

Defining Terrorism in Pakistani Anti-Terrorism Law

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Key words

Principle of legality, Terrorism, Anti-Terrorism Act 1997 and Human Rights.

Abstract

We critically examine the definition of 'terrorism' in the Anti-Terrorism 1997 of Pakistan and as it is interpreted by the Supreme Court of Pakistan under the principle of legality in criminal and human rights law standards. We conclude that the definition of terrorism under the Anti-Terrorism Act does not pass the test of the principle of legality and the jurisprudence of the Supreme Court of Pakistan is inconsistent confounding the situation further. We recommend that Pakistan, following the principle of legality and human rights standards, amend the current definition of terrorism as an overbroad definition could be misused and abused leading to human rights violations.

One key direction in which the 9/11 event changed the world was the need for a quick, persistent and rigorous criminal justice response to terrorism in the form of legislation; strategies; policies; investigation and prosecution. Following that tragic event, the United Nations Security Council, in Resolution 1368 (2001), called 'on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable'.³ This was interpreted as an authorisation for the use of force against terrorists and those states supporting and harbouring them leading to a US-led coalition attack on Afghanistan on 7 October 2001. The Security Council, in Resolution 1373 (2001), further called on states to 'criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts'.⁴ This is an indication to strengthen the criminal justice systems in states to respond to the threat of terrorism, in addition to the international efforts including the use of force under the UN Charter. While the post 9/11 UNSC Resolutions seem to support the criminal justice approach to acts and threats of terrorism, the

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³ Resolution 1368 (2001), para 3.

⁴ Resolution 1373 (2001), para 1(b).

international community has failed to develop a consensus definition of the offence of 'terrorism'.⁵ But this is not a new phenomenon. Defining 'terrorism' has been a challenge since early 20th century. A 1988 study found as many as 109⁶ and a 1994 study identified 212 definitions of 'terrorism'.⁷ Since 9/11, the definition has assumed greater importance and scholarly literature has been steadily growing.

There is growing research on Pakistan's role in fighting terrorism⁸ but little attention is given to research focusing on challenges to Pakistan's criminal justice system. Pakistan has made serious efforts both at the law and policy levels to strengthen the criminal justice response to terrorism. First, the Pakistani government has set up a National Counter Terrorism Authority under the National Counter Terrorism Authority Act 2013. Its main functions are 'to receive and collate data or information or intelligence, and disseminate and coordinate between all relevant stakeholders to formulate threat assessments with periodical reviews to be presented to the Federal Government for making adequate and timely efforts to counter terrorism and extremism' and 'to coordinate and prepare comprehensive National counter terrorism and counter extremism strategies, and review them on periodical basis'.⁹ Second, NACTA has been able to develop a National Internal Security Policy 2014 -18 aiming at three elements: dialogue with all stakeholders; isolation of terrorists from their support systems and enhancing deterrence and capacity

⁵ Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985-2004', *Chinese Journal of International Law* (2005) 4 CJIL 1, 20.

⁶ John F. Murphy, 'Defining International Terrorism: A Way Out of the Quagmire', *Israel Yearbook on Human Rights* (1989) 19 IYHR 13, 14.

⁷ Jonathan Matusitz, 'Terrorism and Communication: A Critical Introduction' (2013 Sage) quoting Jeffrey D. Simon, *The Terrorist Trap* (Indiana University Press 1994).

⁸ See generally, Moeed Yusuf, *Pakistan's Counterterrorism Challenge* (Foundation Press 2014) (an edited book that focuses 'on violence being perpetrated against the Pakistani state by Islamist groups and how Pakistan can address these challenges, concentrating not only on military aspects but on the often-ignored political, legal, law enforcement, financial and technological facts of the challenges.'). Akbar Ahmad, *The Thistle and the Drone: How America's War on Terror Became a Global War on Terror* (Vanguard Books 2013) (examines the social and historical context of the relations between America and the Muslim world and America's involvement in the fight against terrorism; devotes two chapters to Pakistan: one on Waziristan and another on Musharraf's counter-terrorism policy). Laila Bokhari, *Pathways to Terrorism-Faces of Jihad: the Case of Pakistan*, 2013, at www.iospress.nl (using Pakistan as a case study, reviews 'some of the issues relevant to radicalization towards violent extremism; last accessed 15 June 2015); Rohan Gunaratna and Khuram Iqbal, *Pakistan: Terrorism Ground Zero* (Reaktion Books 2011) (analyses the roles of the insurgent groups working in Pakistan); Ejaz Hussain, *Terrorism in Pakistan: Incident, Patterns, Terrorists' Characteristics, and Impact of Terrorist Arrests on Terrorism*, PhD Dissertation, University of Pennsylvania, 2010. Available at <http://repository.upenn.edu/cgi/viewcontent.cgi?article=1163&context=edissertations> (accessed 21 October 2013).

⁹ National Counter Terrorism National Authority (2017), 'About NACTA' <<http://www.nacta.gov.pk/About.htm>> accessed 9 March 2017.

of the security apparatus to neutralise the threats to internal security of Pakistan.¹⁰ Third, Pakistan has introduced two important legislations, i.e. The Investigation for Fair Trial Act 2013 and the Protection of Pakistan Act (PPA) 2014. These laws seek to help in successful implementation of the anti-terrorism law, particularly to ensure efficient investigation of terrorism cases and contribute to enhance the conviction rate.

High acquittal rate in terrorism-related cases in Pakistan (4 % conviction ratio) has been a matter of serious concern.¹¹ In early 2013, the Chief Justice of Pakistan urged 'effective measures' to pursue terrorism related cases in the country.¹² In its 2011 country report, the State Department of the United States' (US) has observed that in Pakistan the acquittal rate of terror suspects remained 85%.¹³ Other countries have better conviction ratio, for example, 89% in the US¹⁴ and 64% in the UK.¹⁵ In Australia, so far out of total 38 terror suspects, 26 have been convicted for terrorism offences (68 %).¹⁶ In Pakistan, with 4% conviction rate there is much to be desired for. Only the recent amendments in the anti-terror law have introduced some changes, such as, the use of cell phones' call data record, as having evidentiary value in a terrorism offence. The issue of balancing security and human rights is also of great concern.¹⁷

The year 2014 has witnessed increased serious efforts to improve protection of witnesses and security measures and procedures for courts dealing with terrorism cases. In March 2014, five senior judges visited the UK to learn some lessons from the British criminal justice experience in prosecuting terrorists.¹⁸

¹⁰ National Counter Terrorism Authority (2014-18), 'National Internal Security Policy (2014 -18) <<http://www.nacta.gov.pk/policies.htm>> accessed 9 March 2017.

¹¹ The Express Tribune (Islamabad, 12 December 2012).

¹² The Express Tribune (Islamabad, 17 February 2013).

¹³ US State Department, 'Country Reports on Terrorist' (2011) <<http://www.state.gov/documents/organization/195768.pdf>> accessed 18 October 2013.

¹⁴The Centre on Law and Security, New York University School of Law, 'The Terrorist Trials Report Card, 2001-2009', p. ii <www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan42.pdf> accessed 18 October 2013.

¹⁵ See UK Home Office Statistics, 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop and searches, Great Britain' (2012 - 2013) <<https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-2012-to-2013/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-searches-great-britain-2012-to-2013>> accessed 4 October 2013.

¹⁶ See Nicola McGarrity, 'Let the Punishment Match the Offence': Determining Sentences for Australian Terrorists' *International Journal of Crime and Justice* (2013) 2(1), 1-15.

¹⁷ Sundaresh Menon, 'International Terrorism and Human Rights', *Asian Journal of International Law*, (2014) 4, 1-33; Ken Roach, 'A Comparison of Australian and Canadian Anti-Terrorism Laws', *University of New South Wales Law Journal*, (2007) 30, 53-85.

¹⁸ Amna Abbas, Report on Pakistan Judicial Delegation's Study Tour of UK, 24-27 March, 2014 (on file with the author).

Second, in June 2014, Pakistan's Law and Justice Commission, in collaboration with the British High Commission, Islamabad, organized a symposium on witness security.¹⁹ Third, the Peshawar High Court (PHC) renewed its effort to explore and address problems faced by the anti-terrorism courts. The PHC sought to develop liaison with relevant provincial government departments and resolved to keep a follow up with them.²⁰ After the attack on a school on 16 December 2014 killing more than 140 people, a National Action Plan (NAP) was developed. A significant proposal in the NAP relates to revamping of the criminal justice system.²¹ Any NAP-based criminal justice reform package would have to seriously study the causes and effects of low conviction rate of the anti-terrorism cases. Key challenges to efficient and effective prosecution come from registration and investigation of cases involving terrorism, protection of judges, investigators, prosecutors and witnesses, absence of high security prison, funding and increased regular and outcome-based coordination amongst all actors of the justice system. Of great significance, however, is the issue of statutory definition of 'terrorism' and its emerging jurisprudence in Pakistan.

This study seeks to critically examine terrorism as is defined by the 1997 Anti-Terrorism Act (ATA) and interpreted by the Supreme Court of Pakistan. It examines the difficulties in defining 'terrorism' and proposes criteria that might be helpful in defining 'terrorism' in line with the principle of legality and human rights standards. This article is divided into four sections. Section I sets out the international and regional efforts for finding common ground and a consensus definition of terrorism. This provides a background and context for analysing the Pakistani definition of terrorism. Section II sets out the principle of legality as a criteria for assessing the definition of terrorism in Pakistani law against it. Section III examines the definition of terrorism in Pakistani legislation and the jurisprudence of the Supreme Court of Pakistan under the principle of legality and human rights standards. Section IV concludes the discussion and makes recommendations for revisiting the definition of terrorism by narrowing it down and making it compliant with the principle of legality.

¹⁹ Pakistan Law and Justice Commission, 'Report of the Witness Security Symposium', 922-24 June 2014) (on file with the author).

²⁰ Peshawar High Court, Minutes of the Meeting held with ATC Judges, 25 April 2014 (on file with the author).

²¹ See details of the National Action Plan on www.nacta.gov.pk. Key points include the establishment of military courts, revamping of criminal justice system and disciplining the affairs of the religious seminaries.

Section I: Definition of terrorism in international law

As we argue that the failure of international community to develop a consensus definition of terrorism has led to the creation of vacuum emboldening states to define terrorism as they deem appropriate, it is apt to provide a broad overview of the international efforts.

A relatively modern history of the use of the word 'terrorism' has been traced back to the French Revolution. 'The Reign of Terror' was a phrase a group of rebels (called the Jacobins) used for their brazen violence (1793-94), in which about 40,000 people were killed. In a bid to justify their violence, the rebels proclaimed that 'terror is nothing other than justice, prompt, severe, inflexible'.²² Terrorism was thus considered as a means to achieve a political goal. A general perception that reflects the political nature is that 'one man's terrorist is another man's freedom fighter', e.g. Nielsen argues that 'Osama bin Laden was a freedom fighter for Reagan, but a terrorist for Bush'.²³ After prefacing the information of some violent actions of 1946, Seto argues that 'the Jewish "Terrorism" (so labelled by the mainstream Jews of the time) helped drive the British from Palestine and thus paved the way for the creation of Israel'.²⁴ Seto further argues that some of the violent actions by the Boston Tea Party (the American Revolution) and anti-slavery movement (e.g. John Brown's attack on Harpers Ferry) would amount to 'terrorism' according to 'most current U.S. legal definitions of that term'.²⁵ This phenomenon has confounded international struggle to define terrorism.

Helping to create a landscape, this section will contribute to the main thesis of this study by positioning Pakistan's anti-terrorism law and jurisprudence in broader context, strengthening an efficient and effective criminal justice response to terrorism, fulfilment of international law obligations and a positive role in international anti-terrorism policy.

Historical overview

The International Law Commission (ILC) initially considered terrorism in 1954. Since 1982, the ILC considered terrorism in its Draft Codes of Crimes in 1991 and 1996. Excluding the role of private

²² Jonathan Matusitz, '*Terrorism and Communication: A Critical Introduction*' (2013 Sage) 1-2.

²³ Kai Nielsen, 'On the Moral Justifiability of Terrorism (State and Otherwise)' *Osgood Hall Law Journal* (2003) 41, 434.

²⁴ Theodore Seto, 'The Morality of Terrorism' *Loyola of Los Angeles Law Review* (2002) 35, 1230.

²⁵ Ibid.

individuals, the 1991 Draft Code proposed a distinct article on 'international terrorism' as an offence committed or ordered to be committed by a state agent or representative aimed at:

Undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figure, groups of persons or the general public.²⁶

The ILC Final Draft Code adopted in 1996 proposed the offence of terrorism as a category of 'war crimes'.²⁷ It, however, did not define 'terrorism.'

In 1972 the General Assembly passed a resolution that established an ad hoc committee on international terrorism, which had to consider the observations of the states in regard to measures aimed at preventing international terrorism and solid proposals for an effective solution to the problem.²⁸ The US also presented a draft convention for the Prevention and Punishment of Certain Acts of International Terrorism. The US draft also did not offer any definition of terrorism. However, it suggests criminalization of certain offences of 'international significance'. Those were:

(1) acts performed with intent to "damage the interests of or obtain concessions from a State or an international organization," (2) involving the unlawful killing, the causing of serious bodily harm, or the kidnapping of another person, (3) that are "committed neither by nor against a member of the armed forces of a state in the course of military hostilities," and (4) are international in character.²⁹

A look at the Security Council's practice would show that post-1985 Resolutions 'designated specific incidents, and types of violence by and against various actors, as terrorism'.³⁰ The 1990s witnessed greater impetus in Council's Resolutions targeting mainly Afghanistan, Iraq, Libya, and Sudan.³¹ From

²⁶ International Law Commission Yearbook, 1990, article 16, at 336.

²⁷ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, article 20.

²⁸ UNGA Res A/3034/27, 18 Dec. 1972.

²⁹ Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definition in Domestic Legislation' *Boston College International and Comparative Law Review* (2006) 29(1), 38.

³⁰ Saul (n 5).

³¹ Ibid.

1998 onward, the Council adopted a series of resolutions on Afghanistan focusing on dealing with Al-Qaeda. The 9/11 attacks were immediately followed by notable Council Resolutions 1368 and 1373, respectively. Resolution 1368 condemned the attacks. Resolution 1373, adopted under Chapter VII of the Charter, listed a number of state obligations. It required the state to refrain from supporting terrorism, prevent terrorist acts, deny safe havens to those who support terrorism, prevent the use of their territory for terrorism, criminalize acts supportive of terrorism, bring to justice those who support terrorism, help each other in criminal investigation or criminal proceedings and prevent cross border movement of terrorists. The Council also established a Committee to monitor the implementation of Resolution 1373. Both the Council and the Committee have failed to define 'terrorism', leaving it open for states to develop their own definitions. Saul argues that '[t]he lack of definition was deliberate, since the consensus on Resolution 1373 depended on avoiding definition'.³² The Committee 'has advocated that domestic terrorism laws be jurisdictionally widened to cover international terrorism'.³³ However, in its Resolution 1566 (2004), the Council condemned a number of criminal acts which may be termed as an attempt to define 'terrorism'. Paragraph 3 of the Resolution states:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism [...].

The Resolution also makes a reference to the right to self-determination, which is a serious controversy in the definition. Paragraph 3 further maintains that the above criminal acts 'are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature'.

³² Ibid 20.

³³ Ibid 21.

Paragraph 3 does not provide a legal definition³⁴ but it may explicitly guide the states ‘on the meaning of terrorism’, helping even to the breaking of the deadlock in the General Assembly,³⁵ and may attain, at least, a de facto significance.³⁶ Commentators have also noted that the phrase—‘which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism’—appears to be qualifying in nature; as if the Council understands ‘terrorism’ as the sum total of definitions laid down in existing international instruments.³⁷ The UN High Level Panel has endorsed the Council’s Resolution as one of the elements of the definition of ‘terrorism’.³⁸ Pakistan also supported the Council’s Resolution, particularly, the 9th preambular paragraph, which emphasized enhancing dialogue and broader understanding among civilizations.

In 1994, the General Assembly adopted a declaration on measures to eliminate international terrorism.³⁹ Paragraph 2 of the declaration elaborated that terrorist acts, methods and practices have negative effects on the entire UN system characterizing friendly relations among states, human rights and fundamental freedoms and democracy. Paragraph 3 attempts to define ‘terrorism’ as:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

While the 1972 ad hoc committee remained inactive, the General Assembly constituted another ad hoc committee in 1996. The ad hoc committee was to propose draft conventions on terrorist bombing, nuclear terrorism and then ‘further develop a comprehensive legal framework of conventions dealing with international terrorism’.⁴⁰ Immediately after 9/11 attacks, when the General Assembly was convened for its 56th session, it considered the report of the 1996 ad hoc committee on developing a draft comprehensive convention on international terrorism.⁴¹ In the ad hoc committee, key issues which lacked

³⁴ Security Council Provisional Record of 5053rd meeting S/PV/5053, 08 Oct., 2004 (SC 08 Oct., 2004).

³⁵ Saul (n 5) 29.

³⁶ Young (n 29) 45.

³⁷ Ibid.

³⁸ See UN, *A More Secured World, Our Shared Responsibility: Report of Secretary General’s High Level Panel on Threats, Challenges and Change*, 2004, at 52 (UN High Level Panel 2004).

³⁹ UNGA Res. A/Res/49/60.

⁴⁰ UNGA Res A/51/210, 16 Jan., 1997.

⁴¹ UNGA Res A/56/88, 22 Jan. 2002.

consensus were: the definition of 'terrorism', scope of draft convention, exemption for the activities of the armed force during armed conflicts and the relationship of the draft convention to other sectoral and regional counter-terrorism conventions.⁴² While consensus grew on many issues, the deadlock still remained on the issues of definition.⁴³

The definitional issue was confounded with a suggestion by the Organization of Islamic Cooperation (OIC) to insert the following provision to the definition proposed in the draft convention:

Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.⁴⁴

⁴² See Surya P. Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law' *International Law FORUM du droit international* (2002) 4(3), 159-169.

⁴³ The text of the definition reads as under:

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

4. Any person also commits an offence if that person:

- (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of this article;
- (b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of this article; or
- (c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
 - (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

⁴⁴ See Report of the Ad Hoc Committee established by General Assembly Res. 51/210 of 17 Dec., 1996, General Assembly Official Records 57th Session Supplement # 37 (A/57/37). See also the 1999 Convention of the Organization of Islamic Conference on Combating International Terrorism.

The OIC countries argued that the activities of those exercising their right of self-determination should not be included in the definition of 'terrorism'. They also argued that their proposal is supported by the 1979 International Convention against the Taking of Hostages. Those opposing the OIC proposal expressed the view that the issue of self-determination is dealt with in other international human rights instruments. Commenting on two words 'aggression' and 'hegemony' used in the OIC draft, Subedi argues that 'aggression' is acceptably used in relation to two states, not in regard to a state on the one side and the people struggling for independence on the other.⁴⁵ Subedi further argues that 'hegemony' is 'a fluid political concept' and thus confusing in context of definition of 'terrorism'.⁴⁶ Suggesting a solution to break the impasse, Subedi argues that the OIC suggestion should not have been adopted; instead the following should have been added in article 18 of the draft convention:

The activities of armed forces during an armed conflict, as those terms are understood under international law, which are governed by that law, are not governed by this Convention, and the activities undertaken by the military forces of a state in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.⁴⁷

A recent and more significant example is the 2011 decision of the UN Special Tribunal for Lebanon (STL) stating that a general definition of 'terrorism' exists in international law. The court has extensively referred to and examined international treaties, UN resolutions and the legal and judicial practice of States to determine opinion juris and State practice. The Court identified the following three elements of the definition:

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or

⁴⁵ See Surya P. Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law', 4 (3) *International Law FORUM du droit international* [2002] pp 159-169.

⁴⁶ Ibid.

⁴⁷ Ibid.

international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.⁴⁸

While efforts for developing a consensus on the draft comprehensive convention on international terrorism in the General Assembly continue, around thirteen international and regional counter-terrorism treaties have already come into force. The international conventions relate to specific acts and situations, such as, acts of nuclear terrorism (2005); financing of terrorism (1999); terrorist bombing (1997); making of plastic explosives for the purpose of detection (1991); acts against the safety of fixed platforms located on the continental shelf (1988); acts against the safety of maritime navigation (1988); acts of violence at airports serving international aviation (1988); physical protection of nuclear material (1980); the taking of hostages(1979); prevention and punishment of crimes against internationally protected persons (1973); unlawful acts against the safety of civil aviation; unlawful seizure of aircraft (1970); and, offences and acts committed on board aircraft (1963).⁴⁹

Regional efforts: the European Union

The European Convention on Suppression of Terrorism was adopted in 1977. Article 1 of the Convention excluded a number of offences from extradition.⁵⁰ It was amended by a Protocol adopted in 2003. The

⁴⁸ The Special Tribunal for Lebanon (Appeal Chamber), *Interlocutory Decision on the Applicable Law Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, 16 Feb. 2011 (STL decision 2011).

⁴⁹ International Convention for the Suppression of Acts of Nuclear Terrorism, Dec. 14, 2005 [Nuclear Terrorism]; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, [Financing Convention]; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, [Bombings Convention]; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, [Plastic Explosives Convention]; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, [Fixed Platforms Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, [Maritime Convention]; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation [supplement to the Montreal Convention], Feb. 24, 1988, [Montreal Airports Protocol]; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, [hereinafter Nuclear Materials Convention]; International Convention Against the Taking of Hostages, Dec. 17, 1979, [Hostages Convention]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, [Internationally Protected Persons Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, [Montreal Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, [The Hague Convention]; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, [Tokyo Convention].

⁵⁰ Its text read as: For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

amended provision criminalized all offences falling in eight of the 13 international counter-terrorism conventions, such as, offences falling under the conventions adopted in 1973, 1979, 1980, (the three conventions of) 1988, 1997, 1999. The amendment further requires that where the offences are not covered by the above mentioned conventions, the same shall apply to both the commission and attempt to commit those principal offences by the perpetrator or an accomplice. The European Union's 2002 Framework Decision offered a definition of terrorism in two parts. First, the commission or threat to commit criminal acts of murder, bodily injury, kidnapping or hostage taking, destruction of public property resulting in major economic loss, seizure of aircraft, ships, or other means of public transport, manufacture, possession, acquisition, transport, supply or use of explosive or nuclear weapons, release of dangerous substances, interfering or disrupting with water, power supply and other natural resource. Second, when the purpose of the above acts is to seriously intimidate a population, unduly compel a government or international organisation to perform or abstain from performing any act, or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The South Asian Association for Regional Cooperation

The South Asian Association for Regional Cooperation (SAARC) adopted a Convention on Suppression of Terrorism in 1987 and a Protocol in 2004. The definition of the SAARC Convention may be divided into three parts. First, the SAARC Convention includes those offences which fall under the 1970, 1971 and 1973 Conventions⁵¹ and all those Conventions to which South Asian nations are parties. Second, it includes a wide range of criminal acts, such as, murder manslaughter, assault, causing bodily harm, hostage taking and offences relating to firearms, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or bodily injury to persons or serious damage to property'. Third, attempt, abetment or conspiracy to commit any offences mentioned in the definition. The protocol to the SAARC convention was adopted in 2004; it reiterates the support of the SAARC states to the UN Security Council resolution 1373. It criminalizes terrorist financing for (a) an act that constitutes

a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; an offence involving kidnapping, the taking of a hostage or serious unlawful detention; an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

⁵¹ They are the 1970 Hague convention (on unlawful seizure of aircraft), the 1971 Montreal Convention (unlawful acts against safety of civil aviation), the 1970 convention on internationally protected persons.

an offence under 11 treaties mentioned in an annex to the protocol, (b) any other act intended to cause death or serious bodily injury to a civilian, aimed at intimidating a population or coercing a Government or an international organization to do or to abstain from doing any act; or (c) an offence within the scope of any Convention to which SAARC Member are parties and which obliges the parties to prosecute or grant extradition.⁵²

The outcome of international efforts

The 12 international conventions, no doubt, establish an international legal regime, but none of them define 'terrorism' as an offence. Among them, nine focus on punishments and three on prevention. The former conventions concern with specific criminal acts, for example, acts which may or do jeopardize the safety of the aircraft (the 1963 Convention). These treaty-based crimes are to be recognized by the states in their domestic laws. The latter conventions pertain to specific acts which the states are obliged to prevent from being committed (e.g. the 1999 Financing Convention). These treaties are of no significance in customary international law because no treaty recognizes any general offence of 'terrorism'.⁵³ Regional conventions appear to be more problematic. The SAARC convention, for example, is dubbed to create no offence but aims at extradition and cooperation for law enforcement.⁵⁴ The 2004 SAARC Protocol does not mention political purpose in the definition it proposes.

Despite the fact that post-9/11 international efforts have been increased and pursued more vigorously, the international community is still unable to define 'terrorism'. Consensus on definition faces two challenges: first, the activities of national armed forces in an armed conflict, and second, the violent pursuit of self-determination by people under foreign occupation. This is because of the nature of terrorism as a crime. Terrorism is by nature a political crime. As noted above, the French Jacobins justified their reign of terror for what they considered as a just cause. Regarding the first challenge, there appears

⁵² Earlier for the implementation of the 1987 convention, the SAARC Terrorist Offences Monitoring Desk (STOMD) was established in 1990. Some key recent efforts include the 2008 approval of the Convention on Mutual Legal Assistance Treaty, the 2009 Declaration on Cooperation on Combating Terrorism and the 2009 formation of a High Level Group of Eminent Experts. The SAARC efforts, however, have produced negligible success. There are a host of reasons for this, lack of trust, particularly between India and Pakistan; blaming each other's intelligence agencies; economic disparity; rivalries between states; and lack of explicit link to UN Counter Terrorism Strategy. See, for example, Mussarat Jabeen and Ishitiah A. Choudhry, 'Role of SAARC for Countering Terrorism in South Asia', 28 (2) *South Asian Studies*, 2013, pp 389-403; Eric Rosand, Naureen Chowdhry Fink and Jason Ipe, 'Countering Terrorism in South Asia: Strengthening Multilateral Engagement', International Peace Institute, 2009.

⁵³ See Saul (n 5) 2

⁵⁴ Ibid 3.

to be little opposition to the view that international humanitarian law can adequately respond to it. Regarding the second challenge, the thrust of the debate is in favour of the view that the right to self-determination could be pursued through other legal means within the purview of public international law, including international human rights law. This view, however, ignores the realities of international law. The most powerful nations, among them, most notably, the US has been playing a hegemonic role in international law. Markopoulos argues that the US used its influence in the adoption of the Council Resolution 1373, as 'the Bush Administration directly solicited other countries' cooperation [...]. The text of the resolution drew significantly from the text of President Bush's Executive Order against terrorism.'⁵⁵ Several movements of self-determination across the world (examples: the Palestinian-Israeli conflict and Kashmir between India and Pakistan) characterizing historical grievances further aggravated by violation of UN Resolutions are some of the key realities of international law, which have impact on the efforts of the international community to define 'terrorism'.

The failure of the international community to develop a consensus definition has provided flexibility for national definition of 'terrorism.' Many countries have added elements of international concerns (e.g. a terrorist act intended to target a foreign government or an international organization or violation of an international convention against terrorism) in their domestic legislation. Despite such insertions, it appears that the drafting and interpretation of the definition of 'terrorism' is dominated by domestic security challenges. While in international law, the lack of consensus on a clear definition is used by the US as a hegemonic tool of its foreign policy, the domestic law vagueness and impreciseness is exploited by powerful political elites, particularly in developing countries, leading to discrimination against religious minorities, immigrants, political opponents and personal vengeance.

Section II: The principle of legality

In criminal law, the principle of legality is based on the Latin maxim *nullum crimen sine lege, nulla poena sine lege* which means no crime without law and no punishment without law.⁵⁶ The principle of legality has three main elements. First, the law must be precise indicating what is criminalised; the related

⁵⁵ Alexander J. Marcopoulos, 'Terrorizing Rhetoric: The Advancement of U.S. Hegemony Through the Lack of a Definition of 'Terror' (2009) <http://ssrn.com/abstract=1327155> accessed 13 March 2017.

⁵⁶ Antonio Cassese et al, *International Criminal Law: Cases and Materials* (OUP 2011) 53. The Latin version of the principles read: *nulla poena sine lege, nulla, poena sine crimine, nullum crimen sine poena legali*. For a recent contribution, see for example, Kenneth S. Gallant, *The Principle of Legality in International and Comparative Law*, 2009. For an older contribution, see Jerome Hall, 'Nulla Poena Sine Lege', 47 *The Yale Law Journal*, 1937, pp 165-193.

principle of strict construction and the idea that ambiguities are decided in favour of the accused. Second, non-retroactivity, i.e. not allowing retroactive criminal prohibition. Third, non-extension by analogy, i.e. 'the prohibition against expanding the scope of criminal prohibition by analogy beyond that set forth by law in advance'.⁵⁷ A distinguished German lawyer, Franz von Liszt, wrote 1893 that these principles are:

The bulwark of the citizen against the state's omnipotence; they protect the individual against the ruthless power of the majority, against the Leviathan. However paradoxical it may sound, the Criminal Code is the criminal's [Magna Carta]. It guarantees his right to be punished only in accordance with the requirements set out by the law and only within the limits laid down in the law.⁵⁸

The principle of legality is also reflected in several human rights treaties. Article 11(2) of the Universal Declaration of Human Rights 1948 nicely sums up the principle:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The Supreme Court of Pakistan has declared the Universal Declaration to be a customary law binding on Pakistan.⁵⁹ Article 15(1) of the International Covenant on Civil and Political Rights 1966⁶⁰ uses similar language stating that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence,

⁵⁷ Ibid. see also Peter Westen, 'Two Rules of Legality in Criminal Law', 26 *Law & Philosophy*, 2007, pp 229-305, at 231-2.

⁵⁸ Cited in Antonio Cassese, *International Criminal Law* (2nd ed OUP 2008) 37.

⁵⁹ See All Pakistan Legal Decisions 2007 Supreme Court 642.

⁶⁰ Pakistan has acceded to the ICCPR 1 June 2010.

provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

The principle of legality is also considered a fundamental tenet of rule of law: laws must be prospective, general, certain, consistent and understandable.⁶¹

Several international organizations have found many national definitions of terrorism as violating the principle of legality being overbroad and vague.⁶² Hardy and Williams suggest three ways to solve the issue. First, consideration of 'whether a domestic definition encompasses a wider range of conduct than is included in from authoritative international sources' (e.g. the definitions offered in the Financing of Terrorism Convention⁶³ and UN Security Council Resolution 1566/2004, reproduced above). Second, different national definitions may be synthesized to determine if a particular national definition is overbroad or not.⁶⁴ Third, whether a definition of terrorism serves its intended purpose.⁶⁵ Hardy and Williams have developed three-pronged criteria: *clarity* relates to the three maxims discussed above; *breadth* expresses the application of the definition beyond its intended purpose; and *consistency* between domestic definitions as a normative function in criminal law and a means of international cooperation.

⁶¹ Hardy and Williams, 'What is "Terrorism"? Assessing Domestic Legal Definitions' *UCLA J Int'l Law FOR AFF* (2011) 16, 82; refers to Regina v. Secretary for the Home Department; Ex parte Person, [1998] A.C. 539. Also adds that the International Commission of Jurists, the Special Rapporteur on the Promotion of Human Rights While Countering Terrorism (Special Rapporteur on Counter-Terrorism) and the UN Office for the High Commissioner for Human Rights have referred to article as reflecting the principle of legality. The principle of legality is an established principle of criminal law in Pakistan.

⁶² Report of Eminent Jurists Panel; the Inter-American Commission on Human Rights Report, 2002, OEA/Ser.L/V/II.116, 2002; UN Human Rights Committee, Concluding Observations of the Human Rights Committee on definitions of terrorism in Israel, Estonia, Belgium, the Philippines, and the US, 2003 (Israel, 14, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003); Estonia, 8, U.N. Doc. CCPR/CO/77/EST (Apr. 15, 2003); Belgium, 24, U.N. Doc. CCPR/CO/81/BEL (Aug. 12, 2004); Philippines, 9, U.N. Doc. CCPR/CO/79/PHL (Dec. 1, 2003); United States, 11, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); the Special Rapporteur on the Promotion of Human Rights While Countering Terrorism (Special Rapporteur on Counter-Terrorism), UN Doc. A/64/211 (03 August 2009).

⁶³ Article 8(1) of the 1999 Convention on Financing Terrorism defines 'terrorism' as '[a]ct intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.'

⁶⁴ Hardy and Williams (n 61) 97; refers to Young (n 29) 64.

⁶⁵ *ibid.*

Section III: Defining ‘terrorism’ in the Anti-Terrorism Act 1997

This section focuses on examining the definition of terrorism in the ATA. Through an examination of internal and external political dynamics of terrorism, we discuss the historical reasons for the enactment of the ATA and how they have overshadowed the development of the terrorism definition. We test the definition of terrorism in the ATA and as it is interpreted by the Supreme Court of Pakistan against the principle of legality set out section II.

Historical perspective

In Pakistan there was no law defining terrorism until the Anti-terrorism Act was enacted in 1997. Nevertheless, a brief study of the history of Pakistan’s anti-terrorism legislation is necessary in order to see how the term was understood in the absence of its definition, why the term was not defined and what factors, after all, made it necessary to define it. The study of Pakistan’s anti-terrorism legislation brings two points to the fore. First, the story of Pakistan’s anti-terrorism legislation begins with political dissent, described as an anti-state activity. Second, since the early days of the independence on 14 August 1947, law making and law enforcement aimed at introducing emergency executive powers and elbowing out of judicial review. Thus, the 1949 Public and Representative Officers (Disqualification) Act (PRODA) could be seen as a weapon to quell political opposition. Other laws introduced were: the Security of Pakistan Act (SPA) 1952, the Defence of Pakistan Ordinance (DPO) 1955 and the Electoral Bodies (Disqualification) Order (EBDO) 1959. The SPA conferred on government wide powers to restrict movements of any suspected person and issue his detention order, to release a person unconditionally or for a specified time, cancel the release orders any time, direct any person to submit his photographs, finger prints, handwriting and signature to the designated officer. The disobedience of orders under the law was punishable for six months or a fine or both. The governments also exercised powers of prevention of offences under the Code of Criminal Procedure (CrPC) 1898, such as, those defined in sections 107 (security for keeping peace) and 144 (passing of temporary executive order in urgent cases of nuisance or danger to public). The law attracted criticism and resentment.⁶⁶ As Kennedy argues that in order to ‘combat terrorism in its various guises ... the Ayub Khan regime [1958 – 1969] was no stranger to the use

⁶⁶ See Saba Noor, ‘Evolution of Counter-Terrorism Legislation in Pakistan’ *Conflict and Peace Studies* (2008) 1(1), 1-17; Shabana Fayyaz, ‘Responding to Terrorism: Pakistan’s Anti-Terrorism Laws’ *Perspective on Terrorism* (2008) II (6), 10-19 <<http://www.terrorismanalysts.com/pt/index.php/pot/article/view/39/html>> accessed 13 March 2017.

of policies to justify the suppression of domestic opposition [under] PRODA and EBDO'.⁶⁷ Commenting on PRODA and EBDO Shabana Fayyaz observes that 'terrorism' was defined through the lens of political dissent, leaving the term vague and abstract. These laws, however, did not use the word 'terrorism'. Another law called the Prevention of Anti-National Activities Act 1974 appeared to have more articulate political nature. It sought to criminalize activities which were intended or support any claim for secession of the country, disruption of sovereignty, territorial integrity, racial, linguistics consideration or propagates a view that the citizens of Pakistan comprises of more than one nationality.

The Suppression of Terrorist Activities (Special Courts) Act (STA) 1975 was the first law that used the word 'terrorism'. The STA was introduced in the background of political opposition spearheaded by nationalist political forces, particularly in Baluchistan and the Khyber Pakhtunkhwa (then called the North West Frontier Province). Its purpose was two-fold: first, suppression of acts of sabotage, subversion and terrorism, and second, provision for speedy trial of these offences. None of the three offences were defined by the law. These offences were rather defined through a schedule which contained four sets of offences from the Pakistan Penal Code (PPC) 1860, nine other laws (for example, the laws relating to explosive substances, arms, telegraph, aircraft, defence of Pakistan and anti-national activities). The law also criminalized 'any attempt or conspiracy, or abetment of any of' offences mentioned in the schedule. The special courts under the law had to follow a speedy trial procedure, with the power to take cognizance of the scheduled offences directly (without routing the case through a magistrate court under the ordinary rules of criminal procedure), refuse adjournment unless justice demands, and trial in absentia in some specific circumstances.⁶⁸ The law also provided that an accused would be presumed to be guilty if found in possession of 'any article or thing' about which there could be reasonable suspicion to have been used in the commission of an offence. This characterizes a visible departure from established criminal law principle of presumption of innocence. This particular aspect of the law attracted criticism by human rights activists.⁶⁹ As the law was seen to aim at silencing political opponents, Khan Abdul Wali Khan, a leading

⁶⁷ Charles H. Kennedy, 'The Creation and Development of Pakistan's Anti-terrorism Regime 1997-2002', in Satu P. Limaye, Mohan Malik and Robert G. Wirsing (Ed.) *Religious Radicalism and Security in South Asia*, Honolulu, Hawaii, Asia-Pacific Center for Security Studies, 2004, pp 387-411, at p 390 (Kennedy 2004). 387.

⁶⁸ See sections 4 and 5 of the Suppression of Terrorist Activities (Special Courts) Act, 1975. The law provided a trial in absentia if the accused once appeared absented without just cause or behaved in the court in such a manner that compelled the court to order his removal. The accused were not to be presumed to have admitted the commission of the offence he is charged with.

⁶⁹ Shabana (n 66) 11 citing Najm-U-Din, *Terrorist unless proven otherwise: Human rights implications of anti-terror laws and practice in Pakistan* (2007 HRCF Publication), 10.

political figure of the time (and the leader of opposition in the National Assembly) and his National Awami Party (NAP) proved as prime targets of the law. Khan was booked under the STA for conspiring against the state. A separate tribunal was set up for his trial and his political party was banned.⁷⁰ Following the STA, the concept of special courts and speedy trial continued until 1997. Thus certain other laws were introduced, such as, the 1987 Speedy Trial Ordinance and the 1990 Terrorist-Affected Areas (Special Courts) Ordinance (the latter enacted as an Act in 1992).

Like many other jurisdictions, such as, the UK and India, Pakistan's pre-9/11 legislation aimed at countering domestic terrorism and sectarian violence. The nature of terrorist threat in Pakistan, however, differed from the UK and India. India faced threats from separatist movements in the East Punjab and Nagaland.⁷¹ Like India, the UK faced separatist movement in Northern Ireland. The UK's threat has a religious dimension too (the separatist being Catholic nationalists).⁷² Unlike the UK and India, Pakistan did not define 'terrorism'. The STA did not define 'terrorism' as a separate or independent offence. It appended a schedule in which offences from several substantive criminal laws, including, the PPC, the main substantive criminal laws were included. While the courts have developed a good deal of jurisprudence on the STA, having remained in force for 22 years, no definition-specific case law, however, is available.⁷³

Definition of 'terrorism' in the ATA: historical reasons

While the anti-terrorism legislation was initially used as a tool of political vendetta, with the passage of time, a host of other internal and external political elements also came into play, making the criminal justice response more complex and challenging. It is crucial to understand those other factors as a background to the introduction of the ATA, particularly the definition of 'terrorism'. Internally, since its

⁷⁰ Ibid. Also see Saeed Shafqat, *Civil-Military Relations in Pakistan* (1997 Westview Press), 38.

⁷¹ See Hardy and Williams (n 61)148.

⁷² See the University of Ulster, 'Conflict Archives on the Internet (CAIN) Web Service-Conflict and Politics in Northern Ireland' <<http://cain.ulst.ac.uk/>> last accessed 6 March 2015.

⁷³ A few Supreme Court's reported judgments appeared in Pakistan Law Journal (PLJ) 1992 Supreme Court (SC) 625; PLJ 1992 SC 500; 1995 Supreme Court Monthly Review (SCMR) 59; 1995 SCMR 1151; 1995 SCMR 1285. Section 8 of the STA (putting the burden of proof on accused person if found in possession of any article or thing which may raise a reasonable suspicion that the accused person has committed a scheduled offence) has come under persistent judicial scrutiny in a number of cases, such as, 1995 Pakistan Criminal Law Journal (PCr.LJ) 61 [Quetta]; PLD 1995 Karachi 16; PLD 1995 Karachi 531; 1995 Monthly Law Digest (MLD) 1272 [Lahore]; 1995 PCr.LJ 1954 [Lahore]. In these cases, the main point involved was the proper proof of recovery of the article or thing. None of the decisions have ever ruled that section 8 is inherently unwarranted being a departure from the established norm of criminal justice pertaining to burden of proof.

independence in 1947, Pakistan faced constitution-making as a dilemma. Among others, two reasons were of great significance: first, the Islamic concept of state and the establishment of a federal system where provinces enjoyed reasonable autonomy. These two dilemmas set directions for the political dynamics cutting across religion, ethnic identity and socio-economic development. With the independence in 1947, Pakistan (as well as India) inherited the British colonial political, administrative and judicial structures.⁷⁴ No serious effort was made to weed out the colonial mind-set and reform the institutional structures which promote and perpetuate it. Rather that mind-set and institutional structures were used as instruments of political oppression. Constitutional quarrels over the Islamic concept of state were fought inside parliament as well as on the streets. The issue of provincial autonomy lacerated into the body politics of the country, first in the East Pakistan (that led to dismemberment of the country in 1971) and later on (until the 1977 military takeover), in Baluchistan and the Khyber Pakhtunkhwa provinces. The dictatorship of General Zia ul Haq (1977- 1988) is notable for three incidents: the hijacking of a Pakistan International Airlines flight in 1981 by a terrorist group called Al-Zulfikar; the formation of the Muhajir Qaumi Movement (MQM), a political party of the Urdu speaking Indian migrants settled in Karachi and other urban centres in Sind;⁷⁵ and a massive Islamization of law and society. Externally, the 1979 Russian invasion of Afghanistan and the 1979 Islamic Revolution in Iran significantly influenced Pakistan's internal political dynamics in several ways. First, the Shia-Sunni sectarian rift enhanced (e.g. the Shia community asked for exemption from the Zakat and Ushr Ordinance 1980). Second, with the emergence of the MQM, Karachi immersed in ethnic-linguistic conflict leading to terrorist activities till today. Third, in order to undermine and defeat Russia in Afghanistan, Western countries led by the US exploited the Islamic sentiments of the Pakistani people by branding the Afghan resistance as *jihad*. The funding by Arab countries added further fuel to the fire of Shia-Sunni sectarian divide in Pakistan. Despite resistance from leftist political parties (mainly Wali Khan's ANP), Zia remained a close ally of the USA and other Western countries for prolonging his dictatorship. While it has now become an open secret that the Afghan war was merely a proxy war, the undue exploitation of the concept of *jihad* through Kalashnikov (gun) culture, sowed the seeds of what has now become global terrorism. The sectarian divided led to nurturing extremism resulting in the establishment of terrorist organizations. It is in this background that successive governments enacted certain anti-terrorism laws in early 1990s followed the ATA to counter ethnic terrorism in the entire country.

⁷⁴ See Anil Kalhan et al, 'Colonial Continuities: Human Rights, Terrorism, and Security Laws in India', 20 *Columbia Journal of Asian Law*, 2007, pp 93-234 (Kalhan 2007).

⁷⁵ Research Society of International Law, 'The Case for Change: A Review of Pakistan's Anti-Terrorism Act of 1997', Oct. 2013 (RSIL 2013).

Definition of 'terrorism' in the ATA and subsequent amendments

As the threat of terrorism grew, Pakistan realized that a new law must be made. Thus on 16 August 1997, the President of Pakistan signed the ATA into law. The preamble sets out the two purposes of ATA: first, prevention of terrorism and sectarian violence, and second, speedy trial of heinous offences. Section 6 of the ATA defines terrorism. On a close reading, the definition may be divided into three parts: purpose or motive of violence, means of violence and consequence(s) of violence:

[Purpose] 'Whoever, to strike terror in the people, or any section of the people, or to alienate any section of the people or to adversely affect harmony among different sections of the people,'

[Means] 'does any act or thing by using bombs, dynamite or other explosive or inflammable substance, or fire-arms, or other lethal weapons or poisonous or noxious gases or chemicals or other substance of a hazardous nature in such a manner as'

[Consequences] 'to cause, or to be likely to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community or displays fire-arms, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act'.

Between 1997 and 2000, the ATA was amended five times.⁷⁶ Three amendments changed the definition. Between 2002 and 2013, the ATA was amended nine times and the definition was amended five times: in 2004, 2009, 2010 and twice in 2013.⁷⁷ On each occasion, all three components of the definition - means, purposes and consequences - were expanded. For ease of reference and analysis amended and currently in force definition is reproduced below in full:

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

⁷⁶ ATA (Amendment) Act 24 Oct. 1998, ATA (Amendment) Ordinance, 27 April 1999, ATA (Amendment) Ordinance 27 August 1999, ATA (Amendment) Ordinance 2 December 1999, and ATA (Amendment) Ordinance 24 July 2000.

⁷⁷ The amending laws are: The Anti-Terrorism (Amendment) Ordinance 15 November 2002; The Anti-Terrorism (Amendment) Ordinance 23 November 2002 ; The Anti-Terrorism (Amendment) Act 30 November 2004 The Anti-Terrorism (Second Amendment) Act 2004; The Anti-Terrorism (Amendment) Ordinance 2009; The Anti-Terrorism (Amendment) Ordinance 2010; The Anti-Terrorism (Amendment) Ordinance 19 March 2013 The Anti-Terrorism (Second Amendment) Act (26 March) 2013; The Anti-Terrorism (Amendment) Ordinance 14 October 2013.

- (a)** the action falls within the meaning of sub-section (2); and
- (b)** the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect ⁵[or a foreign government or population or an international organization] or create a sense of fear or insecurity in society; or
- (c)** the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause ¹[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.]

(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 ²[including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson or by any others means;]
- (d)** involves the doing of anything that is likely to cause death or endangers person’s life;
- (e)** involves kidnapping for ransom, hostage-taking or hijacking;
- [(ee)** involves use of explosive by any device including bomb blast ²[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 civic life;
- (j)** involves the burning of vehicles or any other serious form of arson;
- (k)** involves extortion of money (“bhatta”) or property;
- (l)** is designed to seriously interfere with or seriously disrupt a communication system or public utility service;
- (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; ^{1*}
- (n)** involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant;
- [(o)** involves in acts as part of armed resistance by groups or individuals against law enforcement agencies; or
- (p)** involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments.]

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

Definition of ‘terrorism’ and the principle of legality

In this section we test the definition of ‘terrorism’ on the touchstone of the principle of legality and will critically examine jurisprudence developed by Pakistani Supreme Court. The three-pronged criteria (clarity, breadth and consistency) developed by Hardy and Williams will be applied to the definition of ‘terrorism’ provided in the original law introduced in 1997 and the various amendments carried out between 2001 and 2013.

As compared to the 2001 definition, the original definition used ambiguous language, at least, in one respect. It provided that, among others, a terrorist act is one which 'adversely affect[s] harmony among different sections of the people'. These words are comparable to the definition offered by India's POTA, which says a terrorist act is one which threatens the unity, integrity and security of India. The word 'harmony' is ambiguous. As it is not a legal word, reference may thus be made to its plain dictionary meaning. According to the 2010 edition of Oxford Dictionary, 'harmony' means 'a state of peaceful existence and agreement; to live together in perfect harmony'. It also refers to different categories of harmony, such as, 'social/racial harmony'.⁷⁸ The Chambers Dictionary defines the word 'harmony' as 'a fitting together of parts so as to form a connected whole; agreement in relation'; 'a normal and satisfying state of completeness and order in relations of things to each other.'⁷⁹ Criminal law requires that the language of the law should be clear and specific and that it be construed strictly. The word 'harmony' is neither clear, nor specific nor could it be construed strictly. Rather, it is liable to many interpretations. This creates a scope for its abuse and misuse in an anti-terrorism criminal case. The definition is also very broad. For instance, 'injury' and 'damage' do not need to be serious. Nor does it make a distinction between public and private 'property'. Similarly, 'the disruption of any supply of services essential to the life of the community' means, as a commentator noted with reference to Indian law, that even the cutting of a telephone line would amount to terrorism.⁸⁰ The selected parts of the text of the original definition do not fulfil the broader conception of the rule law, i.e. the law must be clear, prospective and certain.

As stated above, several changes were introduced in the definition. Two changes introduced in 1998 amendment are worth consideration. First, in respect of means of violence, some generic words such as 'any other weapon'; and regarding the consequences of the terrorist act, the words 'on a large scale' after the words 'damage to property', were added. These sets of words add breadth to the definition. Second, certain other offences, such as, gang rape, child molestation, robbery coupled with rape were also added a terrorist offences. While these offences are of heinous nature, they could not be categorized as terrorism. In other words, these offences take the law beyond its intended purpose.

The post-2001 amendments are reflected in the above definition. The purpose, means of violence and consequences all have been loaded with greater details. The definition has come under judicial scrutiny

⁷⁸ Oxford Dictionary (2010 Oxford University Press) 712.

⁷⁹ Chambers Dictionary, Chambers (2006 Harrap Publishers Ltd.) p 682.

⁸⁰ Young (n 29) 90.

in several cases but the most important one is *Mehram Ali v. Federation of Pakistan (Mehram Ali)*⁸¹ as it touched several issues including the definition of 'terrorism'. The court rejected the argument that the murder of a public servant even on account of personal enmity would amount to terrorism. The court accepted the argument that if a public servant is murdered with the intention and design to terrorize the public servants so that they may not discharge their official duties, the criminal act would amount to terrorism. Relying on *Memon*,⁸² the court observed:

[T]he offences mentioned in the Schedule should have nexus with the object of the Act and the offences covered by sections 6, 7 (definition and punishment for 'terrorism') ...if an offence included in the Schedule has no nexus with the above section, in that event notification including such an offence to that extent will be ultra vires.'

While *Mehram Ali* clearly enunciated 'nexus' as a necessary element of the terrorism, a study of the subsequent case law would show that the higher courts have shown little adherence to it. As the case law examined below demonstrates that the creation of fear and insecurity has been seen as a sine qua none for the offence of 'terrorism'.

In *Ziaullah*, the Supreme Court held that the murder of a lawyer and police officer in court premises amounted to terrorism because it created a 'sense of insecurity not only amongst a section of the public, but community of Advocates as well'.⁸³ In *Mst. Najam-un-Nisa*, which involved the murder of seven persons in a house at night time, the Supreme Court observed that 'the crucial question for determination was that whether the said crime had or had not the effect of striking terror or creating a sense of fear and insecurity in the people or any section of the people'.⁸⁴ The creation of sense of fear and insecurity has also been interpreted as the psychological effect produced by a violent criminal act. In *Mushtaq*, a case in which four persons were killed on broad day light on a busy road in a big city, the court held that the 'cumulative fallout of the occurrence as to the time, place and manner of the act created a sense of fear and insecurity in the society'.⁸⁵ This line of argument was maintained by the court in many cases involving

⁸¹ PLD 1998 SC 1445; PLD 1999 SC 504.

⁸² See *The Government of Baluchistan through Additional Chief Secretary v. Azizullah Memon* PLD 1993 SC 341.

⁸³ *Ziaullah v. Special Judge Anti-Terrorism Court, Faisalabad and 7 others* 2002 SCMR 1225.

⁸⁴ *Mst. Najam-un-Nisa v. Judge, Special Court Constituted under Anti-Terrorism Act, 1997* 2003 SCMR 1323.

⁸⁵ *Muhammad Mushtaq v. Muhammad Ashiq and others* PLD 2002 SC 841.

circumstances of crime, such as, a murder by sprinkling petrol on a person and firing with Kalashnikov,⁸⁶ the killing of two persons in a mosque during Friday prayer,⁸⁷ and the killing of a college teacher for restraining a student from cheating in examination.⁸⁸

In most cases examined here, the Supreme Court did not refer to *Mehram Ali*. In some cases, the court has relied interpretations /views expressed in *Mehram Ali*. For example, an act involving the murder of a college teacher (who admonishing a student for cheating in examination) was held to be terrorism. The court's view reflected the *Mehram Ali's* reasoning, arguing that the teacher apprehended the student as part of his official duties. The court held that 'the act of the accused persons created fear, sensation, panic and insecurity in the teaching class as a whole'.⁸⁹ Similarly, in *Akhtar*, the accused persons killed a medical surgeon.⁹⁰ Brief facts of the case were that the deceased surgeon had conducted a surgery on the body of the mother of the accused persons. After surgery her condition worsened resulting in the amputation of the leg of their mother. The accused persons privately asked for compensation and the expenses incurred on the medical treatment. Their demand, having not been met, they killed the surgeon. The Supreme Court admitted that the motive was 'the personal grievance' of the accused persons, 'but the murder of the doctor after his abduction for such motive would be an alarming situation for all doctors and would be a direct source of creating panic and terror in the medical profession'.⁹¹

Only in a few cases, the Supreme Court held that certain acts were not terrorism. For example, in 2007 case involving criminal trespass, and damage by fire or explosive substance, was not found to be one of terrorism.⁹² The court referred to the lack of 'nexus', as held in the *Mehram Ali* case.⁹³ In another case concerning the murder of three persons and attempted murder of one person in the background of a dispute over immovable property, the court held that the first information report did not reflect that the incident create any fear or panic the public.⁹⁴ The court reasoned that the incident was rooted in personal vendetta. As discussed above, the court did rule in certain cases of personal enmity that such cases

⁸⁶ *State through Advocate General N.W.F.P. v. Muhammad Shafiq* PLD 2003 SC 224.

⁸⁷ *Muhammad Farooq v. Ibrar and 5 others* PLS 2004 SC 917.

⁸⁸ *Zahid Imran and other v. The State and others* PLD 2006 SC 109.

⁸⁹ *ibid.* paragraph 31.

⁹⁰ *Naeem Akhtar and others v. The Stat and others* PLD 2003 SC 396.

⁹¹ *Ibid.* Paragraph 12.

⁹² *Fazal Dad v. Col. (Retd.) Ghulam Muhammad Malik and other* PLD 2007 SC 571.

⁹³ *Ibid* [5].

⁹⁴ *Muhammad Yaqoob and others v. The State and others* 2009 SCMR 527.

involved act of terrorism.⁹⁵ Another case, in which the court realized that personal enmity would not lead to terrorism, is *Mohabbat Ali*.⁹⁶ In this case, one man was murdered, another injured. The reason was a dispute over land in which the complainant party had earlier murdered two tenants of the accused party.⁹⁷ Reiterating its earlier opinion, the court ruled that the crime, which was the result of personal enmity, did not pass the test of creation of sense of fear and insecurity.⁹⁸ In a 2009 case having a linkage to a private criminal dispute, the court held that:

Fear or insecurity must not be a by-product, fallout or unintended consequence of a private crime. As such, creation of fear and insecurity in society is not itself terrorism unless the same is coupled with the motive. Act of terrorism is desired to be determined with the yardstick and scale of motive and object, instead of its result or after effect. The definition of terrorism is not attracted if the offence has neither created any threat to, coerce or intimidate or overawe the government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society.⁹⁹

This case is of great significance for two reasons. First, it seeks to brush aside the view that a criminal act, no matter how much of a grave nature it may be, is not terrorism unless it aims at coercing and intimidating or overawing 'the Government or the public or a section of the public or a sect...'. Second, it maintains the existing line of argument by giving weight to the creation of 'a sense of fear or insecurity in society.' None of the decisions examined above has referred to the first reason. Although this decision includes the court's usual view alluded to in the second reason.

While it is established that the Supreme Court's jurisprudence does not reflect a consistent approach, arguably, the blame goes to the wordings of the definition only for lack of clarity and (over) breadth. Even the stress on 'nexus' by the *Mehram Ali* court does not appear to correct the course of jurisprudence. The reason is that the nexus must be between the criminal act and the object of sections 6, 7 and 8 of the ATA. In other words, it is the wordings of law which are imprecise and overbroad. Moreover, the law does not confine the action or its threat to mere coercing and intimidating or overawing the Government, but

⁹⁵ Ibid [10].

⁹⁶ *Mohabbat Ali and another v. The State and another* 2007 SCMR 142.

⁹⁷ Ibid [2].

⁹⁸ Ibid [8].

⁹⁹ *Bashir Ahmad vs. Muhammad Siddique and other*, PLD 2009 SC 11.

includes 'the public or a section of the public or community or [a] sect or a foreign government or an international organization'. As was seen above, the courts have interpreted the words 'create a sense of fear or insecurity in society' mostly in relation to the words 'public or a section of the public or community'. In almost all cases discussed above, accusations of violence in private disputes were brought under the ATA. These parts of the definition thus have either nothing or little in common with the terrorist attacks on Marriot hotel in Islamabad,¹⁰⁰ the Sri Lankan cricket team in Lahore¹⁰¹ and the Army Public School in Peshawar.¹⁰²

Given the imprecise and overbroad definition of 'terrorism', in Pakistan, the ATA evidence shows that the ATA has been applied in unwarranted circumstances, leading to misuse and abuse of the law. The Human Rights Commission of Pakistan (HRCP) has noted numerous instances in recent reports. Reporting from Sind province, for example, the HRCP's 2011 Report has noted that 390 people, including three parliamentarians, were arrested while they were asking the government to release water in the rivers network of a rural district in order to resolve the issue of clean drinking water.¹⁰³ The same report has noted further instances. Examples are: the arrest of 100 lady health workers demanding regularization of their contract service, and the conviction of six labour leaders to a total 490 years in jail by the Anti-Terrorism Court in Punjab.¹⁰⁴ In 2013, the case of 11 missing persons detained in Rawalpindi's Adiyala Jail, who were arrested by security forces after their acquittal on the charge of terrorism; four of them died in custody, raised a national outcry, particularly, when the matter was heard by the Supreme Court.¹⁰⁵

The analysis has shown that until 1997, in Pakistan, governments have used anti-terrorism legislation as an instrument of political oppression. The roots of political disgruntlement lie in Pakistan's two main pressing problems: the role of religion in politics and a lack of an effective federation. The disgruntlement has found expression in 'sectarian[ism], racial nationalism, ethno-linguistic and religious'¹⁰⁶ tensions.

¹⁰⁰ CNN, 'Deadly blast targets Marriott Hotel in Islamabad' (21 September 2008)
<<http://edition.cnn.com/2008/WORLD/asiapcf/09/20/pakistan.islamabad.marriott.blast/index.html>> accessed 14 December 2017.

¹⁰¹ BBC, 'Gunmen shoot Sri Lanka cricketers' (3 March 2009)
<http://news.bbc.co.uk/1/hi/world/south_asia/7920260.stm> accessed 14 December 2017.

¹⁰² BBC, 'Pakistan Taliban: Peshawar school attack leaves 141 dead' (14 December 2014)
<<http://www.bbc.co.uk/news/world-asia-30491435>> accessed 14 December 2017.

¹⁰³ The Human Rights Commission of Pakistan, 'The State of Human Rights in 2011' (2012 HRCP Publication) 113.

¹⁰⁴ Ibid 114.

¹⁰⁵ HRCP (n 101) 71.

¹⁰⁶ RSIL (n 75) 8.

International and regional conflicts have further contributed and complicated the situation. As a key justice sector response to the rising wave of terrorism, the original anti-terrorism law—the ATA—was amended in two phases. The first phase of amendments runs from 1998 till August 2001. The second phase started from the events post 9/11 and still continues. Obviously, the main thrust for the second phase comes from the international environment. While, like many other countries, Pakistan has been keen in striving hard to strengthen and solidify its criminal justice response to terrorism, it is still far away from any visible success in the fight against terrorism. The definition of ‘terrorism’ remains as much a challenge for Pakistan as it is for any other country; indeed, the challenge is of a global nature.

Section IV: Conclusion and recommendations

The definition of ‘terrorism’ in Pakistan’s ATA is imprecise, overbroad and inconsistent with other jurisdictions. There is evidence that the law has been causing human rights abuses. While terrorism as an organized crime requires extraordinary criminal justice response, there is a growing international concern about consideration for human rights standards. The guidelines issued by the 2006 UN Global Counter-Terrorism Strategy may be followed at the national level. Section 6 of the ATA may be suitably amended to bring about clarity and ensure that the definition is not applied for the purpose not intended by the law. This may help the courts while interpreting the definition. But the courts themselves have to realize that being a criminal law, the ATA may be construed strictly. Last, but not the least, a meaningful independent review mechanism would further help ensure safeguard against the abuse and misuse of the law, on the one side, and a regular review of the promise and pitfalls of the law, on the other.