

Legal Solutions to Combat Terrorism in Pakistan

By

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Introduction

Despite facing unprecedented and grave threats of terrorism, Pakistan has surprisingly not yet instituted a comprehensive and effective legal framework to counter such threats. Moreover, the Government of Pakistan has failed to seize this matter urgently. For instance, the proposed amendments to the Anti-Terrorism Act (“ATA”) were pending in the Senate for the last several years. The nature of current terrorist threat is clearly distinguishable from the nature of terrorist threats faced by Pakistan in the recent past. Previous counterterrorism legislation and other relevant legal instruments were drafted in the context of sectarian terrorism; however, the nature of terrorism has changed and the current strain of terrorism is aimed at dismantling the State of Pakistan and its institutions. Therefore, Pakistan’s existing counterterrorism legal framework is obsolete and needs to be revamped to effectively overcome the challenges posed by terrorism today.

In light of the above, this paper offers various legal solutions designed to bolster Pakistan’s counterterrorism efforts.

1. Distinguishing ‘Constitutional Detainee’ from ‘Conflict Detainee’

There is an urgent need to draw a conceptual and legal distinction between terrorists committing acts of violence as means of waging war against the State by either dismantling or controlling its institutions and terrorists committing acts of violence to further social ideals, to derail non-state actors, to combat a third party state, etc. Although Pakistan constantly faces counterinsurgency and attacks against the State, it handles these issues with obsolete legal tools like the Code of Criminal Procedure (“Cr.P.C.”) and the ATA, which are primarily designed to handle isolated incidents of law and order through surgical operations. In order to more effectively combat terrorism, Pakistan’s policymakers must realize that the sheer size and scale of counterinsurgency, the deployment of resources, the duration of conflict and the means and methods of these new adversaries distinguish modern anti-state terrorists from other terrorists acting in peace time. The former could be aptly characterized and treated as ‘conflict detainees’ and the latter as ‘constitutional detainees.’

The recent threats and dangers of terrorism come from non-state actors who have demonstrated clear and unequivocal intentions to assert and establish unlawful control on the territories of Pakistan through private armies and private military organizations. They are ideologically driven and take direct instructions from elements hostile to Pakistan. Moreover, they have established channels to launder funding for arms procurement. Their terrorist acts target state infrastructure such as police stations, military installations, hospitals and schools. They attack the state via suicide bombs and other improvised explosive devices to sap morale. In other words, these terrorists have withdrawn or relinquished their loyalty to the State of Pakistan under Article 5 of the Constitution^[1] and now the

state needs to deliberate over whether or not and to what extent it must safeguard the fundamental rights of these terrorists.

The constitutional contract that exists between a loyal citizen and his or her state has been clearly breached by these terrorists. Through renunciation of loyalty to the state and the Constitution of Pakistan, a 'miscreant' now falls under the definition of an enemy of the state who is not entitled or privileged to the treatment accorded to a citizen who commits an offense but has otherwise not forsaken his or her loyalty to Pakistan.

In this context and in relation to the specific category of terrorists or non-state actors belonging to any violent organization, Pakistan immediately needs to undertake legal measures that range from a legal framework for detention to making a collection of evidence by intelligence means admissible.

1. Legal Framework for Detention

Pakistan enacted Action (in Aid of Civil Power) Regulations ("AACP") in 2011, which lays down the legal framework for detention. This law contains some creative solutions to challenges faced by Pakistan. It introduces internment as a regime whereby a miscreant can be interned during actions in aid of civil power. Article 245 of the Constitution^[2] provides the legal space necessary to enact internment regulations because during action in aid of civil power, there is a constitutional pause and implementation of fundamental rights are muted. AACP is an effective response to the phenomenon of missing persons, as it is widely recognized that a legal framework for detention curbs the temptation of intelligence and law enforcement agencies to engage in extrajudicial killings. Moreover, the regulations incorporate various human rights provisions and for the first time provide parameters for the legitimate use of force by the Armed Forces. Importantly, these regulations are applicable only in counter-insurgency situations and not during peace time.

Currently, the scope of the application of AACP is limited to the Federally Administered Tribal Areas (FATA) and the Provincially Administered Tribal Areas (PATA). However, these regulations should be made applicable throughout Pakistan via an enactment by the Parliament to ensure civilian supremacy over military actions conducted anywhere in Pakistan.

1. Challenges Faced by the Prosecution

(A). Scarce Resources

AACP provides a legal framework for dealing with only one aspect of the problem. The other aspect includes carrying out prosecution of hundreds of detainees. Such prosecution would mark one of the most ambitious prosecution exercises ever undertaken in the world. Unfortunately, the Government of Pakistan has yet to formulate any strategy to effectively deal with this challenge. The sheer number of individuals waiting to be prosecuted makes this task especially daunting. For example, the National Accountability Bureau, despite being so resourceful, was only able to conduct 1900 trials in 10 years. Currently, the fifty-two anti-terrorism courts operating in Pakistan are conducting approximately 2000 cases. It is clear that to effectively prosecute the detainees, more than fifty judges and as many investigators and prosecutors are required. This is undoubtedly a daunting challenge and the judiciary would be mandated to make the necessary appointments. Also, inevitably, there will be pressure on

resources as substantial funding will be required to establish court premises and secured compounds to conduct trials of hundreds of internees.

(B). Legal Challenges

Even if the logistics are taken care of, additional challenges facing prosecution will remain in place. For example, does the existing law permit the trial of miscreants in groups or does the law need an amendment to make such trials legally viable? Section 121 of the Pakistan Penal Code (“PPC”)[3] relates to war waged against the state and under the said offense, charges can be framed simultaneously against several persons. However, if the prosecution is to be carried out under the ATA, its schedule needs to be amended because section 121 of the PPC is currently not referenced in ATA’s schedule.

Moreover, the prosecution needs to be innovative while framing charges. One fact common to all the internees is that they are all non-state actors who are affiliated with some violent organization. Such groups can be characterized as private armies or militias and the raising of private armies or militias is not only prohibited under the Constitution but also constitutes an offense under AACP and the Private Military Organizations (Abolition and Prohibition) Act of 1973. Thus, a common charge can be framed for joining a private army, provided that the organization is notified under the Act. A miscreant may be sentenced for up to five years if he “forms, organizes, trains or equips a private organization capable of functioning as a military organization, or is a member or adherent, or takes part in the activities, of any such organization.”[4]

(C). Choice of Forum Issues

The Government of Pakistan must decide upon the appropriate forum for prosecution of the internees. One option is to prosecute them under the ATA but for this to be viable, the jurisdiction of the ATA will need to be extended to the FATA region under Article 247 of the Constitution. A second option is to prosecute them under the regular courts of Cr.P.C or under the Frontier Crimes Regulations. Additionally, the Government could enact a new law constituting or designating a forum or special courts to prosecute the internees. Regardless of the solution, it is imperative that a decision in this regard is taken swiftly.

1. Prevention of Terrorism through New Law for Interception and Surveillance

It is both astonishing and sobering to note that Pakistan does not yet have a legal framework to deter the occurrence of terrorist acts. Under the existing law, the police is legally bound to wait for an act of terror to happen[5] before it can register a First Information Report (FIR) and take cognizance of the matter. In other words, the police must wait for the terrorist act to take place before it takes control of the matter. At the moment, intelligence agencies wiretap the conversations of suspects, but since this kind of intelligence gathering lacks any legal coverage. It is inadmissible as evidence in a court of law. Therefore, there is an urgent need to develop a legal framework that permits intelligence agencies and law enforcement agencies to collect evidence with judicial approval or a warrant of interception so that such evidence is admissible.

In this regard, both civil law and common law jurisdictions across the world have developed legal regimes strengthening the powers of their investigating agencies. Recent precedents include the Regulation of Investigatory Powers Act 2000[6] (“RIPA”) in the United Kingdom and the Foreign Intelligence Surveillance Act of 1978[7] (“FISA”) in the United States. Both legislations permit their investigating and intelligence agencies to utilize and benefit from interception of communications, property interference, human surveillance and other modern techniques for the collection of evidence. The advantage of such a framework is that it allows the state to successfully prevent an act of terror while simultaneously engaging in interception activity under judicial oversight. In fact, prosecutors in the United Kingdom and the United States primarily rely on lawfully intercepted emails or communications to build their case rather than using witnesses, which are scarcely relied upon. In contrast, the prosecution in Pakistan is heavily reliant and dependent on witness testimony.

Pakistan must also enact legislation that permits interception of communications and surveillance under a warrant issued by a judge of the High Court that adequately safeguards the right of privacy and prevents abuse of investigative powers by the intelligence agencies.[8] If the interception is conducted under lawful authority, it will almost automatically become admissible under Article 164 of the Qanun-e-Shahdat Order.[9]

1. Innovative Administrative Measures

While the legislative framework is deliberated upon, certain administrative measures can be taken in the meantime that will improve the efficiency of the existing criminal justice system. In this regard, the following is proposed:

1. Executive guidelines to be issued by the provincial governments and federal Interior Ministry for categorizing or prioritizing high profile terrorism cases so that they are given special attention and due care for investigation.
2. Executive guidelines to be issued by the provincial governments and federal Interior Ministry establishing a panel of special investigators exclusively dedicated to conducting investigations in categorized high profile terrorism cases.
3. The Chief justice of each High Court to issue guidelines for taking evidence through video to shield witnesses from intimidation.
4. Guidelines to be issued to the police for using and incorporating forensic evidence more effectively in the judicial process.

5. Establish quality assurance review panels in every province comprising of two or three retired judges with experience in both trying terrorist suspects and the related appeals process. The panels would informally examine the evidence and case record before it is filed in court proceedings and make recommendations, where appropriate, to improve the chances of a successful conviction.
6. Guidelines, if and when appropriate, to be issued to improve the safety and protection of judges and courts involved in terrorism cases.
7. Law and Justice Commission to issue draft model guidelines and in certain cases, issue the guidelines themselves.

1. Establishment of De-radicalization Programs for Inmates

The Government of Pakistan needs to institute a comprehensive policy for the de-radicalization of those who are interned, in preventative detention or serving sentences. These inmates are an available and captive audience for de-radicalization programs. In this regard, the government can seek guidance from Saudi Arabia's model, which has enjoyed considerable success.

1. Review of Current Sentencing Regime

In the United States, those imprisoned for multiple federal crimes serve consecutive sentences running up to 200 years. Such a sentencing regime acts as a powerful deterrent and encourages the defendant to swiftly pursue plea-bargaining. In contrast, sentences often run concurrently in Pakistan. Unless an inmate is serving a death sentence, those sentenced to imprisonment for even the most heinous and serious crimes are released in less than ten years. Clearly, Pakistan must review its sentencing regime to bolster its counterterrorism efforts.

If consecutive sentencing is deemed to be against the common law jurisprudence, then it is desirable to look at other viable options that act as powerful deterrents to the planning or commission of terrorist acts. One such option includes the institution of more effective and potent property confiscation mechanisms.

1. Counterterrorism in the Context of Pakistan's International Law Obligations

As a responsible state in the international system, Pakistan is obligated under various binding international law instruments to take measures to effectively combat terrorism. Such obligations arise out of a series of binding Chapter VII United Nations Security Council Resolutions ("UN Law on Terrorism"), such as Resolutions 1373[10] and 1267.[11] Additionally, Pakistan has ratified the International Covenant on Civil and Political Rights[12] and the United Nations Convention against

Torture,[13] which require Pakistan to safeguard and respect the fundamental human rights of all persons within its territory. Therefore, in order to fulfill its international law obligations, Pakistan must formulate finely balanced laws that meet the objectives of the UN Law on Terrorism, yet also ensure the protection of fundamental human rights.

Conclusion

- Internment regulations should be implemented in spirit and their oversight mechanism should function properly as recently indicated by the Supreme Court of Pakistan so that the missing persons phenomenon is addressed and resolved and internees are provided easier access to their families and better medical attention and care.
- While the legislative framework is deliberated, certain administrative measures must be undertaken in the meantime to improve the efficiency of the existing criminal justice system.
- Federal legislation is required to allow intelligence and law enforcement agencies to carry out interception and surveillance under judicial oversight through issuance of a warrant by a High Court judge.
- Administrative guidelines must be issued to improve the management of the criminal justice system. The respective Chief Justices can issue guidelines for allowing video testimony of the witnesses to shield them from intimidation.
- Innovative prosecution techniques such as framing a group charge or considering prosecution under Private Military Organizations (Abolition and Prohibition) Act, 1973, should be encouraged and employed more frequently.
- A properly structured de-radicalization strategy and program must be instituted for reforming those interned, preventively detained or serving sentences.
- Pakistan must review its sentencing regime to more effectively deter the preparation or commission of crime. In light of the common law constraints, legal mechanisms to confiscate property may also be effective.

- In order to fulfill its international law obligations arising under various binding international instruments, Pakistan must formulate finely balanced laws that meet the objectives of the UN Law on Terrorism and also ensure the protection of fundamental human rights.

[1] “(1) Loyalty to the State is the basic duty of every citizen ... (2) Obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being in Pakistan.” Pakistan Const. art. 5.

[2]“[(1)] The Armed Forces shall, under the directions of the Federal Government defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so....” *Id.* art. 245.

[3] “Whoever wages war against Pakistan or attempts to wage war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and shall also be liable to fine.” Illustration: A joins an insurrection against Pakistan. A has committed the offence defined in this section. Pakistan Penal Code, § 121.

[4] The Private Military Organizations (Abolition and Prohibition) Act, 1973 (IV of 1974), § 3.

[5] Although the police can register an FIR for attempting an offense, the registration itself puts the offenders on alert.

[6] Regulation of Investigatory Powers Act, 2000, 48 Eliz. 2.

[7] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811 (2006)).

[8] Although there is a general provision related to interception under the PTA Reorganization Act 1996, it is insufficient and does not declare the admissibility of the intercepted communication.

[9] “Production of evidence that has become available because of modern devices etc.: In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.” Qanun-e-Shahadat Order, 1984, art. 164.

[10] S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001).

[11] S.C. Res. 1267, U.N. Doc. S/RES/1267 (1999).

[12] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

[13] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113, 114.