

CHANGES IN PAKISTAN'S COUNTER-TERRORISM LEGAL REGIME

CHALLENGES, PROSPECTS, AND RECOMMENDATIONS

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ZULFIQAR HAMEED



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Washington, DC Office

1899 L Street, NW, Suite 400
Washington, DC 20036

www.NewAmerica.org

T: 202-986-2700

F: 202-986-3696

New York Office

199 Lafayette Street, Suite 3B
New York, NY 10012

nyc@newamerica.net

Author

Zulfiqar Hameed is a visiting Carnegie Fellow at New America. He has more than twenty years law enforcement and security sector experience in the Pakistan Police Service and multilateral organizations. He has previously published in several national and international journals on security and law related issues.

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Punjab Governor Salman Taseer assassinated in capital Islamabad on January 04, 2011 in Islamabad, Pakistan.

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INTRODUCTION

The December 16, 2014 attack on the Army Public School and College in Peshawar, Pakistan which killed more than 150 people, including 133 children, and injured another 120, led many observers to term it Pakistan's 9/11. The attack elicited overwhelming condemnation from people in Pakistan and around the globe. The condemnations and calls for action aside, the most consequential response in the attack's aftermath has been the drastic change in the structure of Pakistan's anti-terrorism laws through the establishment of special military courts for conducting trials for terrorism offenses under the Army Act instead of the Anti-Terrorism Act 1997. This report examines the legal regime for countering terrorism before the recent amendments. It briefly reviews the dismal performance of Pakistan's 1997 special law. It then examines the constitutional amendments and changes in Pakistani law in the aftermath of the Peshawar attack. It concludes with a discussion of the merits and demerits of these amendments and a set of recommendations for countering terrorism in Pakistan.

THE OLD COUNTER-TERRORISM LEGAL REGIME

Prior to the recent constitutional amendments, Pakistan's counter-terrorism legal regime was dominated by the Anti-Terrorism Act 1997.ⁱ The Anti-Terrorism Act 1997 (ATA hereafter) is the law most often applied in cases related to terrorism in Pakistan. However, the act does not comprehensively cover all terrorism related activity and therefore several other statutes are also used in such cases. These include:

1. The Protection of Pakistan Act 2014ⁱⁱ
2. The Investigation for Fair Trial Act 2013ⁱⁱⁱ
3. Explosives Act 1884^{iv}
4. Explosive Substances Act 1908^v
5. The Arms Ordinance 1965^{vi}
6. The Pakistan Penal Code 1860^{vii}
7. The Criminal Procedure Code 1898^{viii}
8. The Qanun-e-Shahadat Order 1984^{ix}

The above laws cover criminal behavior not covered under the ATA itself. For instance, the use of any explosives during the commission of a crime is declared an offense under the Explosives Act 1884 and the Explosive Substances Act 1908 while the use of illegal firearms is covered under the Arms Ordinance 1965. Similarly, some offenses not covered by the ATA are instead proscribed under the general law i.e. Pakistan Penal Code. The general principle used in cases of terrorism is that all relevant sections from all relevant laws are applied in the First Information Report (FIR) which becomes the basis for subsequent prosecution of these cases. The First Information Report (FIR) is that document of the police record that, for the first time immediately after the happening of any offense, documents the incident as narrated by a complainant. It forms the basis for all police investigations. However, wherever the ATA is applied, even when other offenses are also applied from other statutes, the case is taken up under the provisions of the ATA. A Joint Investigation Team (JIT) under the ATA would investigate the case and the trial would commence in the special court established under the ATA. The last

two statutes cover the procedural aspects of the operation of anti-terrorism law in Pakistan while the ones before them are all substantive laws and aim to define and punish different offenses not comprehensively covered under the ATA 1997.

THE ANTI-TERRORISM ACT 1997

Even though the Pakistan Penal Code is the main substantive law in the criminal law area, in the area of terrorism the main substantive law is the Anti-Terrorism Act 1997 (ATA). Since it is a specialized law, the ATA prevails whenever a section of the ATA applies. Only when no provision of the ATA applies is the Pakistan Penal Code or one of the other special laws used.

The ATA defines several new offenses as acts of terrorism under the law. Any offense falling under these categories would be investigated and tried under the ATA. These offenses include actual acts of terrorism, abetting terrorism through any means (including financial help, active help in preparation etc.), action against organizations as well as activists, office bearers or associates of such organization found involved in terrorism, and the running of training camps.^x The ATA also mandated heavier penalties for many of these offenses ranging from death to several years in prison.

The ATA established special anti-terrorism courts, and all cases, in which the ATA is applied, go to these special courts. The anti-terrorism courts follow the same procedural law as is followed under the ordinary criminal law i.e. the Criminal Procedure Code. The rules of evidence to be followed are substantially the same as in the normal law of evidence contained in the Qanoon-e-Shahadat Order 1984, Pakistan's statute containing its law of evidence. There are some departures from the ordinary criminal law. For example, the ATA makes confession before a senior police officer admissible and prescribes a shorter timeline for trials. However, in practice these differences in legal provisions are not observed strictly due to superior courts' adverse observations about confessions before police officers. The burden of proof is on the prosecution as it is in Pakistan's general criminal law.

In practice, the ATA has been deficient in countering terrorism. In terms of substantive law, the ATA is not up to date with the latest trends in terrorism. It does not cover suicide bombing, planning for terrorist attacks beyond areas to which ATA extends, for instance the Federally Administered Tribal Areas, or transportation and possession of large quantities of explosives. For some of these offenses, the police have to depend on other quaint laws like the Explosive Substances Act and the Arms Ordinance, which are meant primarily for licensing and not as criminal statutes for prohibition of criminal offenses. In such cases, the trial is conducted not just for the offenses under the ATA but also for offenses under these separate laws. In some instances, however, there is no provision in the law at all (for example the other laws do not cover suicide bombing or the transport and possession of explosives).

The ATA is notorious for the low rate of conviction under it even though it was meant to ensure exemplary punishments for terrorists. Fewer than 20% of cases registered under the ATA result in convictions.^{xi} One of the major reasons for the low rate of conviction under the ATA has been the legal requirements contained in the law of evidence mandating an excessive dependence on eye witness accounts for proving any offense and the absence of a witness protection program.^{xii} In addition, the legal requirements developed by judges over the years for ensuring the rights of defendants under the ordinary criminal law hamper convictions under the ATA.

For instance, the process for the identification parade (known as the police lineup in the United States) is so cumbersome and risky for the victims under the High Court Rules that very few venture forth to do it.^{xiii} Witnesses are required to go to the prison for the identification parade and cannot do it in the police station. They have to do it after a long period of time in the presence of a magistrate, inside the jail and have to go in front of the

criminal and actually tell the magistrate by touching the shoulder or arm of the criminal. This obviously means that their identity is fully known to the criminals and the criminals have advance notice of this activity. It takes a brave victim or witness to go through this to identify a person accused of terrorism. This process was developed under the Rules of the High Court, purportedly to protect the rights of the defendants, but has a chilling effect on the victims. Interestingly, the Police Rules 1934 mandate that there can be an identification parade within the police station provided a senior police officer is present at the occasion.^{xiv} However, in practice this provision of the Police Rules is not accepted by the courts and as a result, there is resort to the long, risky process described above.

Yet the identification parade is taken as an almost essential element for conviction by judges and as a result there are few convictions. A study conducted by the Counter-Terrorism department of the Punjab province on the reasons cited by ATA courts for acquittal of terrorism accused, found that in 35% of cases lack of identification parade was given as a reason for acquittal.^{xv}

Similarly, there is a disproportionate dependence on the narration of events in the First Information Report of the case. While in other countries, a First Information Report would be treated as a starting point for an investigation, in Pakistan, due to the judge-made jurisprudence over the years, the FIR has become an almost necessary element for conviction. One study conducted by the Counter-Terrorism department found out that in more than half of the cases in which accused were not convicted, one of the major reasons that was cited was ‘not being named in the First Information Report.’^{xvi} The overreliance on the FIR places an impossible condition on the police and prosecution and therefore leads to low convictions. It is therefore no surprise that the rate of conviction is lower than 20% for cases registered under the ATA.^{xvii} Even this rate of conviction is deceptively high because it includes cases of murder and kidnapping for ransom which are not *per se* terrorism. Kidnapping for ransom has been statutorily included as an offence in the ATA even in cases where there is no clear link with a terrorism incident or a terrorist organization. In several instances, ordinary cases of multiple murders are registered under the ATA by the police thus indirectly undermining the intent of the legislature even though technically these cases are covered under ATA.^{xviii}

THE INVESTIGATION FOR FAIR TRIAL ACT 2013

The Investigation for Fair Trial Act 2013 was enacted in January 2013 to provide for collection of evidence from modern devices including the collection of cell phone data and email communications. The statute’s primary intent was to ensure that such forms of communication would be admissible as evidence in the courts of law since they were not previously admissible in courts. This was due to the evidence law contained in The Qanun-e-Shahdat Order which was promulgated in 1984 (substantially based on the earlier Evidence Act of 1872) and only treated as admissible documents that were at that time considered to be legal documents, for example written communication.^{xix} This did not include email communication or any type of electronic communications. Since the law of evidence was not amended after the advent of electronic communications, there was a void in terms of admissibility of evidence in the law that has now been filled through the latest statute.

The statute also sought to empower investigation of cases involving such means and to regulate the investigation and intelligence agencies conducting such investigations. The law, for the first time in Pakistani history, empowers intelligence and law enforcement agencies to conduct surveillance and interception of electronic and cellular phone communication for the purposes of any investigation into an offense. The scope of the reasons for starting an investigation is broad and a reasonable suspicion of involvement in any activity that could lead to a criminal offense is sufficient for an application for a warrant under this law. Even though the grounds for obtaining a warrant are broad, the procedure for obtaining a warrant and conducting an operation under this law is quite cumbersome. The application for a warrant is to be submitted by a senior officer of an intelligence or law

enforcement agency. This application has to be approved first by the federal interior minister and then by an honorable Judge of the concerned High Court before the surveillance and interception can occur. The warrant is only issued for a limited period of sixty days, which can be extended on application again through the same process. If it is established that there has been an offense under the ATA or four other laws given in the schedule of the Investigation for Fair Trial Act on the basis of such surveillance and interception, a criminal case shall be registered. The material collected under The Investigation for Fair Trial Act 2013 can then be used as evidence in the trial of such a case.

THE PROTECTION OF PAKISTAN ACT 2014

The Protection of Pakistan Act 2014 (POPA hereafter), enacted in July 2014 in the wake of terrorism incidents and army operations in Swat and Waziristan, brought several changes to the existing legal regime of anti-terrorism in Pakistan. The act shifted the jurisdiction for a long list of offenses given in the schedule of the law to special courts established by the Federal government. The list of offenses under the POPA has twenty entries and is quite comprehensive. Where POPA is applied, it will take precedence over the ATA. POPA also shifted the burden of proof from the prosecution to the defense in cases where an enemy alien or a militant as defined in the Act is facing charges of a scheduled offense under POPA.^{xx} This law also provides for preventive detention of enemy aliens and persons involved in actions against the security, integrity, public order and defense of Pakistan under POPA for a period of up to ninety days subject to the protections provided in Article 10 of the Constitution through oversight by the High Court. The law also provides a larger role to the armed forces in that, where the armed forces have been called in aid of civil powers, they can perform the functions of an investigation agency and hold persons in detention under POPA. The minimum punishment under any of the scheduled offenses under POPA is twenty years but stricter punishments including the death penalty can also be awarded under other relevant laws. POPA also empowers the special court to exclude the public from the proceedings of a trial if the prosecution submits an application stating such exclusion is considered necessary on the grounds of public safety. Provisions of the Criminal Procedure Code of Pakistan (Cr. P. C.) regarding suspending of sentence and liberal bails during the pendency of appeals against sentences awarded by a POPA court would not apply even though as a matter of general principle the Cr. P.C has been adopted for trials under POPA.

THE NEW LEGAL REGIME

CONSTITUTIONAL AND LEGAL CHANGES

Following the December 2014 terrorist attack on the Army Public School and College in Peshawar, Pakistan established a parallel legal structure for trying cases of terrorism through military tribunals under the Army Act of Pakistan.^{xxi} The change was made through a constitutional amendment.^{xxii} The amendment was passed unopposed by any political party in the parliament on the heels of two all parties conferences.^{xxiii} Two religious parties i.e. Jamaat-e-Islami and the Maulana Fazl-ur-Rahman's Jamiat Ulema-e-Islam abstained on the grounds that religious parties were being targeted through this amendment.^{xxiv}

The constitutional amendment and the Army Act are valid for two years after which the constitutional amendment will automatically lapse while the amendment to the Army Act can be extended through a resolution passed by the two houses of the Parliament. The amendment in the constitution is in Article 175 of the constitution and creates an exception in the judicial structure of the country for trials to be conducted by military tribunals under the Army Act 1952, The Pakistan Air Force Act 1953, The Pakistan Navy Ordinance 1961 and The Protection of Pakistan Act,

2014.^{xxv} The practical impact of the changes is that cases that would have been tried under these four laws are taken out of the jurisdiction of the civilian courts of the country including all appellate courts and instead placed under the jurisdiction of the Army Act's Field General Courts Martial. As a result the rights available under the constitution to any accused in Pakistan's criminal justice system would not be available for cases under these four laws.

The Army Act was meant to be applied only to present and past employees of the armed forces as a matter of disciplining and regulating their conduct before the present amendments.^{xxvi} After the amendments, the law has converted the army tribunals into criminal courts of general jurisdiction for all cases falling under the scope of several new offenses created through these amendments. The military tribunals' exclusive jurisdiction has also been extended to any person who is accused under the Protection of Pakistan Act 2014. POPA itself has a list of more than twenty offenses which would now be tried by the military tribunals. The accused in these categories are now liable to stand trial under the Army Act before the Field General Courts Martial comprised of military officers under the procedure laid down in the Army Act. The right to appeal provided in the act is within the military hierarchy and no civilian court has jurisdiction to hear an appeal under the Army Act as it stands today after the amendments. The procedure for conducting trials would also presumably be under the Army Act even though POPA had expressly provided earlier that the procedure to be adopted would be under the Code of Criminal Procedure of Pakistan.^{xxvii} The burden of proof had already been shifted to the defense instead of the prosecution under offenses in POPA and presumably that would remain so after the amendments in the Army Act.^{xxviii} Under the general scheme of law in Pakistan before POPA and Army Act (even in terrorism cases), the burden of proof was on the prosecution.

These amendments were passed as a result of a deep dissatisfaction with the present legal regime. The main criticism of the previous anti-terrorism legal regime in Pakistan had been that it did not adequately punish the terrorists and as a result the state's response to terrorism remained enervated or conversely operated out of the legal bounds in the form of extrajudicial actions by law enforcement agencies. The conviction rate in cases of terrorism has been 18% even under the special anti-terrorism law in Punjab and there is widespread criticism of the legal system in this connection.^{xxix} The other criticism is that the law was too general and is liable to abuse.^{xxx} The amendments were meant to show resolve in the fight against terrorism and to be a reflection of the deep sense of repugnance, revulsion and sorrow in the aftermath of the Peshawar incident.

LEGAL CHALLENGES

Despite passing unanimously in the parliament, the amendments have come under a steady stream of criticism which started even during the process of the passing of the amendments in the Parliament.^{xxxi} Senator Raza Rabbani of the Pakistan People's Party (who has since been elected unopposed as Chairman of the Senate) had voiced reservations regarding the amendments during the proceedings of senate; the press reported that Senator Raza Rabbani wept on the floor of the house for having cast his vote in favor of the amendment following party policy even though this favorable vote was against his conscience.^{xxxii}

This criticism has now taken the shape of legal challenges. The amendments have been challenged in the Supreme Court of Pakistan by the Lahore Bar Association and several other applicants on the grounds that they are unconstitutional, and the Supreme Court has commenced the hearing on the merits of the challenges.^{xxxiii} The main grounds on which the amendments have been challenged are threefold:

- 1) That the amendments violate the fundamental rights provided in the Constitution (like due process of law, the right to life and liberty, the right to a fair trial) guaranteed under the constitution.
- 2) That a parallel judicial system has been created through these amendments.
- 3) That the amendments undermine the independence of judiciary which is a feature of the Basic Structure of the constitution and hence cannot be changed even through a constitutional amendment.

Against these arguments is arrayed an express provision of the constitution itself that provides that no amendment in the constitution can be called into question in any court of law.^{xxxiv} The respondent i.e. the federation of Pakistan has also argued that since the Supreme Court is itself a creature of the constitution, it cannot arrogate to itself the power to adjudge amendments in the document of its creation. It is also likely to be argued that one pillar of the state i.e. the Supreme Court, cannot limit the power of another pillar i.e. the Parliament, which has been expressly given this power through the constitution and which is the representative of the will of the people of Pakistan. The respondents have submitted before the court that there are adequate protections against the abuse of the military tribunals for political purposes. These protections include a sunset clause of two years and protection to political party workers, as well as trial of only those cases that are transferred to them by the federal government. The respondents have argued that in view of these protections, the amendments should be upheld.

The Court's earlier jurisprudence on these questions is mixed. While the Supreme Court has never expressly adopted or accepted the argument that it can strike down a constitutional amendment itself because it is against the basic structure of the constitution, it is clear that where the independence of judiciary or the legal system is concerned, the court has jealously guarded its turf in the recent years and not hesitated to strike down any amendments of law as well as of the constitution.^{xxxv} The Al-Jehad Trust Case, the Mehram Ali Case and Eighteenth Amendment of Constitution case are clear on this point as in all three cases the court indirectly struck down amendments to the constitution.^{xxxvi} However, in the three cases, the Court adopted an indirect method of declaring the amendments unconstitutional on the grounds that they were against earlier, express provisions of the constitution safeguarding the independence of judiciary. In these cases, the court accepted the argument that where two provisions of the constitution are in apparent conflict, it is the court's job to ensure a harmonious interpretation. In practice however, this has translated into giving one provision of the constitution priority over another provision and declaring the later amendments themselves unconstitutional. The court has also resorted to interpreting the intention of the framers of the constitution and has given one amendment preference over a later amendment generally in cases involving independence of judiciary. Even if the court has not expressly adopted the argument of Basic Structure, it has implicitly adopted it in the area of independence of judiciary.^{xxxvii} In this case, a strong challenge could be made on the ground that the rights to due process of law, equal protection, and a fair trial have been done away with.^{xxxviii}

Until the Supreme Court of Pakistan adjudicates these legal questions, the fate of the amendments in the anti-terrorism regime of Pakistan will hang in the balance. The Supreme Court, however, has not stopped the process of establishment of the military tribunals and trials by them.^{xxxix} On April 2 2015, the Director General of Inter-Services Public Relations (ISPR) Major General Asim Saleem Bajwa, the official spokesperson for the Pakistan army, announced that seven terrorists had been sentenced by a military tribunal established under the Pakistan Army (Amendment) Act 2015.^{xl} Six of the men were sentenced to death while the seventh was sentenced to life imprisonment. The Chief of Army Staff confirmed the sentences and the convicts had a right to appeal to the

court of appeals. Since the proceedings of the trials were not open to public, it is not clear where the trial was conducted and which procedural law was adopted for the trial. No other information is available regarding the progress of other cases in other tribunals established under this new legal dispensation. Legal experts, media and civil society organizations had already expressed skepticism and dismay at the secretive manner of conduct of the trials and the lack of transparency surrounding the proceedings.^{xii}

In a related development, the Supreme Court of Pakistan has resumed hearings in the case challenging the amendments.^{xiii} The court has formed a full bench for the hearing signifying the importance attached to this case since a full bench is traditionally formed in cases considered to be of the highest importance. This full Bench is now hearing the arguments on the case on an expedited basis.

A QUAGMIRE OF BAD POLICY MAKING

Regardless of the outcome of the legal battle, it is clear that the role of the armed forces has increased even more in the present campaign against terrorism while the role of the civilian institutions has been further weakened. The steps now being taken, however, are unprecedented. A judicial role has been assigned to the army, which is an admission of failure by the political leadership not only of the judicial system, but also of a will to reform the judicial system. Instead of seizing the opportunity and translating the disgust felt by the citizenry into tangible legal reform, the leadership has succumbed to the temptation of an easy way out. This begs the question of the fate of the judicial system after the two years when the tenure of the military courts would end. Is the expectation that the issue of terrorism will be resolved by then or that the civilian legal regime will have somehow started delivering? The larger question of reform of the legal regime of anti-terrorism has been left hanging in the air. Even the earlier anti-terrorism law was a result of a special dispensation when it was promised that the special anti-terrorism courts and the new law would solve the problem of terrorism.^{xiiii} That promise has failed to translate into reality and this does not augur well for the new system being put in place. Similarly, the civilian institutions of law enforcement have been ignored and no effort is being put into building their capacity to fight terrorism on an ongoing, consistent basis.

This state of affairs should be worrying for the army which has put its own credibility at stake through the amendments. The assumption appears to be that the problem of terrorism is primarily one of a legal/judicial nature and thus amenable to solution through a less cumbersome legal procedure, simplified (perhaps truncated) law of evidence and a curtailed right of appeal. If this were the solution then a more logical step forward would have been to make these changes in the law and ask the ordinary courts to perform their functions more diligently. The issue of enhancing the capacity of civilian law enforcement and prosecution institutions has instead been ignored.

If the standards required for conviction are lowered, then the legitimacy of the whole process will come into question. Without legitimacy, the fresh initiative is unlikely to yield the results that are expected from it. The purpose of having fair trials is to ensure that the stigma attached to a heinous act resulting in criminal sanctions being applied to the perpetrators reflects the abhorrence a society feels against these acts. Conversely, it also reflects the value the society places, through fair trials, on ensuring that innocents are not punished. If the perception of legitimacy is absent, then the risk is that the stigma would not attach to the perpetrators. Such an outcome is especially undesirable in terrorism cases where it is vital that the terrorist act is unequivocally stigmatized and result in adequate punishment. This poses particular risks for the army. On the one hand if they are not able to deliver a substantial reduction in terrorism, their credibility would suffer as an institution. On the other hand, if the process is perceived as illegitimate, the objective of reducing terrorism in the long run would not be met.

The issues of due process of law, of a fair trial and adequate legal guarantees have not been addressed in the rush to make changes. This has resulted in the present legal challenges in the Supreme Court. These issues should have been thought through more thoroughly. If the Supreme Court asks the government to take corrective action because these issues were not adequately addressed, it would be a significant blow to the legal regime's legitimacy. A more important issue however is that of the different approaches that work for counter insurgency and counter terrorism. While the role of the army is critical in counter insurgency in unregulated areas like FATA, it would be naive to expect the army to perform the counter terrorism function that is required in the urban and settled areas of Pakistan. This job can only be done on a consistent, day to day basis through better law enforcement and improved investigations resulting in convictions for terrorists.

The role of the police forces in KPK and Punjab has been critical in containing terrorism and the reduction in the number of incidents of terrorism during the last four years is a testament to their effectiveness, bravery and good police work.^{xliv} The number of fatalities across Pakistan as a result of terrorism incidents has dropped from 11,704 in 2009 to 5,496 in 2014 with fatalities of security forces going down from 331 in 2011 to 108 in 2014 in Khyber Pakhtunkhwa.^{xlv} This effort not only needs to be better acknowledged but should result in much more investment in enhancing the law enforcement and investigative capacity of the counter-terrorism and investigation wings of the police across the country. Unfortunately, very little momentum has been developed in this direction. Even when the army conducts successful operations in FATA or other areas, it is imperative that there is good follow up action to ensure that these areas do not become safe havens for terrorists again. This can only happen when these areas are brought into the mainstream of law enforcement and legal system. The archaic systems of governance that have led to the present impasse by providing space to militant organizations need to be brought into the modern era of policing, legal and judicial systems and adequate protection of rights.

THE AMENDMENTS' SILVER LINING

While the amendments reveal the unaddressed policy quagmire of Pakistan's anti-terror legal regime, these criticisms do not obviate the necessity of immediate, concrete action in Pakistan's own version of war against terror. Pakistan has been the victim of a campaign of terror that has resulted in more than fifty thousand of its citizens being killed in incidents of terrorism during the period between 2003 to February 2015.^{xlvi} It has lost more than six thousand security personnel and more than twenty thousand civilians in this period.^{xlvii} The attack on the school in Peshawar is just the latest in a long string of gruesome incidents that have inflicted incalculable damage on the people of Pakistan. It is therefore vital for the people of Pakistan that they see something being done. In this context, the present moves are a continuation of the vigorous actions initiated during the last year including the army operation in North Waziristan. Much more than anything else, the amendments signal the intention of the decision makers in Pakistan that they are not going to make any exceptions in the present campaign. In that sense they are a good signaling mechanism and have value not only for the people of Pakistan but for anyone around the world who is interested in ensuring that the only Islamic nuclear power goes down the path of security and stability instead of instability and chaos.

The possibility that some of the legal changes might actually work and bring the menace of terrorism under control should also not be dismissed. Among the important reforms is the provision of better security for the judges of the tribunals. In a country that has no witness protection program, no formal mechanisms for ensuring the security of investigators, prosecutors and judges and no legal provision for conducting trials that do not reveal the identity of the state functionaries involved, conducting trials through military tribunals would at least solve the problem of security of judges for the time being. However, in the long run even the judges on these tribunals may face enhanced security threats. The need for a witness protection program cannot be overemphasized. Another potential benefit is the faster resolution of terrorism cases. In a judicial system marked by delays and

interminable rounds of litigation, military tribunals should result in quick disposal of cases and better rates of conviction. This in turn should result in better deterrence and reduced incidents of terrorism in the future.

CONCLUSION

Terrorism is not merely a legalistic problem even though a large part of the solution lies in fixing the legal structure in Pakistan. Coming up with a holistic approach that addresses all key components of the problem of terrorism in Pakistan is critical. This would include legal reform, upgrading the criminal justice system as well as addressing the root causes that lead to extremism and terrorism through madrassa reform, curriculum reform, and provision of opportunities for upward mobility through education and economic growth on a sustainable basis especially in conflict areas. The National Action Plan is a key step in identifying these key requirements. However, the real challenge is not the identification of these issues which have been identified many times before. The key challenge would be to ensure effective implementation through concerted action. It is in this connection that the following steps are being recommended to ensure better implementation that gives lasting results.

- 1) No power comes without responsibility. This is a lesson that both the civil and military leadership needs to imbibe well. Both the civilian and military leadership need to step forward and perform their roles vigorously and in conjunction with each other.
- 2) The military and civilian leadership should act on the desperate need for change in the legal regime for countering terrorism. The tribunals should not be used as an escape from this policy challenge. There has to be a clear recognition of the fact that the normal law of procedure made for controlling ordinary crime in a rural, homogenous and much smaller society more than a century ago would not suffice to control the menace of terrorism in this day and age. This needs to be changed through legislation that not only addresses the substantive law on the subject but also fixes the procedural loopholes that allow interminably long trials and even longer rounds of appeals. Issues of burden of proof and of admissibility of evidence as well as of allowing trials through closed door proceedings need to be addressed through legislation sooner rather than later. Establishing special courts is not the solution to the problems of the ordinary court system that need to be addressed as a top priority.
- 3) The military and civilian leadership must build legal safeguards and clear guidelines into the special military tribunals if they are to work. Ensuring adequate legal representation, open court trials as far as possible, transparent rules of procedure and regard for the due process requirements are an immediate necessity. This would not only address the questions of legitimacy of the new system but would also insure against legal challenges in the future.
- 4) The tribunals should not be considered a permanent feature not only for legal reasons but also for policy and moral reasons. It is imperative that they are sparingly used, are transparent in their proceedings, and give results soon. As soon as their period of validity is over, the system should go back to the normal criminal justice dispensation, hopefully with major improvements.
- 5) It is critical that the capacity enhancement, development of specialization and operational autonomy for the law enforcement and prosecution functions in the country be ensured. Unfortunately, there has been very little investment in these areas which needs to be rectified on an urgent basis by the federal and provincial governments.
- 6) The need for law enforcement and intelligence coordination is much more than earlier but the formal, institutional mechanisms like the national Counter Terrorism Authority (NACTA) have been lying dormant despite many protestations to the contrary. It needs to be reinvigorated and the concept of joint task forces manned by intelligence and law enforcement agencies should be strengthened.

NOTES

- ⁱ The Anti-Terrorism Act 1997 (Act XXVII of 1997) promulgated on 20th August 1997. Full text of the Act is available at <http://www.punjabcode.punjab.gov.pk/index/showarticle/ref/d9d3baa7-91f3-4006-a694-834284211862>
- ⁱⁱ The Protection of Pakistan Act, 2014 (X of 2014). Promulgated on July 14 2014. Full Text of the Act is available at http://www.na.gov.pk/uploads/documents/1409034186_281.pdf. List of offenses is available in the Schedule to the Act.
- ⁱⁱⁱ The Investigation for Fair trial Act 2013 (Act I of 2013) Full Text of the Act is available at www.na.gov.pk/uploads/documents/1361943916_947.pdf
- ^{iv} Explosives Act 1884 (Act IV of 1884) Promulgated 26th February 1884. Full Text of the Act is available at <http://www.punjabcode.punjab.gov.pk/public/dr/THE%20EXPLOSIVES%20ACT,%201884.doc.pdf>
- ^v Explosive Substances Act 1908 (Act VI of 1908) Promulgated on June 9 1908. Full text available at <http://www.punjabcode.punjab.gov.pk/index/showarticle/ref/a3a32f6c-ab1f-48b3-bdd9-f7e2ce260e19>
- ^{vi} The Punjab Arms Ordinance 1965 (Ordinance XX of 1965). Promulgated on 10th July 1965. Full text of the Act is available at <http://www.punjabcode.punjab.gov.pk/index/showarticle/ref/b8ed1eb7-700c-4a10-bb4b-6f9affdf10a>.
- ^{vii} Pakistan Penal Code (Act XLV of 1860). Promulgated on 6 October 1860. Full text of the Act is available at <http://www.punjabcode.punjab.gov.pk/index/showarticle/ref/a54fa6d0-63e7-4c43-aea5-10ea2082d1f4>
- ^{viii} Code of Criminal Procedure (Act V of 1898). Promulgated on 1 July 1898. Full text of the act is available at [http://punjabpolice.gov.pk/system/files/code-of-criminal-procedure-1898%28Amended by Act II of 1997%29.pdf](http://punjabpolice.gov.pk/system/files/code-of-criminal-procedure-1898%28Amended%20by%20Act%20II%20of%201997%29.pdf)
- ^{ix} The Qanun-E-Shahadat Order 1984 (Presidential Order No. 10 of 1984). Promulgated on 28 October 1984. Full Text of the Act is available at <http://www.punjabcode.punjab.gov.pk/index/showarticle/ref/ec49a367-8529-431f-a850-fc378bc0453a>
- ^x Actions include sealing of offices of the organization, freezing of its bank accounts, seizure of all literature disseminated by it and prohibition on all types of dissemination of documents. See Section 11E and 11F of ATA.
- ^{xi} Hameed, Zulfiqar; Chapter on Anti-Terrorism Law in “*Stabilizing Pakistan through police reform*”, Asia Society Special Commission on Pakistan Police reform, July 2012 New York. See Page 54. Available at http://asiasociety.org/files/pdf/as_pakistan_police_reform.pdf
- ^{xii} Article 2(c) and 2(d) of The Qanun-e-Shahdat Order 1984, as interpreted and applied by courts in Pakistan. See note ix supra for citation. ATA provides in Section 21 that court or government can give direction to ensure the protection of judges, prosecutors or witnesses but this empowering clause has seldom been utilized and this is in any case subject to availability of resources on a case to case basis. There is no institutional arrangement for protection in terrorism cases.
- ^{xiii} The High Court Rules Punjab Volume 3 in Chapter 11, Part C. Full Text available at <http://lhc.gov.pk/system/files/Volume3.pdf>
- ^{xiv} See Chapter 26, Rule 32 of the Punjab Police Rules 1934. Full text at <http://nasirlawsonline.com/laws/prules34.htm>
- ^{xv} ‘*Why do terrorism cases fail in court? An empirical analysis of acquittal cases in Punjab*’, Report submitted by the Counter Terrorism Department of the Punjab Police to the Government of Punjab 2011. This report was compiled by Mr. Ejaz Hussain Shah Deputy Inspector General of Police (DIG) of the CTD.
- ^{xvi} Ibid.
- ^{xvii} Ibid note xii supra
- ^{xviii} Op cite note xii at pages 39 and 40.
- ^{xix} The evidence law only defines evidence in two forms i.e. oral evidence in front of court and documentary evidence. The definition of Documentary evidence does not include electronic communications. Therefore the need was felt for bringing in the new law. See sections 2(1)(b) and 2(1)(c) of the Qanun-e-Shahdat Order 1984. See note ix supra. The Evidence Act 1872 can be seen at <http://indiankanoon.org/doc/1953529/>.
- ^{xx} Militant is defined in section 2(f) of POPA while enemy alien is defined in section 2(e) of the act. Militant is a person who wages war or insurrection against Pakistan, raises arms against Pakistan, its citizens, its security or law enforcement forces and raises arms against the integrity or security of Pakistan etc.
- ^{xxi} The Pakistan Army Act 1952 (XXXIX of 1952). The Pakistan Army Act, 1952 (XXXIX of 1952) can be accessed at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54f853a34> in its non-amended form.

xxiii Constitution (Twenty First Amendment) Act 2015 was passed on the 6th of January 2015 by both houses of the Parliament and received Presidential assent and signed into law on the 7th of January 2015. Text of the amendment available at http://www.na.gov.pk/uploads/documents/1420547178_142.pdf

xxiii See “Parliament passes 21st Constitutional amendment, Army Act amendment” Desk report in Daily ‘Dawn’ Dated 6 January 2015 available at, <http://www.dawn.com/news/1155271> ; also see “21st amendment will divide the nation: Fazal” in Daily “Capital” Dated January 6 2015 Web Desk article available at <http://dailycapital.pk/21s-amendment-will-divide-the-nation/>.

xxiv See “ With excuses, law makers vote for military courts” by Amir Waseem and Raja Asghar in Daily Dawn, Dated January 7, 2015, available at <http://www.dawn.com/news/1155432/with-excuses-lawmakers-vote-for-military-courts>.

xxv The Constitution (Twenty First Amendment) Act 2015 can be accessed at http://www.na.gov.pk/uploads/documents/1420547178_142.pdf. The Pakistan Army (Amendment Act) 2015 can be accessed at <http://www.refworld.org/pdfid/4c3f1fe12.pdf>. The Pakistan Army Act, 1952 (XXXXIX of 1952) can be accessed at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54f853a34> in its non-amended form; The Pakistan Air Force Act, 1953 (VI of 1953); The Pakistan Navy Ordinance, 1961 (XXXV of 1961). The last two statutes are not available online for reference.

xxvi Section 2, 60 and first schedule of the Army Act have been amended.

xxvii See Section 4 of POPA 2014.

xxviii Section 15 of POPA 2014 provides that for all cases against an enemy alien, militant or any person preparing or attempting any act of terrorism and facing the charge of any scheduled offense under POPA, the burden of proof would be on the defense instead of on the prosecution.

xxix See ibid note xii supra. See also Hameed, Zulfiqar, “*The anti-terrorism law of Pakistan: Need for reform*” published in Social Science and Policy Bulletin, Volume 3, No. 3, Winter Spring 2013, School of Social Sciences, Lahore University of Management Sciences available at <http://lums.edu.pk/docs/dprc/11-SSPB-WinterSpring-2012.pdf>

xxx See Charles H, Kennedy, *The Creation and Development of Pakistan’s Anti-Terrorism Regime, 1997–2002*, in Religious Radicalism and Security in South Asia, ed. Satu Limaye et al. (Honolulu: Asia Pacific Center for Security Studies, 2004), 387–412; and Amnesty International, *Pakistan: Legalizing the Impermissible: The New Anti-Terrorism Law* (London: Amnesty International, 1997).

xxxi For criticism See ‘*Law and (Military) Order*’ by Sheila Fruman, Foreign Policy Dated January 16 2015 available at <http://foreignpolicy.com/2015/01/16/law-and-military-order/> ; Also see ‘*Back in the driver’s seat*’ by Raza Rumi, Foreign Policy Dated January 16 2015 available at <http://foreignpolicy.com/2015/01/16/back-in-the-drivers-seat/>; Also see “*A Sad Day*” Editorial in Daily ‘Dawn’ Dated January 3 2015, available at <http://www.dawn.com/news/1154719>.

xxxii See “Raza Rabbani bursts into tears as Senate passes 21st amendment” Desk report in Daily ‘The News’ Dated January 6 2015 available at <http://www.thenews.com.pk/article-170979-Raza-Rabbani-bursts-into-tears-as-Senate-passes-21st-amendment> ; The video footage of the event can be seen at http://www.dailymotion.com/video/x2e63qi_senator-raza-rabbani-s-speech-on-21st-constitutional-amendment-7th-january-2015_news.

xxxiii For grounds of the challenge, see The Express Tribune Dated January 7, 2015 available at <http://tribune.com.pk/story/818230/21st-constitutional-amendment-challenged-in-sc/>;

xxxiv Article 239(6) of the Constitution of Pakistan. Full text of the constitution is available at http://www.na.gov.pk/uploads/documents/1333523681_951.pdf

xxxv This theory was developed by the Supreme Court of India in the Kesavananda Bharati case, *His Holiness Kesavananda Bharati Sripadagalvaru and Others. v. State of Kerala and Another. (1973) 4 SCC 225* and has been strengthened in subsequent cases so that in the Indian jurisprudence the Supreme Court has adopted the role of an arbiter of the constitutional amendments themselves. Full Text of this Judgment available at: <http://indiankanoon.org/doc/257876/>.

xxxvi *Al Jihad Trust and others versus Federation of Pakistan and others*, PLD 1996 SC 324; *Mehram Ali and others versus Federation of Pakistan and others*, PLD 1998 Supreme Court 1445; CONSTITUTION PETITIONS NOS. 11-15, 18-22, 24, 31, 35, 36, 37 & 39-44/2010, available at Supreme Court of Pakistan’s website at <http://www.supremecourt.gov.pk/web/page.asp?id=433>.

xxxvii For criticism see Siddique, Osama ‘*Pakistan’s Experience with Formal Law: An Alien Justice*’ Pages 24-25. Cambridge University Press 2014.

xxxviii These rights have been guaranteed under articles 8, 9, 10, 10-A and 25 of the Constitution of Pakistan.

xxxix <http://www.thenews.com.pk/Todays-News-13-35560-SC-rejects-plea-against-setting-up-military-courts>

^{xi} Official Press Release Number 79/2015- ISPR dated April 2, 2015 issued by the Inter-Services Public Relations Department of the Pakistan Military (ISPR) available at https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=2822 and

<https://www.facebook.com/ISPROfficial1?fref=ts>

<http://tribune.com.pk/story/863170/military-courts-sentence-six-terrorists-to-death-ispr/>

^{xii} *'Military Courts' secrecy unnerves experts'* in Daily Dawn, April 4, 2015. Available at

<http://www.dawn.com/news/1173841>

^{xiii} *'Full Bench: SC to take up challenge to military courts'* in Daily The Express Tribune, April 4, 2015. Available at

<http://tribune.com.pk/story/864179/full-bench-sc-to-take-up-challenge-to-military-courts/>

^{xiiii} Introduced again by the previous Nawaz Sharif regime in 1997.

^{xlv} The sacrifices of the KP police have been widely acknowledged and the then Chief of Army Staff General Ashfaq Parvez kayani also visited the Police Lines Peshawar in November 2009 where he praised the work of police. See https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=1024&search=1.

^{xlv} Excluding FATA. Data from the South Asia Terrorism Portal at:

http://www.satp.org/satporgtp/countries/pakistan/database/fatilities_regionwise.htm. Accessed on February 9, 2015.

^{xlvi} South Asia Terrorism Portal. <http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm>.

Accessed on 8 February 2015.

^{xlvii} Ibid.