protecting Human Rights: A Manual* (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 182 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁷⁴ *Countering Terrorism, Protecting Human Rights: A Manual* (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 182 <<http://www.osce.org/odihr>> accessed 20 October 2016

alleged terrorist can be seen as a martyr or a victim⁷⁵. An attempt to undo the presumption of innocence may cause the fundamental tenets of the criminal justice process to come crashing down⁷⁶.

Recommendation

- Counter-terrorism legislation should not have a reverse onus provision as it is a clear violation of Article 14 of ICCPR and therefore Pakistan's obligations under international human rights law.

5.3.5 SECTION 3 (2) (c) OF THE PPA

The right to privacy is enshrined under Article 14 of the Constitution of Pakistan, which states that (1) the dignity of man and, subject to law, the privacy of home, shall be inviolable. Furthermore, Article 17(1) of ICCPR provides that no one "shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence..."⁷⁷ UN Human Rights Committee has elaborated that the prohibition on arbitrary interference under Article 17 of ICCPR includes interference provided for under the law⁷⁸.

In contravention to Article 14 of Pakistan's Constitution and Article 17 (1) of ICCPR, S 3(2) (c) of the Act provides authority to law enforcement officers to enter and search a premises without a warrant. This provision essentially curtails an individual's right to privacy and their right to apply for remedies. Privacy is one of the fundamental human rights that underpins human dignity⁷⁹. The right to privacy should remain protected, and the level of authority given to law enforcement under PPA leaves room for abuse of this power. It provides law enforcement agencies with unfettered power to enter and search private premises without judicial approval. Therefore, future legislation should protect the right of privacy, and law enforcement agencies should only be able to enter and search with a warrant. Such measures must also be open to challenge before a court⁸⁰. Counter-terrorism measures should be effective for the purpose that they are intended for, necessary in the

⁷⁵ Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2007) 188 <<http://www.osce.org/odihr>> accessed 20 October 2016

⁷⁶ Ong, K (2013). Statutory Reversal of Proof: Justifying Reveals and the Impact of Human Rights. University of Tasmania Law Review, 32 (2), p. 253 cited in Anwar O, Legislating Away Innocence: Assessing The Reverse Onus Provisions of the Protection of Pakistan Ordinance (The Center for International Law and Human Rights 2014) 7

⁷⁷ Article 17 ICCPR

⁷⁸ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 19 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

⁷⁹ Article 17 ICCPR

⁸⁰ Guidelines On Human Rights and The Fight Against Terrorism (Council of Europe 2002) 4

context of a democratic society and proportionate to the advantage gained⁸¹. Such unrestricted authority also has the potential to disproportionately affect minorities, which can have a serious impact on the society as a whole.

Recommendations

- I. Law enforcement agencies should only be able to enter a private premises with a warrant.
- II. If there is a state of emergency, and the right to privacy is restricted, such measures should be open to challenge before a court.

5.3.6 SECTION 10 OF THE PPA

Section 10 of the PPA authorizes a Special Court to exclude all or any portion of the public during any part of the proceeding upon the request of the prosecution. This request can be made on the grounds of 'public safety'⁸². This is contrary to Article 14 of ICCPR which lays down, "everyone shall be entitled to a fair and a public hearing by a competent, independent and impartial tribunal established by law"⁸³. UN Human Rights Committee has stated that public proceedings ensure that the proceedings remain transparent thereby protecting the interests of individuals and the society at large⁸⁴. This general rule is subject to certain exceptions which must be narrowly construed: reasons of morals; national security in a democratic society, public order or where the court is of the opinion that publicity would prejudice the interests of justice⁸⁵. Note that public safety is not one of the exceptions. Although Section 10 states that the sentence will be passed in public, it is the combined effect of Sections 9 and 10 that is worrying. It could potentially mean that the family of the detainee may only find out about the detention when the sentence is announced in public⁸⁶. Section 10 is therefore a violation of Article 14 ICCPR.

Recommendation

- Public should only be excluded from a proceeding where national security, public order are affected or where the court is of the opinion that

⁸¹ Counter-Terrorism and The Protection of Human Rights Human Rights Advocates) 12

⁸² International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 10 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

⁸³ Article 14 ICCPR

⁸⁴ UN Human Rights Committee, General Comment No. 32

⁸⁵ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 11 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

⁸⁶ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 11 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

publicity would prejudice the interests of justice.

5.3.7 SECTION 20 OF THE PPA

Section 20 of the PPA stipulates that “no member of the police, armed forces or civil armed forces acting in aid of civil authority, Prosecutor General, prosecutor, Special Judicial Magistrates or the Judge of a Special Court shall be liable to any action for the acts done in good faith during the performance of their duties”⁸⁷. Furthermore, S 6 (5) provides retrospective immunity for arrests and detentions made by the armed forces or civil armed forces before PPA was enacted⁸⁸. Granting immunity for crimes under international law and grave violations of human rights are prohibited under international law. Under international law States have a duty to investigate and prosecute any such violations and to provide a remedy⁸⁹.

PPA's provisions have the potential to cause grave miscarriage of justice. Therefore, it is essential that when such wide-ranging powers are granted to law enforcement officials, the powers should not be accompanied with complete immunity including indemnity for actions prior to the promulgation of PPA⁹⁰.

Recommendations

- I. There should be no immunity for officials for crimes under international law.
- II. States should have a duty to investigate, prosecute any violations of rights and provide a remedy.

5.4 CONCLUSION

PPA has been subjected to wide criticism by rights activists and politicians. Asma Jehangir was of the opinion that this legislation would push the country

⁸⁷ The Protection of Pakistan Act 2014 (8) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

⁸⁸ The Protection of Pakistan Act 2014 (5) <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> accessed 15 September 2016

⁸⁹ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 13 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

⁹⁰ International Commission of Jurists, 'Protection of Pakistan Bill, 2014: An Affront to Human Rights' (ICJ 2014) 14 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf>> accessed 20 September 2016

towards a security state as opposed to a welfare state⁹¹. Now that the PPA has expired, Pakistan should either focus on drafting new anti-terrorism legislation that counters terrorism effectively, while protecting rights, after taking input from civil society and international experts⁹² or strengthen the current criminal justice system.

⁹¹ Dawn, 'Ordinance Challenged in Supreme Court' (2014) <<http://www.dawn.com/news/1083169>> accessed 26 September 2016

⁹² The Express Tribune, 'Pakistan Protection Ordinance: Human Rights Watch Urges Senate to Strike Down 'Repressive' Law' (2014) <<http://tribune.com.pk/story/694222/human-rights-watch-urges-senate-to-strike-down-repressive-protection-of-pakistan-ordinance/>> accessed 29 September 2016

CHAPTER 6

THE PAKISTAN ARMY ACT 1952 AND THE JURISDICTION OF MILITARY COURTS

MINAHIL KHAN

6.1 INTRODUCTION

*"[I]t is hard to imagine a judicial system that protects the rights of victims and at the same time remains indifferent and passive toward flagrant crimes by those who have violated them,"*Theo van Boven, UN expert on the right to restitution, compensation and rehabilitation¹.

In the wake of the Peshawar carnage the Prime Minister, Nawaz Sharif, announced the establishment of military courts under the National Action Plan. This however was not the first time that military courts were introduced in our legal framework. Due to Pakistan's tumultuous history with terrorism, insurgencies and ethnic violence, we have already experienced military involvement in the judicial processes.

The establishment of military courts to try civilians has been widely criticized; whether it is because they abridge the trichotomy of power or because they are an affront to the right of fair trial and due process or because they negate some of the fundamental features of a democracy- their criticisms are wide and many.

The premise of the 21st amendment was the failure of the civilian Anti-Terrorism Courts, with their inordinate delays and low conviction rates, to deal with the ongoing complex law and order situation². To counter the rate of acquittal and the delays caused due to the lack of protection provided to the prosecution the State decided to establish a parallel judicial system with complete immunity from the fundamental freedoms provided in the Constitution. Therefore, the life, dignity, liberty and free movement of citizens was safeguarded by proposing a law that took those very freedoms from alleged terrorists.

The reasonability of such an action was one of the subjects of the Supreme Court judgment challenging the 21st amendment³. As per Justice Khosa in his dissenting opinion the establishment of military courts was a knee jerk reaction and an imprudent and short term solution to a problem that required

¹ UN Doc. E/CN.4/ Sub.2/1992/8, para. 5.5.

² Umer, R, Rethinking Justice, Dawn News, 01.02.16, (<http://www.dawn.com/news/1236633/rethinking-justice>)

³ District Bar Association Rawalpindi and others v. Federation of Pakistan PLD 2015 SC 401

a better thought out mechanism of combatting terrorism.

The reason for the high rate of acquittal by the civilian courts was the lack of evidence, the lack of proper investigation and the lack of proper prosecution. As per Ejaz Afzal Khan, J in his dissent in the same judgment, the lack of evidence is due to a lack of will on the part of the witness to give evidence and this lack of will is due to the lack of proper security. Where evidence is not a problem it is the lack of proper investigation and the lack of prosecutorial skills that leave lacunae and create loopholes in the system. Military courts provide shortcuts and palliatives but do not provide an enduring solution to these problems.

Since the 21st Amendment passed in January 2015, military courts have sentenced 274 'terrorists'; 161 have been sentenced to death while 113 have been imprisoned and twelve civilians have already been executed after secret trials⁴. As per a former officer of the army's judge advocate general (JAG) branch there were over six thousand suspects detained at different internment centres⁵. It is unlikely, however, that all these detainees will be brought before the Military Courts.

While Pakistan does have a legal duty to protect its people against terrorist attacks and a duty to investigate, prosecute and bring perpetrators to justice, the counter terrorism measures it uses must also be lawful and legitimate. Departures from legal procedures and safeguards in the name of countering terrorism is counter-productive as it fuels the very violence it is meant to curtail⁶.

6.2 LEGITIMIZING MILITARY COURTS

Military courts fit rather uneasily into the Constitution of Pakistan. They were introduced in the 21st amendment to the Constitution and contain a sunset clause. Proponents express solace in the fact that they are only to remain in force for a period of two years in the 'hope and expectation that by that time the existential threat which Pakistan is facing would be resolved'⁷. However,

4 https://www.ispr.gov.pk/front/main.asp?latest=1&o=t-press_release

5 Asad, M, Military Courts Quietly Given Powers to Try Internment Centre Suspects, Dawn News, 25.08.2015, (<http://www.dawn.com/news/1202421>)

6 International Commission of Jurists, "Report of the eminent jurists panel on terrorism, counterterrorism and human rights", July 2009, (<http://icj.wpengine.netdna-cdn.com/wpcontent/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-JuristsPanel-on-Terrorism-series-2009.pdf>)

7 Mian Saqib Nisar, J in District Bar Association Rawalpindi v Federation of Pakistan, PLD 2015 SC 401

none of the advocates of military courts have been able to provide any substantive proof as to how these courts will function better than civilian courts apart from the argument that the rate of conviction will potentially be higher. This argument is also flawed as to equate justice with the rate of convictions goes against the precept of rule of law⁸.

There have been attempts by proponents of military courts at reconciling their operation with international law. Justice Bandial called to consider this an international law crisis and not just one pertaining to municipal law. In light of that he argued that there is a difference between lawful and unlawful combatants in public international law as was endorsed in the case of *Ex Parte Quirin*⁹ wherein it was held that unlawful combatants are not prisoners of war and are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

He opined that the principles in *Mehram Ali*¹⁰ and *Sh. Liaquat Hussain*¹¹ apply to criminal administration of justice by the civil courts of the land, but cannot be adopted across the board for the trial of terrorist militants who are engaged in waging war against Pakistan through belligerent and hostile armed conflict with the Armed Forces and law enforcement agencies of Pakistan. In his opinion this crisis is of international proportions and should be labelled as such and that the rules of procedure applicable for trial of a person in a criminal case before a military court do not violate any accepted judicial principle governing trial of an accused person.

However, the problem still remains that this is an internal crisis. There is a flagrant violation of human rights as per media reports and due to the opaque nature of their operation and the lack of a window for appeal it is impossible to obtain factual clarity as to what standards are being applied and followed¹².

The International Commission of Jurists has observed that the judges are part of the executive branch of the State and continue to be subjected to military command. The right to appeal to civilian courts is not available¹³, the right to a public hearing is not guaranteed; a duly reasoned, written judgment, including evidence and legal reasoning is denied; the court procedure,

⁸ Umer, R, Rethinking Justice, Dawn News, 01.02.16, (<http://www.dawn.com/news/1236633/rethinking-justice>)

⁹ *Ex Parte Quirin* [317 US 1] (1942)

¹⁰ *Mehram Ali and others v. Federation of Pakistan and others* PLD 1998 SC 1445

¹¹ *Sh. Liaquat Hussain and others v. Federation of Pakistan* PLD 1999 SC 504

¹² Hamdani, Y, 2016, "What standards of justice should military courts in Pakistan adhere to?" Express Tribune

¹³ The right of review is available to the High Courts and Supreme Court only on the grounds of *coram non iudice*, *mala fide* and without jurisdiction and this has been very narrowly interpreted by the Supreme Court in their recent judgment titled *Said Zaman Khan v. Federation of Pakistan and others* (Civil Petitions No.842 OF 2016

selection of cases, location and timings of the trial and all details of the offences are kept secret and the death penalty is implemented after unfair trials¹⁴. They have come to the conclusion that the proceedings before these courts fall short of national and international standards requiring fair trials before independent and impartial courts.

6.3 PAKISTAN ARMY ACT 1952

6.3.1 PURVIEW

Prior to January 2017 military courts after amendments to the Army Act, 1952 had the authority to try persons who claim to, or are known to, belong to “any terrorist group or organization using the name of religion or a sect” and carrying out acts of violence and terrorism, including:

- Attacking military officers or installations;
- Kidnapping for ransom;
- Possessing, storing or transporting explosives, firearms, suicide jackets or other articles;
- Using or designing vehicles for terrorist attacks;
- Causing death or injury;
- Possessing firearms designed for terrorist acts;
- Acting in any way to “over-awe the state” or the general public;
- Creating terror or insecurity in Pakistan;
- Attempting to commit any of the above listed acts within or outside of Pakistan;
- Providing or receiving funding for any of the above-listed acts; and
- Waging war against the state¹⁵.

6.3.2 PROCEDURES FOLLOWED BY MILITARY COURTS

According to Government sources, provincial apex committees select cases of individuals to be referred to the military courts and forward them to the Ministry of Interior for final approval. The criteria for selection is not publicly known. Under the Pakistan Army Act, a military court is composed of three¹⁶

¹⁴ Pakistan: “Military Justice” system an affront to human rights- new analysis brief, <http://www.icj.org/pakistan-military-justice-system-an-affront-to-human-rights-new-analysis-brief/>

¹⁵ S. 2(d) of the Army Act 1952

¹⁶ Section 87 of the Army Act: A field general Court martial shall consist of not less than three officers.

to five serving officers of the armed forces¹⁷ and there is no requirement for the military officers to be legally trained. The law officer of the Judge Advocate General (JAG) branch only has advisory powers but no decision making authority in this regard. Even the officers who comprise the appellate tribunals are military officers without legal training and who remain subjected to the chain of command. These military appellate tribunals have the power to reduce or enhance punishment awarded by the courts of first instance¹⁸. The verdict of the military court is final and there is no further appeal in any civilian court except in review on the grounds of being *coram non judice*, mala fide and without jurisdiction which are elaborated below.

The rules of evidence in the Army Act are the same as those observed by civilian criminal courts¹⁹. However, the amendments to the Act allow the Federal Government to transfer proceedings pending in any other court against any person accused (under the scheduled offences) to a military court. Once the case has been transferred there is no requirement for a re-appraisal of evidence and verdicts can be based on previous evidence and recorded statements.

The Act also does not require the trials to take place in public and pursuant to the Ordinance amending the Act the judges of the military courts can hold in camera trials and keep the identities of the individuals associated with the cases a secret. Furthermore, an accused person may be tried and punished for offences under the Act “in any place whatever²⁰”.

Fairness requires that trials should be public and denying access to human rights organizations, journalists and even family members to the military court proceedings is detrimental to the rights of the defendants and this opacity makes it harder to discern where and how human rights are being abridged²¹.

17 Section 85 of Army Act: A general Court martial shall consist of not less than five officers each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of captain.

18 S. 133, Pakistan Army Act

19 S. 112, Pakistan Army Act

20 S. 93 of the Act: Any person subject to this Act who commits any offence against it may be tried and punished for such offence in any place whatever.

21 P. 15, International Commission Of Jurists, Briefing Paper on Military Injustice in Pakistan, June 2016, <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf>

6.4 MILITARY COURTS: COMPATIBILITY WITH HUMAN RIGHTS AND INTERNATIONAL LAW

Just a year from the pronouncement legitimizing military courts the Supreme Court heard sixteen petitions from relatives of people who had been subjected to enforced disappearances. The victims of the disappearance had been subjected to secret trials and it was contended that the procedure adopted and followed denuded the proceedings of the requirement of a fair trial and due process. It was also contended that the convicts were kept in internment centres for years, no pre-trial proceedings were conducted, no summary of evidence was produced to the accused or presented in court, there was no objective criteria and nothing on record to illustrate the basis for the selection of these cases and that one of the convicts was a juvenile and therefore could not be tried by the Field General Court Martial. Azmat Saeed, J in his judgment held that while the right to appeal on the grounds of mala fide, coram non iudice and without jurisdiction was available to the petitioners, the grounds were to be given a strict interpretation. He held that the nature of the offense was exactly the 'mischief' sought to be suppressed by the law and the trial reflected the due fulfillment of the mandate and purpose of the law. He also clarified that the High Court nor the Supreme Court could sit in appeal over the findings of the FGCM or undertake an exercise of analyzing the evidence produced before it or dwell into the "merits" of the case. All other arguments regarding the fundamental freedoms and the trial of a minor were subverted on the ground that the Pakistan Army Act was validly and effectively incorporated through the twenty-first amendment in the first schedule to the Constitution and therefore could not be called into question on the ground of being in violation of fundamental rights²². This judgment confirms the fears of international jurists that military courts will not only justify enforced disappearances but will also work in an opaque manner and in contravention to all the rights that are otherwise afforded to defendants in a trial even though under international law one of the obligations of the State is to respect and ensure the right not to be arbitrarily deprived of life and not to be subjected to enforced disappearance²³.

²² Said Zaman Khan v. Federation of Pakistan and others (Civil Petitions No.842 OF 2016, 3331, 3332, 3674 & 3777 OF 2015, 06, 32, 211, 278, 417, 1263,1306, 1335, 1353, 1503 AND 1541 OF 2016 available at http://www.supremecourt.gov.pk/web/user_files/File/C.P_842_2016.pdf)

²³ International Covenant on Civil and Political Rights (Arts. 2.1 and 3.)

In the same case, the argument regarding violations of Art. 10 (arrest and detention) were not even considered on the ground that it was previously decided by the Supreme Court that the provisions of the Act are protected under Article 8(3)(a) of the Constitution from being challenged on the ground of inconsistency with fundamental rights. Therefore non-compliance of Art 10(2) for non-production of the accused officers within 24 hours of their arrest before a Magistrate and the absence of a written order of the accused could not invalidate the arrests²⁴. Applying the same dicta no remorse was shown towards either the suspects or their families even though international jurisprudence is unanimous in considering that the anguish and suffering caused to the family²⁵ by the disappearance of a loved one and the continuing uncertainty over the person's fate and whereabouts are a form of torture or cruel and inhuman treatment.

It is also universally upheld that any deprivation of liberty must comply with the following general principles:

- i) lawfulness (material and procedural);
- ii) legitimacy (purpose of the detention);
- iii) necessity and reasonableness of the detention;
- iv) proportionality; and
- v) protection of human rights, particularly the rights to personal security, against arbitrary detention and with the guarantee of effective judicial remedy. In addition to the above, international norms and standards require the following measures to prevent enforced disappearances and extrajudicial executions

It is a duty of the State to regulate which authorities may order deprivation of liberty and the conditions under which such orders may be given. States must also ensure strict control, including a clear chain of command over all officials responsible for apprehension, detention, arrest, custody, preventive detention, transfers and incarceration, as well as all officials authorized by law to use force and firearms. There is an obligation to ban prolonged incommunicado detention and prolonged solitary confinement and to ensure the right of the detainee to communicate with the outside world, particularly with family members or a lawyer²⁶.

24 Shahida Zahir Abbasi v. President of Pakistan PLD 1996 SC 632

25 p.13 (<http://www.icj.org/wp-content/uploads/2016/07/Universal-PG-Enforced-Disappearance-N10-Publications-Practitioners-Guide-2015-ENG.pdf>)

26 UN Doc. E/CN.4/ Sub.2/1992/8

Scrupulous observance of the international norms concerning the right to personal liberty and freedom from arbitrary detention is essential for preventing enforced disappearance and extrajudicial execution²⁷. The protocols and conditions required under both international and national law are absent in the military court framework and there is little to no accountability as was displayed in the recent judgment regarding enforced disappearances mentioned above²⁸.

In light of the above it becomes clear that the trial of civilians by military courts is an affront to human rights and international law. With the operation of military courts having reached its end it becomes even more unclear what the future holds; whether the operation of these courts will be extended for another two years or whether the State will succumb to the pressure from the international arena to end their operation. Listed below are some recommendations that if incorporated in the system of military courts will make it more compliant to both national and international standards of due process and fair trial.

6.5 AMENDING THE LAW

In May 2016, the National Assembly (lower house of parliament) passed a bill to strengthen the criminal justice system and "root out the evil of terrorism with exemplary deterrence". The bill proposes the following amendments²⁹:

- Introduce a vaguely framed offence that makes wounding religious feelings through words (including using loudspeakers) or gestures punishable with one to three years imprisonment;
- Increase the minimum sentence for "forced marriage" from three to five years imprisonment if the victim is a minor or a non-Muslim;
- Increase the sentence for police officers guilty of "neglect/violation of duty" from three months to three years imprisonment;
- Make convictions on the basis of "modern techniques" lawful (previously the law gave the court discretion to allow evidence based on modern techniques to be produced);
- Introduce a new crime of "lynching" in the Anti-terrorism Act, 1997, punishable with three years imprisonment; and

²⁷ Universal Declaration of Human Rights (arts. 3 and 9); International Covenant on Civil and Political Rights (art. 9)

²⁸ Said Zaman Khan v. Federation of Pakistan and others

²⁹ Criminal Laws (amendment) Act, 2016, accessed at : http://www.na.gov.pk/uploads/documents/1463738605_158.pdf

- Introduce long imprisonment sentences (five to seven years) for people who provide “false information” in criminal cases where the prescribed penalty is life imprisonment or death sentence, and one fourth of the sentence in other cases³⁰.

These amendments fail to respond to the specific weaknesses of the criminal justice system that were used as the justification for establishing military courts to try terrorism-related cases. The rationale behind the establishment of military courts (as discussed above as well) was the alleged failure of the civilian courts with their high rate of acquittals and slow progress and the threat of violence from and intimidation. The current bill fails to address any of these problems which will again fuel the inadequacies of civilian courts and perpetuate military interference.

6.6 CONCLUSION AND RECOMMENDATIONS

The operation of military courts in Pakistan was incompatible with the right to a fair trial and raise the following concerns:

- i. Lack of an independent forum
- ii. Secret trials
- iii. Unavailability to appeal to civilian courts and the limited power of review given to the High Court and Supreme Court
- iv. Enforced disappearances
- v. The absence of a duly reasoned and written judgment
- vi. Trial of children
- vii. Imposition of death penalty without an independent trial.

Although international standards are clear in stating that the jurisdiction of military courts should not be extended to civilians; bearing in mind the current war like situation and the fact that the military courts were established by virtue of constitutional cover, and their operation may be renewed the following recommendations are proposed:

- I. In a recent resolution on the integrity of the judicial system the UN Human Rights Council called upon States to integrate military courts or special tribunals for trying criminal offenders into the general judicial system, and to ensure that such courts apply internationally recognized fair trial standards³¹. This is similar to the pronouncement

³⁰ International Commission of Jurists, Briefing Paper on Military Injustice in Pakistan, p. 13, Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2013, (<https://documents-ddsny.un.org/doc/UNDOC/GEN/N13/421/29/PDF/N1342129.pdf?OpenElement>)

in the *Mehram Ali* case and is a feature that could benefit the military court system in Pakistan.

- II. The trial of civilians by military courts should be exceptional, necessary and justified by objective and cogent reasons as to why the same trials cannot be carried out by civilian courts and the criteria for selection of these cases should be made public;
- III. That the trials by military courts should comply with international and national standards of a fair trial, ensure due process and protect all fundamental freedoms available to the defendants:
 - (a) Human rights organizations, journalists and family members of the accused should be allowed to attend the trials;
 - (b) The location of the trials should be made public;
 - (c) The evidence collected and the arguments made should not be concealed;
 - (d) Trial should be by independent and impartial judges who do not fall within the chain of command of the military. The UN Human Rights Committee has made clear that 'the trial of civilians in military or special courts raise serious problems as far as the equitable, impartial and independent administration of justice is concerned³²';
 - (e) Ensure that the accused are free from torture and ill treatment and that confessions are not extracted on the basis of such torture and ill treatment;
 - (f) The accused should be allowed to choose a representative.
- IV. That the Supreme Court and High Court should be given appellate powers over the decisions of the military courts. They should be able to look into the facts of the case in order to determine whether there have been any miscarriages of justice.
- V. Improve the operation of the ordinary courts in order to equip them to deal with this crisis without having to resort to military intervention:
 - (a) Guarantee the independence, impartiality, competence and accountability of the ordinary courts in order to enable them to

32 Human Rights Committee, General Comment 32, "Article 14: Right to Equality before courts and tribunals and to a fair trial," (General Comment 32) UN Doc. CCPR/C/GC/32 para 22

- adhere fully to applicable human rights law and standards, including fair trial and due process guarantees³³. Failure of the ordinary courts to meet these standards should not be used to justify military courts;
- (b) Protection procedures should be adopted for judges, lawyers and the witnesses in terrorism cases;
 - (c) Provide a mechanism for speedy disposal of cases without violating the principles of a fair trial;
 - (d) Strengthen prosecutorial and investigative skills.
- XI. Military courts must not have jurisdiction over minors; in consonance with the ICCPR, the Convention of the Rights of the Child³⁴, and the UN Standard Minimum Rules for the Administration of Juvenile Justice.
- XII. Safeguards should be introduced against enforced disappearances and compensation be provided to the families of victims of such disappearances.
- XIII. In light of international obligations the moratorium on death penalties awarded by military courts must be reinstated.

³³ In tune with Article 14 of the ICCPR

³⁴ Ratified in 1990

CHAPTER 7

THE ACTIONS (IN AID OF CIVIL POWER) REGULATIONS, 2011

MAIRA SHEIKH

In June 2011, the Government of Pakistan issued two identical regulations, one for the Federally Administered Tribal Areas (FATA) and one for the Provincially Administered Tribal Areas (PATA) known as the Actions (in Aid of Civil Power) Regulations (AACPR)¹. The AACPR were issued as notifications pursuant to Article 245(1) of the Constitution of Pakistan². Article 245(1) requires the Armed Forces, under direction from the Federal Government, to defend the State against external aggression or threat of war, and act in aid of civil power when called upon to do so in conjunction with established law³.

7.1 PRE-ACCPR SITUATION IN FATA AND PATA

As ongoing negotiations and locally enforced peace agreements with the Tehreek-e-Taliban Pakistan (TTP) and their associates failed, significant military operations began within PATA towards the end of 2007. Operation Rah-e-Haq launched in November 2007 in Swat. By January 2008, the first phase of military operations subsided and in July 2008, the second phase, Operation Rah-e-Haq II, began. In the course of Operation Rah-e-Haq II, both the Pakistan Army and Air Force conducted operations. The third phase of Operation Rah-e-Haq in Swat began in January 2009. At the end of Operation Rah-e-Haq III, the Malakand Peace Accord was signed. By April 2009, Operation Black Thunderstorm was launched as the Malakand Accord failed to secure peace and as the Taliban continued to expand their control over Swat and advance towards Islamabad. Operation Rah-e-Rast was the third phase of Operation Black Thunderstorm, clearing Mingora by the end of May 2009. Operation Black Thunderstorm ceased in mid-2009.

Simultaneously, counter-insurgency offensives took place in FATA in mid-2008, Operation Zalzala, in South Waziristan, Operation Sirat-e-Mustaqeem in Khyber Agency and Operation Sherdil in Bajaur Agency. At the end of 2008, Operation Daraghlam began in Khyber Agency, followed by Operation Biya Daraghlam in September 2009. Operation Rah-e-Nijat then launched in October 2009 to clear South Waziristan of the TTP and its associates. Operation Khwakh Ba De Shum took place at the end of 2009 and in 2010 in

¹ Actions (in Aid of Civil Power) Regulations (2011) S.R.O. 11(6)P/L/2011 [hereinafter AACPR].

² Pakistan Const. (1973) art. 245(1).

³ Ibid.

Orakzai and Kurram Agencies. Operation Brekhna in Mohmand Agency also began at the end of 2009.

7.2 NOTIFICATION OF THE AACPR

The nature and intensity of the military operations between 2007 and 2009 in both FATA and PATA indicated the need for more comprehensive guidelines governing military operations. In accordance with the Constitution of Pakistan Article 247, the President in FATA and the Governor of Khyber Pakhtunkhwa (with the President's approval) in PATA may “with respect to any matter within the legislative competence” of Parliament or the Provincial Assembly respectively, may make regulations for the “peace and good government” of the Tribal Areas⁴. Article 247, in conjunction with Article 245(1), required further legal cover for military operations, a need thus filled by the AACPR for both FATA and PATA. The AACPR itself provides that the Federal Government directed the Armed Forces to “act in aid of civil power” to counter threats to the State, “while being subject to the law provided hereinafter⁵.”

The Preamble of the AACPR advocates the need for such legislation on the basis of the domestic hostilities characterized as a “grave and unprecedented threat to the territorial integrity of Pakistan by miscreants and foreign-funded elements, who intend to assert unlawful control over the territories of Pakistan⁶.” It is also acknowledged within the Preamble that the Armed Forces were continuously stationed in FATA and PATA to secure the area from “miscreants” that are no longer loyal to Pakistan⁷. Thus, it is now necessary and imperative that

[P]roper authorization be given to the Armed Forces to take certain measures for incapacitating the miscreants by interning them during the continuation of the actions in aid of civil power⁸.

It is also necessary, as per the language of the AACPR that the operations covered hereunder are carried out in accordance with the law⁹.

4 Id. at arts. 247(4)-(5).

5 AACPR, *supra* note 1, at Preamble.

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

As previously stated, the AACPR was issued as a notification of an action in aid of civil power in June 2011. However, the law applies itself retrospectively from February 1, 2008 to provide legal cover to the operations already conducted¹⁰, particularly with respect to the internment of persons captured at the time. The nature of this ex post facto application is then dubious at best. On the one hand, retrospective application of the AACPR introduces new crimes, punishments and procedures that previously did not apply during the military operations the Regulations now cover, on the other hand, persons detained prior to the AACPR within a legal black hole of sorts, now have legal cover to be released, transferred for prosecution or to remain interned under the supervision of an Oversight Board.

7.3 INSIDE THE AACPR

In Chapter II, the AACPR reaffirms the Federal Government's requisitioning of the Armed Forces for actions in aid of civil power in both FATA and PATA. To call in aid of civil power is defined as a "direction for the requisition of the Armed Forces made by the Federal Government under Article 245 of the Constitution of [Pakistan]"¹¹. Actions in aid of civil power are defined as:

[A] series of measures that involve the mobilization of Armed Forces, in aid of civil power or their requisition by the Federal Government, including measures such as armed action, mobilization, stationing etc., till such time they are withdrawn by the written order of the Federal Government¹².

To act in aid of civil power, the Armed Forces may also perform law and order actions and conduct law enforcement operations, combat natural disasters and work towards rehabilitation of communities in FATA and PATA¹³.

Also in Chapter II, all previous directions issued calling in the Armed Forces prior to the notification of the AACPR are declared valid and the Armed Forces are required to conduct themselves in accordance with the Regulations¹⁴. The deployment of the Armed Forces, under the notification of the AACPR, shall remain unless their requisition is withdrawn explicitly¹⁵.

¹⁰ Id. at § 1(3).

¹¹ Id. at § 2(c).

¹² Id. at § 2(d).

¹³ Id. at § 3(4).

¹⁴ Id. at § 3(2).

¹⁵ Id. at § 3(3).

The primary focus of the AACPR is subsequently divided between the authorization of force in armed actions, internment and the punishment of offences that include the waging of war against the State.

7.3.1 AUTHORIZATION OF FORCE

Chapter III of the AACPR regulates the conduct of armed action. Before using force in an action in aid of civil power, the Armed Forces are required to take certain precautions, including evacuating civilians and taking special protections for vulnerable persons¹⁶. The Commander of the Armed Forces is required to direct the Armed Forces operating in the designated region to adhere to principles of proportionality and necessity, keeping collateral damage at a minimum¹⁷. Nevertheless, the AACPR authorizes the use of arms and ammunition (i.e. firearms, weapons and air strikes) to achieve “necessary” objectives¹⁸. The overall vagueness of this section suggests significant scope for misuse and abuse of force in an armed action.

The abuse or misuse of force during an action in aid of civil power, if reported, is to be investigated within the “hierarchy” of the Armed Forces¹⁹. The procedure for reporting and punishing such abuse of force is vague. The AACPR contains a fairly broad indemnity clause:

No suit or other legal proceedings shall lie against any person for anything done or intended to be done in good faith under this Regulation²⁰.

This provision essentially negates the misuse of powers provision as it relies on the intention of the accused. To overcome this indemnity clause, bad faith would have to be demonstrated, which appears to be quite difficult in the course of a military action in aid of civil power. It would be almost impossible for a claim to proceed on the basis of this misuse of powers provision considering both the extremely limited jurisdiction of the judiciary and the overall vague and contradictory provisions within the AACPR itself.

¹⁶ Id. at § 4(1).

¹⁷ Id. at § 4(2).

¹⁸ Id. at § 4(3).

¹⁹ Id. at § 5(1).

²⁰ Id. at § 23.

7.3.2 INTERNMENT

One of the primary purposes of the AACPR was to establish a legal regime on internment in FATA and PATA for the numerous persons captured during military operations from 2007 and onwards. Chapter V of the AACPR explicitly establishes the power to intern individuals during any authorized action in aid of civil power. The grounds upon which a person may be interned under the AACPR are non-specific and any person, for example, that “may obstruct actions in aid of civil power in any manner whatsoever” may be deprived of his liberty²¹. The Interning Authority, the Governor of Khyber Pakhtunkhwa or anyone subsequently authorized as the case may be, is also generally authorized to intern any person if it is “expedient for peace in the defined area.”²²

The interning powers of the AACPR also extend beyond the defined area. Any person beyond the area in which the action in aid of civil power is conducted that is suspected of having committed acts or having a nexus with actions for which internment is authorized may also then be interned²³. Though it is not explicit within the text of the AACPR, the implication of this provision is that any person within Pakistan may be interned in FATA or PATA if they are suspected of the above.

The procedures for internment provided in the AACPR are established generally in accordance with international standards providing for the deprivation of liberty, if implemented fully. For example, each internee must receive a separate written order of internment²⁴ and each internee is to be examined by a medical officer within twenty-four hours of admission²⁵. The admission procedure for a detainee under the Internment Rules, 2011 (notified under both the AACPR for FATA and PATA) is also substantially detailed, with procedures similar to those provided in the Prisons Rules, 1978²⁶.

The duration of an internment is considered valid, under the AACPR, from the date of its application (retrospective to February 1, 2008) or the date the

21 Id. at §9(1)(a).

22 Id. at §9(2).

23 Id. at §9(3).

24 Id. at §9(4).

25 FATA Internment Rules, 2011 (Notification No. FS/L&O/401/FCR/3813-24), at R. 7(3) [hereinafter Internment Rules]. Identical rules are in place for PATA under Notification No. SO (FATA)HD/1-60/CPR/2011.

26 See Id.

internment order was issued to the end of the action in aid of civil power²⁷. Because the AACPR itself is an authorization of an action in aid of civil power, its withdrawal or an overriding notification would then signal the end of internment for those deprived of their liberty pursuant to the Regulations.

During the internment, an Oversight Board is to be convened at each internment center to review the case of each internee within 120 days from the date of internment²⁸. The AACPR does not specify the nature of the review and it is not clear whether the review within 120 days is singular or periodic after each 120 days cycle. Though international standards promote periodic review, they do not specify the frequency with which a review is to be conducted, particularly an initial review²⁹. Nevertheless, 120 days may extend beyond what is considered reasonable.

It must be acknowledged that the AACPR, at least on its face, prohibits the use of torture and inhuman or degrading treatment³⁰. Torture and inhuman or degrading treatment, however, are not further defined under the law and no reference is made to any definition provided elsewhere (i.e. the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to which Pakistan is a State party)³¹.

7.3.3 PUNISHMENT OF OFFENCES

The AACPR, in Chapter VII, criminalizes several offences directly and also indirectly through reference, in Schedule III, to other related laws. It is an offence, for example, to challenge or to be suspected of challenging the authority and writ of the Federal or Provincial Government, or to attempt to assert unlawful control over any territory in Pakistan or to resort to acts of waging of war against the State³². The punishment for this and the other crimes provided for range from death or imprisonment for life to up to ten years of imprisonment³³ or, alternatively, the punishment provided in the respective law listed in Schedule III³⁴.

Persons that do commit an offence pursuant to the AACPR may be proceeded

²⁷ AACPR, supra note 1, at § 11.

²⁸ Id. at § 14(1).

²⁹ UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35.

³⁰ Id. at § 15.

³¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

³² AACPR, supra note 1, at § 16(1).

³³ Id. at § 17(1).

³⁴ Id. at § 17(2).

against under the Frontier Crimes Regulation, 1901, Code of Criminal Procedure, 1898 or Anti-Terrorism Act, 1997³⁵. The internee may thus be transferred to the custody of the investigating or prosecuting authority³⁶. Along with the internee, all evidence, information, material collected, received and prepared during the internment shall also be transferred as admissible evidence sufficient to prove the matter at hand³⁷. Further, any member of the Armed Forces or any other authorized official may provide testimony as to any event or offence that shall be taken as primary evidence of that event or offence having taken place and no further proof of such event or occurrence is thus required³⁸.

The almost non-existent threshold for admissibility of what may be called evidence is indicative of the acknowledgement of the Government of how difficult investigations during armed actions are in fact. However, the threshold is far too low and any statement by any official is enough to convict an accused under the AACPR. All evidence gathered during internment, no matter the manner of collection or the quality, may also be transferred as conclusive evidence of an internee's guilt. This is of course in addition to the fact that if the accused is tried within the Tribal Areas, they may not have the ability to appeal their conviction either, because the criminal courts in the settled areas do not extend their jurisdiction to the Tribal Areas.

7.4 RECOMMENDATIONS

- I. The retrospective application of the AACPR must be reviewed in accordance with international criminal justice and human rights law standards.
- II. Though the AACPR requires the Commander of the Armed Forces to instruct subordinates in relation to principles of proportionality and necessity, additional requirements should be present acquainting members of the armed forces with all of the relevant provisions of humanitarian and human rights law and the extent of the application

35 Id. at § 18(1).

36 Id. at § 21(1).

37 Id. at §§ 19(1), (3).

38 Id. at § 19(2).

and overlap of these legal frameworks during an action in aid of civil power.

- III. A distinction is not made within the AACPR regarding the threshold for the use of force between a human rights law and a humanitarian law framework. Any authorization to use force within the law should acknowledge a distinction between the two regimes, particularly with respect to the trainings and instructions provided by the Commander of the Armed Forces.
- IV. The mechanism for reporting the abuse or misuse of the use of force during an action in aid of civil power must be established more concretely. The gravity of the misuse or abuse of the use of force is dealt with vaguely through the “hierarchy” of the Armed Forces.
- V. The indemnity clause should be revised for vagueness so that it does not negate the misuse and abuse of force reporting mechanism. To this end, the good faith exception should be narrowed to provide only limited legal cover to those actions permitted under the law.
- VI. The grounds upon which a person may be interned under the AACPR must be narrowed down significantly otherwise they may violate Pakistan's international law obligations prohibiting the arbitrary deprivation of liberty.
- VII. It is not entirely clear within the text whether the ability to intern someone beyond the designated area for the action in aid of civil power extends to all of Pakistan or only to the Tribal Areas. With some clarification in the law as to the prior, concrete limits on such internment measures should be included to prevent arbitrary deprivation of liberty and the violation of other rights of those detained beyond the jurisdiction of the courts.
- VIII. The duration of internment as well as the frequency with which the validity of that internment is reviewed must be examined against

Pakistan's international law obligations and assessed for reasonableness.

- IX. Though torture is prohibited by the AACPR, the prevention provision must, at a minimum, include a definition of torture to clarify what is being prohibited.
- X. The introduction of offences within the AACPR, bearing in mind its retrospective application, is a dubious proposition under the law. The offences themselves, along with the associated punishments are too broadly written to the point of being arbitrary.
- XI. The threshold for admissibility of evidence is almost non-existent. The evidentiary requirements under the AACPR entirely ignore Pakistan's standard evidence law (Qanun-e-Shahadat, 1984) and allow all evidence collected and accepted during internment to be admissible during criminal procedures.
- XII. The testimony of officials, particularly hearsay testimony, should not automatically be considered primary evidence sufficient for the conviction of an individual as this goes against internationally-accepted fair trial standards.
- XIII. An appeal mechanism should be explicitly included within the AACPR for those convicted under the law.

THE RESEARCH SOCIETY OF INTERNATIONAL LAW

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 was founded in 1993 by Mr. Ahmer Bilal Soofi, Advocate Supreme Court of Pakistan, and 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.

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