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Editorial Team

Editor's Note

From externally sponsored terrorism to indigenous religious, ethnic and political groups, Pakistan has faced the scourge of terror since the times of the Afghan war. To deal with this ever-growing threat, the Parliament promulgated the Anti-Terrorism Act (the Act) in 1997. The Act created a special civilian court to deal with cases of terrorism. At the time of its inception, the legislation aimed to bring terrorism offenders to justice in a swift but fair manner. The law was specifically designed to plug the holes that have long plagued criminal administration of justice in Pakistan, and was structured to ensure efficiency. But 18 years later, the highest legislative body – by passing the 21st Amendment to the Constitution (21st Amendment) – and the highest court – by accepting the legality of the 21st Amendment – have conceded that the anti-terrorism courts (ATC) have failed to deliver justice and/or curb terrorism.

One of the major problems with the legislation was its deeply flawed definition of terrorism. The definition was too broad on multiple levels. Firstly, it covered both the intent and consequences of the act. Secondly, an extensive list of offences (and additional factors) was included within the definition. Thirdly, the often-contradictory jurisprudence on this point compounded the confusion of courts, which resulted in many ordinary cases being tried in ATC.

Another significant structural flaw was the heavy reliance of these cases on testimonial evidence. Under Pakistani law, criminal cases have traditionally relied on testimonial evidence, as forensic evidence is not considered primary in nature. In order words, a conviction cannot be given based solely on forensic evidence. But in terrorism cases, without a functional and credible witness protection program, witnesses are not willing to give evidence. As a result, many cases fail. At the height of war on terror in 2009 in Pakistan, the conviction rate for terrorism cases in Khyber Pakhtunkhwa, a province at the forefront of the war, was around 2%. In the famous Marriot bombing incident, a stone's throw away from the Parliament, all 84 witnesses resiled from their police statements, and refused to give further evidence. Fortunately, in 2013-14, through an amendment to the Act, forensic evidence was granted primary status. But the damage to the credibility of ATC had been done.

It was in this backdrop that the tragic Army Public School attack in Peshawar happened. More than 100 children were killed in the attack claimed by the Taliban. The barbarity and audacity of the terrorists shook the entire country. The knee-jerk reaction of the Parliament – like in many Western countries – was to further curtail civil liberties by passing the 21st Amendment. The Amendment created military courts (MC) to "provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan". The constitution of MC was immediately challenged in the Supreme Court. Among other grounds, fundamental rights (especially the right to fair trial) was used to challenge its legality. Ultimately, the Supreme Court gave its blessings to the 21st Amendment, a decision questioned and criticized by many.

But the apex court is not alone in its opinion that the creation and functioning of military courts.There are now a growing number of people who genuinely believe that compromising civil liberties for security is the right bargain. While it is true that democracy has always remained a system of balancing rights, a long term concession to civil liberties is not only counter-intuitive but counter-productive too. If the MC deliver at the expense of failings of civilian courts, the State will lose all incentive to invest in them. People will prioritize other areas over reform and rehabilitation of criminal administration of justice. Therefore, a concerted effort is required to bring home two points of crucial significance: Firstly, that the civilian courts are reformable. And secondly, that relying on MC will further weaken the civilian courts, and the political resolve to reform them.

The third volume of the journal covers this issue among others. The aim of the journal is to create awareness and legal scholarship in these areas so that a healthy and much needed debate, the bed rock of a democratic society, can continue.

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PROFESSIONALS

The Price of Protection: The Right to Fair Trial & the Protection of Pakistan Act

by Hassan Niazi[1] & Noor Bano Khan[2]

"The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box." ~Harper Lee, 'To Kill a Mockingbird'

"For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process." ~ Article 10A of the Constitution of Pakistan, 1973.

Introduction

'The first thing we do, let's kill all the lawyers.'

Dick the Butcher's words are often quoted but, as with many quotes, often misunderstood. The reference was made by a character in 'Henry VI' who believed that by disturbing law and order one could eventually become king.[3] Terrorism seems to be taking a different approach to get to its kingdom. Whenever it rears its head, a strange pestilence sweeps through our nation that makes everyone sure that the cure is a sacrifice of our liberties. Perhaps terrorists have adopted Shakespeare's words with a twist of their own, 'the first thing we do, is make them give up all their rights.'

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[3] Vogel, 1990. See Gershman, 2014.

How is it, though, that nobody thinks it is their own liberty that they are sacrificing? At that critical point, when inhumane acts of terrorism occur, everyone believes that it is the perpetrators who should be stripped of all their rights and privileges guaranteed by the Constitution, and duly executed. People want blood, and they don't want anything like the pesky constitution to stand in the way. So we give up our rights one by one. Speech, due process, life, all are thrown onto the fire that fuels the State machinery that is supposed to grant us security. With each right sacrificed, the terrorists come closer to their goal. Because without fundamental rights democracy has little value, and the fall of democracy is one of the goals terrorist organizations are pursuing around the world.

History shows that this is not just some random mob mentality. A certain perception of justice lies at the heart of this, and people will find ways to pervert justice to reach exactly that end. The judgment at Nuremburg was innovative with the offences that the accused were charged with. Although few people would disagree with the notion that a retrospective law is abhorrent to the very principles of justice, the Nazis had to be held accountable for their crimes and legal nuances weren't going to stop the Tribunal from getting a conviction. In the famed Eichmann trial, a similar situation existed; with legal rules and principles being shunned so that a sense of moral justice could prevail. Many other international examples of such reactionary perversions of legal norms can be found, this includes the U.S. enacting the PATRIOT Act. A piece of legislation that goes in direct conflict with principles of International Human Rights Law and the U.S. Constitution, regardless of what Bush, Cheney and Rumsfeld might think.

Pakistan, never to be left behind, enacted its fair bit of reactionary laws to counter terrorism. The Fair Trial Act, 2012 was enacted to enhance the surveillance powers of the State, even though it violates many aspects of our Constitution's 'right to privacy' given in Article 14.[4] The 21st Amendment granted military courts constitutional authority as a reactionary measure to the horror of 16th December, 2014.[5]

This paper, focuses on one such piece of legislation which abounds with constitutional absurdity: The Protection of Pakistan Act, 2014 ('PPA'). It looks at this legislation's constitutionality in terms of Article 10A's guarantee of a right to a fair trial. This paper breaks down what the writers

[4] See for reference Mir and Niazi, 2015

[5] Iqbal, 2015. Also see for reference Houreld, 2015; the Guardian, 2015

perceive as some of the most glaring provisions of the PPA that would violate Article 10A, and *a fortiori* the Constitution of Pakistan. Although the writers realize that the PPA suffers from many constitutional infirmities apart from Article 10A, the focus is on the fair trial aspect because it is, in the writers' view, a constitutional guarantee that has not gotten the attention it deserves in the constitutional discourse within academia and the legal community. This paper argues that the PPA violates not just Article 10A but also the International Covenant on Civil and Political Rights ('ICCPR') which has been ratified by Pakistan. It asks the judiciary to strike down the law by highlighting some of the most obvious constitutional issues that the law presents. It concludes that such reactionary laws, rather than actually assisting in protecting the rights of the people of Pakistan, actually exacerbate the harm to them.

This paper will follow the following structure: Part I will highlight the relationship between Pakistan's superior courts and Article 10A, arguing that the judiciary has neglected to give any elaboration or clarity to the right apart from making vague assertions that it means what it was always thought to mean in Pakistan's constitutional jurisprudence. It argues that with the ratification of the ICCPR, Pakistan's judiciary needs to take the Human Rights Committee's views as persuasive reasoning in interpreting Article 10A. Part II analyses the PPA's constitutionality in light of Article 10A. Part III presents our conclusions on the constitutionality of the law.

I. The Court and The Constitution

Nobody wants the Constitution to be a rambling document making paper promises. But no constitutional promise, no matter how powerful its words, can mean anything if it does not enjoy an internalization in the hearts and minds of the people. People have to believe in its normativity and its legitimacy, while also seeing it as something that the country needs in order for it to work, or uphold the rule of law. Ever since Article 10A became a part of the Constitution it has been cited often in judicial decisions but with little elaboration as to what exactly it means[6]. Litigants also seem to share the judiciary's predilection for referring to Article 10A in their petitions, but after examining the judgments on this specific Article, it seems like everyone knows it's in the Constitution but nobody knows what it means. None of the judgments on Article 10A can be said

[6] See for example District Bar Association, Rawalpindi & Others v. Federation of Pakistan & Others [2015]; Ali Azhar Khan Baloch & Others v. Province of Sindh & Others [2015]; Sharafat Kaleem v. Additional District Judge, Bahawalnagar [2013]; Muhammad Ameer & Others v. Mst. Fajjan & Others [2012]

to have jumped on the opportunity to lay out the exact scope and ambit of this fundamental right. This raises questions about the normativity and legitimacy of the right. In terms of how normative it is, the judiciary seems to understand that a fair trial is a norm, seeing as it has spoken of its importance.[7] However, its failure to define the content of this norm in specific terms leads to an empty norm at best. Nobody knows what exactly the norm is, and thus the understanding of Article 10A is that it is an amorphous idea. The legitimacy of the right in the minds of many people can come about through the judiciary upholding the importance of this fundamental right in its decisions.

Although the judiciary by itself is insufficient to truly make the people of Pakistan believe in the legitimacy of a right (much like all rights this is a matter of consciousness raising within the mindset of the people), it has a role to play given the fact that fair trial issues are always lurking in the shadows of many issues in Pakistan. For example, the target killing of Malik Ishaq springs to mind, the intense media presumption of guilt in the case of Shahrukh Jatoi, the secret trials before military courts, and various provisions of the National Accountability Bureau Ordinance, all of these raise issues related to Article 10A, and although many issues do not come before the higher appellate courts, those that do get there result in the judiciary never giving Article 10A much importance[8]. All over the world the most important constitutional questions regarding the right to a fair trial come about in cases concerning the criminal law. While in Pakistan, although the appellate courts hear countless criminal cases, since Article 10A's inception no case has even bothered to elaborate and define it[9]. Judges adjudicating over criminal cases don't understand it, don't care for it, and can't be bothered with it. This makes Article 10A lose much of its legitimacy in the minds of the people of Pakistan. If the judiciary, which is tasked with upholding the constitution, doesn't see it as important why should they?

Of course due process protections were recognized by courts in Pakistan long before Article 10A came around, especially with respect to case law under Article 4[10], but then a swift and clear

[7] Suo Motu action concerning Malik Riaz Hussain and Dr. Arsalan Iftikhar, [2012]

[8] The Supreme Court could have easily elaborated on the right in Suo Motu Case No.4 of 2010 [2012]

[9] Criminal cases merely seem to make sweeping statements about the right without going into any probing analysis. See The State v. Aijaz Alias Fouji Lashari & Others [2013]; Shafi Muhammad Bhangwar & 3 Others v. The State [2012].

[10] Babar Hussain Shah v. Mujeeb Ahmed Khan & Another [2012]. Also see for reference New Jubilee Insurance Company Limited, Karachi v. National Bank of Pakistan [1999]; Aftab Shahban Mirani v. President of Pakistan [1998]

elaboration of this right should have been more forthcoming. The Supreme Court makes mention of things like the importance of the right to appeal[11], a right to a proper hearing[12] and an impartial tribunal, but little else is said. It has described the presumption of innocence as a cornerstone of the administration of justice before adding Article 10A as an afterthought[13] but the elaboration ends there.

One reason for this is obviously a lack of discourse on the topic in general, both within the legal community and the general population of Pakistan. Although certain organizations such as the Justice Project Pakistan and the American Bar Association are striving to elevate the discourse, they are a minority in a nation slowly eroding the fundamental nature of fair trials. This is evidenced by the enactment of the 21st Amendment and statutes like the PPA.

It is surprising that for a nation that uses international and comparative law routinely to interpret constitutional provisions, no interest has been shown towards the ICCPR that Pakistan ratified and which contains fair trial obligations in Article 14. The bare text of Article 14 contains a more thorough elaboration of the right to a fair trial than the entire corpus of judgments on Article 10A put together.[14] Ratified on 23 June, 2010, it has been 6 years, and still little has been done to live

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[11] Pakistan Steel Mills v. Muhammad Aslam Chaudhry, [2013]

[12] Baz Muhammad Kakar and Others v. Federation of Pakistan, [2012]

[13] Suo Motu action concerning Malik Riaz Hussain and Dr. Arsalan Iftikhar, [2012]

[14] Article 14 reads:

'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumst0ances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

up to the expectations of the ICCPR. No higher appellate court, as per the writers' knowledge, has cited the ICCPR when interpreting Article 10A, in fact, instead of living up to the aspirations of the ICCPR, Pakistan has actually disregarded it completely when enacting statutes like the PPA.

II. The PPA on Trial and the Presumption of Innocence

One of the most well-known principles of criminal trials is the requirement that the prosecution bears the burden of proving the accused guilty 'beyond all reasonable doubt.[15]' Its enforcement has been described as the 'foundation of the administration of our criminal law'[16]. At its most basic formulation, the rationale for the presumption lies in the protection of the innocent from a

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[15] LII/Legal Information Institute, 2016

[16] Coffin v. United States, [1895]

wrongful conviction.[17] A criminal conviction has the dramatic potential to unhinge and destroy the life of an individual. This is true not just in the physical sense but also with regards to the social stigma faced, potential death, mental torture and prolonged periods of incarceration amongst others. These issues come entangled with a criminal conviction and it is hard to view it being untangled from them. Even if there is a conviction for a minor offence it causes serious problems for the livelihood of an individual. Consider: 'Stigmatization can have consequences for the way in which a person is treated in the community, either informally or formally through measures such as registration as an offender, disqualification from some forms of employment and compulsory disclosure regimes.'[18] It makes sense, then, that before any of these results are brought to bear upon an individual there should be strong justifications for them, justifications which are 'beyond reasonable doubt.'[19]

Stumer points to three reasons why it should be the State that needs to have the burden of proving guilt against an accused:

i) It allocates the burden of proof on the party with the greater resources;

ii) It acts to counter tendency in criminal trials to assume the guilt of the defendant and to discount the defendant's evidence;

iii) It allocates the risk of non-persuasion to the prosecution.[20]

From a constitutional perspective other aspects of the presumption of innocence are equally important. Especially in upholding the rule of law. Although not all principles of the rule of law are well-settled, the presumption of innocence strengthens a State's leaning towards the rule of law in the eyes of its citizens. It demonstrates that the negative consequences of a criminal conviction, that have been aforementioned, are not falling on individuals arbitrarily.[21] A failure by the State to establish that someone is guilty beyond all reasonable doubt in a public trial, causes a risk that citizens will believe that the punishments being meted out are not justified. This rationale

[17] Stumer, 2010 at page 28

[18] Ibid.

[19] Ibid.

[20] Ibid at page 33

[21] Ibid at page 38

can be thought of in terms of maintaining the 'moral force' of the law.[22] As Justice Brennan pointed out:

"Use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[23]

In a constitutional system, the presumption of innocence seeks to maintain the rule of law, and the legitimacy of the criminal law by making sure that people do not lose faith in the judicial system.[24] This analysis of the rationale behind the presumption of innocence leads into our discussion of the constitutionality of section 15 of the PPA.[25] This section violates Article 10A by reversing the burden of proof and thus doing away with the presumption of innocence. If the State is going to abolish the presumption of innocence in criminal cases, it needs to rebut the compelling case for the presumption of innocence that has just been elaborated. But no interpretation of Article 10A, no matter how restrictively interpreted, can be squared with this section of the PPA so as to deem it facially constitutional. If the enactors of the PPA thought more terrorists would go to jail because of this provision, it would be the duty of those who respect the values of a fair trial to remind them

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[22] Ibid.

[23] Re Winship, [1970]

[24] Stumer, 2010 at page 38

[25] The full text of Section 15 reads:

(1) An enemy alien or a militant financing the charge of a scheduled offence on existence of reasonable evidence against him, or a person arrested in preparation to commit or while attempting to commit such an offence shall be presumed to be engaged in waging war or insurrection against Pakistan unless establishes his non-involvement in the offence.

(2) Any person apprehended in course of preparation, attempts or commission of a scheduled offence and from whom any weapon, material, vehicle, article or instrument designed for or capable of being used to commit or to facilitate the commission of the offence of bombing, suicide bombing or target killing or grievous hurt shall be presumed to be guilty of preparation, attempt or commission, as the case may be, of a scheduled offence.

Explanation: A cell phone or other instrument that contains logs or evidence of calls or messages made or received that facilitates the preparation, attempt or commission of such an offence, shall be deemed to be such an instrument and any record thereon or therein shall be admissible in evidence.

that this enactment has the potential to put scores of innocent people, robbed of their presumption of innocence behind bars. A situation that should provoke sleepless nights for anyone complicit in the framing of this provision of the PPA.

Even if we put aside the legitimate theoretical understanding of Article 10A, this provision of the PPA conflicts directly with Supreme Court doctrine. The Supreme Court formed the opinion that, 'It is the cornerstone of the administration of justice in the country that all people whether they appear to us guilty or innocent, are entitled to the due process of law and are to be deemed innocent until proven guilty after a fair trial.'[26]

Furthermore, this provision is an egregious disregard for the explicit textual provisions of Article 14 of the ICCPR. It is hard to see how the ICCPR could have made it more explicit that this was one of the most fundamental provisions of a fair trial. The Human Rights Committee, set up under the ICCPR, has upheld the importance of the presumption of innocence time after time. In Gridin v. Russian Federation (770/97)[27], where the author of the communication claimed that the head of the police and the investigator declared the author guilty before the court hearings, and these statements were then, subsequently, made public. The Human Rights Committee took the view that it was the duty of all public authorities to refrain from prejudging the outcome of a trial. Since the authorities failed to live up to this expectation, they violated the author's rights under Article 14 paragraph 2. Look at this case side by side with section 15 of the PPA. This case involved mere statements by public authorities, not an entrenchment and disregard for the presumption of innocence in a statute that would render all trials under that statute to disregard Article 14. If mere acts of public authorities violate Article 14, is it really hard to see how the PPA violates established international rights that give a great degree of importance to the presumption of innocence? In view of how integral the presumption of innocence is to the right to fair trial, the PPA seems to be so far into the sphere of unconstitutionality that it is hard to see any justification that could possibly save its reversal of the presumption of innocence under domestic or international law.[28]

Consider also the vast amount of treaty language, beyond the ICCPR, that speaks about the presumption of innocence. This is telling as to how problematic the PPA is. In short, the following refer explicitly to the presumption: Article 8 (2) of the American Convention of Human Rights,

[26] Suo Motu action concerning Malik Riaz Hussain and Dr. Arsalan Iftikhar, [2012]

[27] Gridin v. Russian Federation (770/97), [1997]

[28] See also Allenet de Ribemont v. France 20 EHRR 557 [1995]

Article 7 (1) of the African Charter on Human & Peoples' Rights; Article 6 (2) of the European Convention on Human Rights; Article 21 (3) of the Statute of the International Criminal Tribunal of the former Yugoslavia; Article 20 (3) of the Statute of the International Criminal Tribunal for Rwanda, and Article 66 (1) of the ICC Statute. The guarantee is so fundamental that it constitutes a rule of *jus cogens* as per the Human Rights Committee.[29]

Section 15 of the PPA is therefore unconstitutional because of various constitutional problems; we use some of the constitutional modalities of interpretation from Bobbitt[30] to lay out these problems:

i) **Textual:** The meaning of the words of the Constitution are clear, everyone is to be a given a 'fair trial', as we have argued, the concept of a fair trial is more or less synonymous with the concept of the presumption of innocence, this is decipherable by the vast amount of treaty language that treats the two concepts together. Furthermore, even an average 'man on the street' knows that in order for a criminal trial to be fair there needs to be a presumption of innocence. Not only is the text of the Constitution determinative on this issue, the text of the ICCPR gives no doubt that the right to a fair trial involves that the accused be presumed innocent until proved to be guilty.

ii) **Doctrinal:** Article 15 is in explicit contradiction with a decision of the Supreme Court of Pakistan. An ordinary statute enacted by Parliament cannot override an express decision of the Supreme Court. Only a Constitutional amendment can achieve that. Furthermore, as far as persuasive reasoning goes, decisions of the Human Rights Committee show how far away from the treaty language of the ICCPR the PPA is.

iii) **Prudential:** If one were to weigh the costs and benefits of abolishing the presumption of innocence, we would come to the conclusion that the costs weigh out any potential benefits there may be. Prudential constitutional considerations would reveal that abolishing the presumption raises serious rule of law problems. Citizens of the State will start questioning the legitimacy of the criminal justice system. The 'moral force' of the law is eroded in the minds of the citizenry. Furthermore, there is a massive risk that innocent people will be convicted and sentenced under this provision.

[29] Moeckli et al., 2010

[30] Bobbitt, 1991

iv) **International Law[31]:** Section 15 violates a *jus cogens* norm of international law, as well as, an express provision of the ICCPR which Pakistan has ratified.

The only conclusion that can be reached regarding section 15 is that it is facially unconstitutional for the aforementioned reasons. Every trial under the PPA will begin and end without the presumption of innocence and thus every trial under the PPA will be unconstitutional under Article 10A.

Punishment without Trial

The PPA allows for a ridiculous provision that violates not just Article 10A, but the constitutional right not to be deprived of life or liberty except in accordance with law.[32] According to section 3 (2) (a) you can be fired upon by law enforcement on the basis of a 'reasonable apprehension'.[33]

[31] Note: This is not one of the modalities that Bobbitt talks about.

[32] Article 9 of the Constitution of Pakistan. After the adoption of Article 10A it is the view of the writers that all laws must be interpreted in light of Article 10A, and thus Article 9 must be read with Article 10A to decipher its meaning. The Constitution must be read holistically.

[33] Section 3: Use of armed forces and civil armed forces to prevent scheduled offences:

(1) Any police officer not below BS-15 or member of the armed forces, or civil armed forces who is present or deployed in any area may, on reasonable apprehension of commission of a scheduled offence after giving sufficient warning, use the necessary force to prevent the commission of a scheduled offence, and in so doing shall, in the case of an officer of the armed forces or civil armed forces, exercise all the powers of a police officer under the Code.

(2) In particular and without prejudice to generality of sub-section (1), an officer of the police not below BS-15 or member of the armed forces or civil armed forces in the above situation may,

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

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

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

Although, 'reasonable apprehension' is defined in the PPA, the breadth of circumstances that can result in the formation of a 'reasonable apprehension' is a bit alarming. The problem can be explained by looking at the 'scheduled offences' in the PPA. If there is a reasonable apprehension that one of these 'scheduled offences' might occur, there is a possibility that a suspect might be killed.

It is important to remember that Article 10A permits for no exceptions textually, so all individuals deserve a trial before any sort of punishment results. Provisions that do try to create exceptions, if we put aside the textual problems for a while, must satisfy the standard of 'proportionality[34]'. Before the backlash and sneers erupt that say that we are implying that the police try to strap handcuffs on a suicide bomber, let us elaborate on the constitutional problem.

Of course the police, if faced with a suicide bomber who is about to detonate explosives, has the power to use force. You don't need the PPA to tell you that. If the PPA was limiting the use of force to such cases few would have an objection. However, the PPA does not do that, instead it allows for the use of force that is so disproportionate to the aim that it is trying to achieve that it

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

Explanation: Reasonable apprehension that death or grievous hurt may be caused, may, inter alia, be based on the following grounds, namely:

(i) credible prior information about a person, who is identified on site or is suspected to be that person and such person either attempts to resist arrest by force or refuses a command to surrender and his action may lead to grievous hurt or death;

(ii) prior information but without any clear identification of individual(s) in an area who may have been or are going to be involved in the planning, commission or financing of a scheduled offence to carry out action as mentioned in paragraph (i) above:

(iii) appreciation of circumstances on the scene that a person can cause harm and the situation may lead to grievous hurt or, a judgment based on event(s) on site;

(iv) threatening movement of a person who is in possession of a firearm or reaching for a firearm, to target law enforcing personnel or a member of the public which may lead to grievous hurt or death; or

(v) prior information or a judgment on the site that the person may cause to signal or personally trigger an explosion which can cause harm or a person assisting in commission of such a crime that may lead to grievous hurt or death.

[34] Syed Zafar Ali Shah v. Pervaiz Musharraf [2000]

must be struck down. For example, 'cyber crimes' are one of the scheduled offences, and could fall within the ambit of this section. Yet, the PPA never defines what exactly a 'cybercrime' is, nor does it spell out the elements of the offence. It is up to law enforcement to figure this out and form a reasonable apprehension regarding this. Another example is the 'destruction or attack on communication lines'. No definition is given as to what exactly is supposed to constitute a 'destruction' or an 'attack'. Let's be realistic, law enforcement in this country is not going to study the nuances of 'cyber crimes' and the like to figure out when a 'reasonable apprehension' regarding them can be formed. They will shoot because the PPA entitles them to shoot. They will shoot because the PPA gives them broad discretion to shoot. And innocent people will suffer.

The PPA thus allows for unlawful killing, depriving people of any sort of trial before a punishment is meted out, let alone a fair one. It contradicts any form of proportionality review that is needed when one is being denied a fundamental right, especially one to which the Constitution provides no exception. Proportionality, which is similar to the American 'narrow tailoring' test, often requires that the least restrictive measure be adopted in the creation of an exception to the fundamental right. Killing someone on a 'reasonable apprehension' for crimes that have not even been defined would fall far short of any standard of proportionality.

To further push home the point about how draconian this provision is, it similarly violates the fair trial requirements of Article 14 of the ICCPR, by denying someone a trial. It is interesting to note that Alston and Goodman point out that there are certain provisions of the right to fair trial which cannot even be derogated in times of war. The principle of no punishment without a trial is one of them.[35] Taking Common Article 3 of the Geneva Conventions, The Civilians Convention, and Article 75 of Additional Protocol I together, they point out that 'these three IHL provisions establish a floor of fair trial rights below which no state may pass.'[36] One of these elements is that no penalty can befall a person without a fair trial.[37] They then add, '[…] General Comment 29 [of the Human Rights Committee] relies on such fundamental protections in reasoning that if certain elements of a fair trial cannot be lawfully transgressed in war, they can never be subject to derogation under the ICCPR.'[38]

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[35] Alston, Goodman and Steiner, n.d. at page 466

[36] Ibid.

[37] Article 75 of Additional Protocol I of the Geneva Conventions, 1949

[38] Alston, Goodman and Steiner, n.d. at page 466

The point is straightforward, if such elements of the right to fair trial cannot even be derogated in ***times of war***, then on what basis can a law that allows for extrajudicial killing for vaguely defined offences be constitutional under Article 10A interpreted in light of the ICCPR?

This provision of the PPA would be unconstitutional for being against the textual wording of Article 10A, for failing to satisfy the test of proportionality, as well as the interpretation of Article 10A as interpreted in light of the ICCPR. It should also be noted that this provision suffers from other constitutional problems which are beyond the scope of this paper.

Secrets

One last aspect of the PPA merits discussion. The PPA allows the government to determine the place of custody, inquiry, investigation and trial of an accused.[39] The problem here is that this can easily lead to trials being held in 'secret' or outside the established judicial system.[40] The more disturbing part is that nobody will know about these trials except the government and the accused. Putting aside arbitrary detention issues, the right to fair trial includes the right to a 'public trial'.[41] The rationale here stems from the idea that trials that are shrouded in secrecy are more than likely to involve and be seen as manipulative of the justice system.[42] They are also often used to suppress groups that might be seen as 'dissident' by a State[43]. As Shapiro argues, courts and commentators explain the need for this requirement along two broad lines: '(a) as a defendant's right and (b) as a right of the public.'[44] As a defendant's right, the presence of the public is seen to have a checks and balances effect on the judiciary, as it prevents any arbitrary action taking place.[45] As Justice Holmes argued (in a tort case):

"It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should act under the sense of public responsibility and

[39] Section 9 of the Protection of Pakistan Act, 2014

[40] Human Rights Watch, 2014

[41] Article 14 of the International Covenant on Civil & Political Rights

[42] Moeckli et al., 2010 at page 277

[43] Ibid.

[44] Shapiro, 1951

[45] Ibid.

that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[46]

This point, and rationale can be tied into the earlier point made in this paper about the rule of law and the 'moral force' of the law. Secret trials cast doubt on the legitimacy of the criminal justice system in the minds of the citizens of the State. It raises questions as to the arbitrary nature in which they potentially can proceed. The courts in Pakistan have often resorted to the principle that 'justice should not only be done but must manifestly be seen to be done.'[47] The potential for secret trials violates these principles.

Doctrinally this provision cannot be reconciled with the decisions of the Supreme Court of Pakistan, which made clear that openness and transparency in the 'full glare of an open court hearing…is one of the defining features of our legal system.'[48] With regards to the doctrine surrounding the ICCPR, it of course accepts that the press and the public may be excluded from a trial for reasons of national security etc. But it does not authorize secret trials, which is exactly what can happen under the PPA. The Human Rights Committee in Estrella v. Uruguay[49] faced an issue where a concert pianist was tried by a military court *in camera*. The Committee decided that this was a violation of Article 14 if there was no justification by the State for not providing a public trial.[50] Not only is this right an imperative feature of the right to a fair trial, but the accused also has a right for the judgment to be made public.[51]

In retrospect, we can see that section 9 faces the same doctrinal and prudential issues that section 15 faced, and the determination of its constitutionality would take these features into account. It is difficult to see how it would escape the fate of being seen as in direct conflict with Article 10A as it violates its principles, interpreted in light of Article 14 of the ICCPR; the clear doctrine of the Supreme Court of Pakistan and the Human Rights Committee; and finally the prudential costs to the legitimacy of the justice system by eroding the 'moral force' of the law.

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[46] Cowley v. Pulsifer, [1884]

[47] Suo Motu action against Prime Minister Yousaf Raza Gilani, [2012]

[48] Suo Motu action concerning Malik Riaz Hussain and Dr. Arsalan Iftikhar, [2012]

[49] Estrella v. Uruguay Communication No. 74/1980, [1983]

[50] Weissbrodt and Wolfrum, 1997 at page 145

[51] Ibid. Also see Touron v. Uruguay, Commission No. R. 7/32, U.N. Doc. A/36/40 (1981)

III. Coming to a Close: Moral Panics & The Constitution

Nicholas Barber, in a forthcoming paper, writes about how certain methods of constitutional entrenchment can guard against periods of 'moral panic'.[52] Moral panics are described as periods of temporary, widespread irrationality, during which a polity forgets the importance of fundamental principles like due process.[53] Entrenchment rules can help protect against moral panics by forcing law makers to address the earlier constitutional commitments it made and is now overturning; and by slowing the process of change.[54] Barber was talking about principles within the Constitution that would make it difficult to amend or change. But how can we guard against moral panics that result in draconian laws like the PPA? The PPA expressly violates the Constitution, so we should be able to resort to the Supreme Court to take a view, dissociated from the 'moral panic' to exercise judicial review and strike down the law. However, the constitutionality of the PPA has been pending before the Supreme Court with nothing on the horizon that shows that the case will be taken up any time soon.

If the courts have abdicated all responsibility, where do we turn? An aroused public could potentially vote out the incumbent government because of the enactment of laws that violate principles of the Constitution like Article 10A, but the popular will seems to be firmly supporting cutting down on such rights with military courts and other such provisions, in the wake of the attack on the APS, enjoying widespread support. The issue seems to be that Article 10A, although enshrined in the Constitution has not internalized itself in the conscious of the people of Pakistan. Constitutional rights require something like an aura of legitimacy in the hearts and minds of the people, they require something akin to H.L.A Hart's 'internal aspect of rules'. If such feelings do not exist in the populace, the legislature can enact draconian laws, and the judiciary can stall the judicial review process till it feels is the right time. But the right time may come when hundreds of people have been tried without a presumption of innocence, when many have been killed on the basis of a 'reasonable apprehension' of some vague offence, and when people have been tried in secret at unknown locations. Constitutional aspirations are easy, constitutional implementation is harder.

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[52] Barber, 2016

[53] Ibid.

[54] Ibid.

In the absence of the people of Pakistan recognizing the need for Article 10A it may well become a ‘paper promise’ unless we elevate the discourse and keep criticizing laws like the PPA. As this paper has shown the PPA has provisions that are blatant in their disregard for the Constitution. Although this paper has only pointed to three such provisions, any reasonable analysis of the rest of the statute will yield equally problematic violations of not just Article 10A but many other provisions of the Constitution of Pakistan. First, the PPA violates the Constitution in the textual, doctrinal and prudential sense with regards to section 15 and 9. It will cause a shift in a population that already doubts the criminal justice system to become completely disillusioned with it; undermining the ‘moral force’ of the rule of law. Principles of International Law, which Pakistan has accepted and endorsed via its ratification of the ICCPR have been disregarded, particularly Article 14. Finally, the principles of proportionality and lack of exceptions in Article 10A have been overlooked in provisions like section 3 of the PPA.

Although the Supreme Court of Pakistan does not bear all the blame, it has failed to live up to its duty of providing clarity to the law. It has failed to recognize and enshrine Article 10A as the fundamental right that it is. Barber’s point about entrenchment makes sense if the Supreme Court had made a strong assertion that Article 10A held immense importance in the constitutional scheme of Pakistan. A judgment talking about the values of the presumption of innocence, no punishment without a trial, and the right to a public hearing would have made it much more difficult for the legislature to sidestep Article 10A. Although this paper accepts that there are Supreme Court precedents that talk about some of these issues, in the view of the writers, these have been mere snippets, general statements made in passing that have never given Article 10A its true importance. The Supreme Court could elevate the discourse, it could entrench the discourse, and it could act as a catalyst to internalize the discourse but it has failed to do any of this.

In light of this, we as the people of Pakistan must take the discourse forward. The writers hope that papers like this can add to it, even if to a minimal extent. We have tried to discuss why certain principles like the presumption of innocence are important so that the reader may appreciate what the State has so smoothly taken away from the people of Pakistan. So that the reader knows what the Supreme Court is not talking about, and most of all to know that the PPA violates the Constitution. Whether or not our courts or our legislature will come to realize this is unfortunately, a question whose answer we can only hope for.

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Missing from Pakistan and the law: Protection against Enforced Disappearance

by Sevim Saadat[1]

Introduction:

"Ours is the century of enforced travel of disappearances. The century of people helplessly seeing others, who were close to them, disappear over the horizon" – John Berger

John Berger's words describe exactly the turmoil we face today in cases of enforced disappearances. Enforced disappearances have become a common problem across the globe. This harsh reality has torn families apart as people continue to go missing in unaccounted ways. In the last 50 years about a million people have been disappeared around the world.[2] The severity of this crime is not just in the number of people it affects but also its widespread nature across the globe. The involvement of government and security agencies lead to discrepancies in reports of enforced disappearances. [3] The brutal nature of this crime has led to widespread international disapproval classifying it as a crime against humanity.

International law recognizes that multiple rights are violated as a result of enforced disappearances. Pakistan, on the other hand, seems to turn a blind eye towards enforced disappearances. In 1985 enforced disappearances were first recorded in Pakistan. Since then these disappearances have continued yet no attention is given to this issue locally. Enforced disappearances have not been incorporated into the law of Pakistan; the increased awareness of this crime in the international arena seems to have little to no effect at home.

This paper urges the enactment of legislation for enforced disappearances in Pakistan. The need to regulate this crime is imminent and if nothing Pakistan has an obligation to at least criminalize enforced disappearances within national law. The paper will be divided into three parts. Part I will establish the position of enforced disappearances in International law; dealing with the nature of the crime and its significance. Part II will analyse enforced disappearances in Pakistan and attempts

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[2] (Sarkin, 2012)

[3] (Sarkin, 2012), (Mughal, 2013, p. 8)

at dealing with this situation. Finally, Part III explores both the national and international obligation on Pakistan to enact legislation specific to enforced disappearance. In order to help curb enforced disappearances Pakistan must bring this crime into the ambit of domestic law, as will be discussed in this paper.

Part I

International law & Enforced disappearances

The International Convention for the Protection of All Persons from Enforced disappearance[4] (herein 'the convention') is the primary instrument that governs enforced disappearances under international law. Article 2 defines enforced disappearances as:

"…the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."[5]

The crucial element of this definition is the removal of a person from the protection of the law.[6] Enforced disappearance is a crime of great intensity as it includes the violation of several fundamental rights. These include the right to life, right to be free from arbitrary detention, right to be free from torture or degrading treatment and the right to fair trial.[7] Such massive violations will continue to occur if enforced disappearances are not controlled. The nature of this crime has attracted attention in the international community and led to the signing of the convention. This convention was necessary as it is specific to the crime and acts as a guideline for states that are adopting local legislation on enforced disappearance. The convention addresses all aspects of the crime; the duty on every state party to criminalize disappearances, the accountability of

[4] (Anon., 2006, p. 3)
[5] (Anon., 2006, p. 3)
[6] (Sarkin, 2012)
[7] (Sarkin, 2012, pp. 538-39), (Dalia Vitkauskaitė-Meurice, 2010, pp. 199-200)

perpetrators and the right to redress/ compensation for victims or the families of the victim. The convention is not the only support for prohibition on enforced disappearance. Before the convention, enforced disappearances were integrated under various international instruments. Article 6 (the Rights to life) of the International Covenant on Civil and Political Rights (ICCPR) interpreted to encompass the prohibition of enforced disappearances.[8] Article 1[9] of the Declaration on the Protection of All Persons from Enforced Disappearances places enforced disappearance as an offence to human dignity marking this as both a denial of the purposes of the Charter of the United Nations (UNC) and a violation of the freedoms in the Universal Declaration of Human Rights (UDHR).[10] So enforced disappearance can be traced back to the UDHR and several other instruments of International law.

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[8]Article 6 ICCPR

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

See also (Human Rights Committee, 1982)

[9] Article 1, Declaration on the Protection of All Persons from Enforced Disappearance

1. Any act of enforced disappearance is an offence to human dignity.

It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

http://www.un.org/documents/ga/res/47/a47r133.htm

[10]Some of the fundamental freedoms that are listed in the UDHR and are denied by ongoing disappearances: Article 3 (Everyone has the right to life, liberty and security of person), Article 5 (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment) and Article 9 (No one shall be subjected to arbitrary arrest, detention or exile). http://www.un.org/en/universal-declaration-human-rights/

The increasing importance of enforced disappearances has led to scholarship on whether this crime has attained the level of a *jus cogens*[11] norm.[12] A *jus cogens* norm has three defining characteristics; severe, universal and must be non-derogable.[13] The severity of enforced disappearance derives from the multiple violations of international human rights that it encompasses.[14] The universality is obvious from the widespread disapproval and customary nature of the crime. Lastly, Article 5 of the convention[15] clubs enforced disappearances as crimes against humanity which would make it non-derogable. There is clearly a possibility that enforced disappearances can fit into the category of a *jus cogens* norm. There has been some support for this proposition,[16] and if we are to agree with this then a duty exists on all states to protect persons from enforced disappearance regardless of whether the state has ratified the convention.

Leaving aside the *jus cogens* argument, enforced disappearance is a crime against humanity under international law and requires immediate attention. States have an obligation under international law, through the convention, the *jus cogens* argument and simply because enforced disappearance have become a rule of customary international law. Even if a state does not ratify the convention there is still an obligation under customary international law.[17]

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[11] (Orakhelashvili, 2006, p. 50) *"Jus cogens norms* are norms that are so morally deplorable as to be considered absolutely unacceptable by the international community as a whole."

[12] (Sarkin, 2012, pp. 541,564)

[13] (Sarkin, 2012)

[14] (Mughal, 2013) (Sarkin, 2012) (Dalia Vitkauskaitė-Meurice, 2010)

[15] Article 5 of the International convention on protection of all persons against enforced disappearance states "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law." http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx

[16] (Walker, 1988, p. 1) Enforced Disappearances are listed under s. 702 which deals with crimes that form part of *Jus cogens norms,* American law institutes restatement third of foreign relations. *See also* (Xuncax v. Gramajo, 1995) The District Court of Massachusetts agreed that disappearances are covered by *jus cogens. See also* (Goiburú et al. v. Paraguay, 2006, ¶ 84) The Inter-American Court of Human Rights recognizes the right to be free from enforced disappearances as a *jus cogens* norm. *See generally* (Sarkin, 2012)

[17] (Amnesty International, 2008, p. 8)

Part II

Enforced disappearances in Pakistan

Enforced disappearances can be traced back to about 1985 in Pakistan.[18] Since its independence in 1947, Pakistan has faced continuous political struggles; juggling between military dictatorships and democracy. This instability has contributed considerably to the large number of enforced disappearances. Political instability continues to drive enforce disappearances in Pakistan even today. Balochistan and Sindh are prime examples of this.[19] Both these regions are infamous for their lengthy lists of missing persons.[20] Balochistan especially continues to suffer from mass cases of enforced disappearance.[21] Victims in these cases include men, women, children, students, lawyers and activists.[22]

Apart from political instability, the post 9/11 war on terror has also fuelled enforced disappearances in recent years.[23] Secret detention and disappearance of persons suspected to be associated with terrorist activities has become common post 9/11.[24] Persons are often disappeared on mere suspicion and denied access to the outside world; be it family or the courts.[25] These post 9/11 cases have targeted primarily the province of Punjab and Khyber Pakhtunkhwa.[26]

Pakistan cannot turn a blind eye towards such widespread violation of fundamental rights. In recent years Pakistan has been criticized for its ignorance towards ongoing enforced disappearances and urged to move towards protecting these persons.[27] Zahid Baloch, chairperson of the Baloch Student Organization was disappeared on March 18th 2014.[28] The government has made no effort to recover any information regarding Mr. Baloch's whereabouts. Ignoring the remarks of the Pakistan Supreme court in 2014[29] and the recommendations of the UN Working Group on Enforce or

[18] (Hassan, 2009, p. 24)
[19] (U.S. Deperatment of State, 2007, p. 2287)
[20] (A/HRC/22/45/Add.2 , 2013, pp. 9-11), *See generally* (Human Rights Watch, 2011)
[21] (A/HRC/22/45/Add.2 , 2013, p. 10)
[22] (Human Rights Watch, 2011, p. 2)
[23] (Mughal, 2013) (Hassan, 2009)
[24] (Mughal, 2013, pp. 6-7)
[25] (Hassan, 2009, pp. 24-26)
[26] (A/HRC/22/45/Add.2 , 2013, p. 9)
[27] (A/HRC/22/45/Add.2 , 2013)
[28] (International Commission of Jurists , 2014)
[29] (Muhabat Shah, 2014)

Involuntary Disappearances in 2012;[30] the government continues to ignore its obligations to investigate such disappearances. In the last year, reports of disappearances from all over the country have been noted.[31] The lack of positive change in this area indicates the lack of attention that this issue has received in Pakistan. The problem of missing persons in Pakistan has not been dealt with and is open to abuse. The need for legislation becomes imminent as the number of cases continues to go up.

The law and enforced disappearances in Pakistan:

There is no law governing enforced disappearances in Pakistan. However enforced disappearances are often dealt with under kidnapping (s.359, 360 Penal Code)[32] or abduction (s. 362 Penal Code).[33] It is inadequate to deal with enforced disappearances under these offenses as they do not cater to the severity of this crime. Moreover, by refusing to criminalize the offense of enforced disappearance the idea that no instances of enforced disappearance occur in Pakistan is being promoted. The authorities have carefully concealed enforced disappearances in Pakistan by arguing that such cases are simple kidnapping or abduction cases. The 2012 annual report of the Working Group on Enforced and Involuntary Disappearances (WGEID) mentions the authorities declared that most missing persons were actually criminals who have gone into hiding or fled the country.[34] If not this, then these persons were abducted or kidnapped by non-state actors and again are mistaken to be victims of enforced disappearances. In opposition to these justification, NGO's in Pakistan voice real concerns about authorities concealing their violations by pretending that enforced disappearances are not an issue in Pakistan.

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[30] (United National Human Rights Office of the High Commissioner, 2012)

[31] (United States Department of State, 2014, p. 4)

[32] s. 359 – Kidnapping: Kidnapping is of two kinds: Kidnapping from Pakistan and kidnapping from lawful guardianship.

s. 360 – Kidnapping from Pakistan, etc: Whoever conveys any person beyond the limits of Pakistan without the consent of that person, or of some person legally authorized to consent on behalf of that person is said to kidnap that person from Pakistan.

http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html

[33] S. 362 – Abduction: Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html

[34] (United National Human Rights Office of the High Commissioner, 2012)

Underreporting of enforced disappearances is a common problem that exists because the law inadequately deals with this crime. Dealing with enforced disappearances under s. 359,360 and 362 of the Pakistan Penal Code (Act XLV of 1860) promotes underreporting creating more need for legislation on this issue. Cases of enforced disappearances have been recorded since 1985 in Pakistan but the numbers recorded vary greatly.[35] There seem to be two conflicting figures annually, one presented by the government and one by human right agencies and NGOs. For example in Balochistan, claims that more than 14,000 persons are still missing are contrasted with the government's recognition of only 100 missing persons.[36] The difference in these two figures can be attributed to the different perceptions of enforced disappearances within the nation. The government believes that disappearances are not increasing and the higher numbers that are recorded are mistakes as those are cases of abductions or kidnapping not enforced disappearances.[37] Opposing this, non-governmental organizations argue that procedural problems create a gap in accurately reporting enforced disappearances. The lower number recorded by the government is simply a political manoeuvre to make the situation of enforced disappearances look better in Pakistan.

Underreporting can be attributed to procedural gaps in the system that result from the lack of legislation governing enforced disappearance in Pakistan. Often family members cannot report disappearances because of fear of threat or intimidation by the involved agencies.[38] Large number of people also struggle to file a first information report (FIR) for missing persons in Pakistan. The police openly discourage and refuse to file such reports in cases of disappearances.[39] The out-right rejection to file these reports makes it easier to not record these instances and thus underreporting continues. Moreover, classifying cases of enforced disappearances under kidnapping[40] or

[35] *See* (Amnesty International, 2008)

[36] (A/HRC/22/45/Add.2 , 2013, p. 10), (Mughal, 2013, p. 9)

[37] (A/HRC/22/45/Add.2 , 2013, p. 10) The inaccuracy discussed above is clear in these contradictory reports of enforced disappearances to the Working Group. *See* (Mughal, 2013, p. 7) In 2010, two figures were reported, the government admitted to 965 disappearances while families and human rights groups provided a range from 200-7000. *See generally* (Ansari, 2012) and (Jilani, 2012).

[38] (Mughal, 2013, pp. 7-8), *see* (A/HRC/22/45/Add.2 , 2013)

[39] (A/HRC/22/45/Add.2 , 2013, p. 10)

[40] *Supra* note 32

abduction[41] facilitates inaccuracy in reporting. Cases that are wrongfully dealt with under s. 359-62 are not recorded as enforced disappearance and thus contribute to underreporting of this crime.

These procedural gaps are clearly attributable to the lack of legislation on this matter. Incorporating enforced disappearance into local legislation will provide individuals with a clear procedure to file such cases. Underreporting is clearly a result of the inability to file cases of enforced disappearances. By enacting legislation governing this crime, cases will not be wrongfully categorized under other offenses and people will have a direct right to assert. Criminalizing enforced disappearances will place a positive duty on the police to act in the best interest of the law and filing of cases will pose less of an issue. The need for legislation addressing enforced disappearances is two-fold; a system of filing and reporting cases of enforced disappearances and allowing courts to effectively deal with the crime.

Another factor that plays a role in underreporting is the lack of media attention. Surprisingly enforced disappearances have not been a hot topic in Pakistan. This can be attributed to lack of awareness, fear of reporting and governmental pressure to keep this issue under the sheets. Media reporting and creating awareness will definitely promote more accurate recordings of enforced disappearance. For example, post 9/11 a surge in reported cases of enforced disappearances was noted.[42] This increase in reporting was a direct result of the anti-terrorism legislation that was initiated in wake of the 9/11 events. These legislative changes expanded police powers by providing discretion to deal with suspects in an arbitrary manner.[43] This lead to serious human right violations throughout the country. Enforced disappearances were definitely on the rise during this period,[44] but more importantly they were being reported to the public due to the awareness of ongoing disappearances. The anti-terrorism act promoted police power and made persons more susceptible to enforced disappearances yet it played a role in bringing enforced disappearances to the forefront. The legislation acted as a legal basis to report enforced disappearances, increasing media attention.

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[41] *Supra* note 33

[42] (Mughal, 2013, p. 9)

[43] *Id. Supra* note 47. A specific example of this is, The Pakistan Protection Ordinance (now Pakistan Protection Act 2014). This was a legislative tool that strengthened security post 9/11. This legislative move resulted in draconian policing power and immunity from punishment. In light of this instrument it has become increasingly easier to publicize enforced disappearance as the PPA supports ongoing disappearances.

[44] (Mughal, 2013, p. 9)

Changing the status of enforced disappearances in Pakistan

In 2013 a draft bill was proposed to deal with the on-going cases of enforced disappearance.[45] It was not a success for several reasons, namely it did not actually facilitate the prohibition of enforced disappearances. Instead the draft bill facilitated enforced disappearances by allowed the detention of persons. The Human Rights Commission of Pakistan expressed its disapproval of the secrecy of this bill, which had been drafted behind closed doors.[46] The draft bill was a puppet that on the face of it would show Pakistan's support for dealing with the issue of enforced disappearances. In reality this draft would have been in line with the excessive powers granted under the Pakistan Protection Act 2014[47] (PPA), today.

The PPA was enacted in 2014 to help curb terrorism and protect national security in Pakistan. This instrument has been a nightmare for human rights advocates as it infringes on the fundamental rights of people by authorizing excessive police power with no scope for accountability. Under the PPA, accountability of security forces is removed for violations that occur in the attempt to counter terrorism in Pakistan.[48] The PPA gives arbitrary powers of detention and withholding of information.[49] These powers guarantee the continuation of enforced disappearances, as there seems to be no protection under law for such persons.

Enforced disappearances will be more accurately recorded once the crime is incorporated into the law. The legislation governing enforced disappearances will form the basis of reporting these instances. More accurate reporting of the crime will contribute to the prohibition of enforced disappearances. This does not mean procedural problems will be eliminated as a whole. Enacting legislation is a necessary step in curbing the increase of these disappearances.

Enforced disappearances continue to occur in Pakistan as the lack of legislation governing this area creates problems in establishing control of this crime. There have been attempts to work around this lack of legislation. Since 2009, the Supreme Court has taken up cases of enforced disappearances in order to gain some control on this issue.[50] The Supreme Court's initiative to take

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[45] (Dawn News, 2013)

[46] *Id.*

[47] Pakistan Protection Act 2014 http://www.na.gov.pk/uploads/documents/1404714927_922.pdf

[48] (International Commission of Jurists, 2014)

[49] *Id.*

[50] (A/HRC/22/45/Add.2 , 2013)

actions *suo motu* has been the primary avenue for redress to victims of enforced disappearances.[51] In 2006, a petition was filed with a list of 41 persons who had disappeared.[52] The Supreme Court took up this case along with several others during this time to help curb enforced disappearances. These cases have not yielded any results because of lack of cooperation of the government and security agencies in Pakistan.

In the Muhabat Shah[53] case, the court held that perpetrators of enforced disappearances would be accountable under the law of Pakistan. The Supreme Court applied the convention on enforced disappearances because of "its inextricable link to the right of life".[54] The right to life is enshrined under Article 9[55] of the Constitution and is violated by such disappearances. The court relies on this nexus[56] between the constitution and the right to life arguing that an obligation exists to prohibit enforced disappearances. The Muhabat Shah case could have been revolutionary however the government challenged the ruling. The government argued that Pakistan had not ratified the convention on enforced disappearance and so the Supreme Court could not apply it in Pakistan.[57] The aim of this government intervention was to retract accountability of the securities agencies.[58] The government filed for review of the judgment and the court removed any remarks implicating the security agencies.[59]

Similarly, on the instruction of Chief Secretary Balochistan the Supreme Court discharged the case of 197 missing persons.[60] The relatives and petitioners were advised to approach the Balochistan High Court instead.[61] This was a politically motivated move as no further investigation was carried

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[51] (A/HRC/22/45/Add.2 , 2013, p. 8) (Hassan, 2009, p. 29)

[52] (Mughal, 2013, p. 9)

[53] (Muhabat Shah, 2014)

[54] (Muhabat Shah, 2014)

[55] Article 9 Security of person: No person shall be deprived of life or liberty save in accordance with law.

[56] In the Muhabat Shah case the court relies on a decision of the Nepal Supreme Court in 2007. The 2007 decision in Nepal established that even though Nepal had not ratified the convention on enforced disappearances; the right to life was an integral component of the crime and formed a part of the Constitution of Nepal. The Supreme Court of Nepal established an obligation to prohibit enforced disappearances without ratifying the convention. (Muhabat Shah, 2014)

[57] (Muhabat Shah, 2014)

[58] (Muhabat Shah, 2014)

[59] *Id*. at

[60] (Balochwarna News, 2015)

[61] *Id*.

out into these cases once they were removed from the Supreme Court.[62] The priority is to protect those agencies carrying out enforced disappearances. Most petitioners end up filing in the Supreme Court in order to ensure that their case is actually taken up and not just tossed aside.

Regardless of its failures, the Supreme Court of Pakistan has asserted that an obligation exists to prohibit enforced disappearances in Pakistan.[63] The struggle in the courts and in enacting legislation to prohibit enforced disappearance makes clear the political instability in Pakistan. The Muhabat Shah Case and lack of legislation are both examples of why perpetrators continue to carry out these disappearances. The lack of accountability for the perpetrator makes it easier to continue these violations without fear of the courts stepping in. In order to get a hold of this situation it is necessary to bring enforced disappearances within the ambit of national law. This will allow the court to stick to its decision in future cases similar to the Muhabat Shah case.

Part III

The obligation to prohibit enforced disappearance: calling for immediate legislative changes

As of 2016 there is no legislation in Pakistan that deals with enforced disappearances specifically. In fact enforced disappearances are not even criminalized under Pakistani law. In order to promote the development of legislation for enforced disappearances we will first examine the international obligation on Pakistan (if any) and then any national pressure to substantiate this argument.

(i) Pakistan's obligation under international law to prohibit enforced disappearances

The international obligation to prohibit enforced disappearances is not applicable as we have not signed onto the International Convention on the Protection of All Persons from Enforced Disappearance. Even in the event of ratifying this convention, as a dualist state Pakistan must enact legislation relating to enforced disappearances to make it an offense discussed earlier are a locally. The convention may not impose an obligation but enforced disappearances as culmination of several violations of international rights does have some weight.[64] In this manner Pakistan does

[62] *Id.*

[63] (A/HRC/22/45/Add.2 , 2013)

[64] (Sarkin, 2012)

have a duty to not violate the purpose of conventions that it has ratified.[65] For instance, Pakistan has ratified the ICCPR and has an obligation to protect the right to life (under Article 6). The right to life is a non-derogable right and should be protected in all situations. It is important that Pakistan understands its international obligations and abides by them. Moreover, ancillary to enforced disappearance is torture. Majority cases of enforced disappearances include some form of torture/degrading treatment. Torture is an accepted *jus cogens* norm and so there can be no deviation from prohibition of torture.[66] In this light Pakistan has a duty to act on the on-going disappearances. Ratifying the Convention on Enforced Disappearances will provide a basis for enacting local legislation. As previously done, Pakistan's ratification of the Convention against Torture helped in moving towards enacting local legislation.[67] It is clear that regardless of Pakistan's ratification to the Convention an international obligation exists to prohibit enforced disappearance. Relying on the international instruments ratified by Pakistan and customary international law, we must adhere to this international obligation.

International law may not be mandatory but in the 21st century it is definitely holds weight in this globalized world. Enacting legislation to curb enforced disappearances will help improve Pakistan's standing in the international arena and will help it flourish in this increasingly political global world. Pakistan should act on its international obligation to prohibit enforced disappearances by enacting legislation or at least criminalizing enforced disappearances within local law.

(ii) National pressure to prohibit enforced disappearances in Pakistan

The obligation imposed by international law does not have a binding effect. Looking at the Constitution we can find a duty to prohibit enforced disappearance in Pakistan. Enforced disappearances are not criminalized under Pakistani law but no one refers to these acts as legal. The nature of this crime is so severe that even without a place under local law it is still condemned by the courts. Enforced disappearances are dealt with under the offense of kidnapping or abduction under the Pakistan Penal Code 1860.[68] This is problematic as neither one of these crimes

[65] *Supra* note 10

[66] (Sarkin, 2012, p. 542) *See* also (Dalia Vitkauskaitė-Meurice, 2010)

[67] (Human Rights Commision of Pakistan, 2014)

[68] *Supra* note 32, 33.

encompasses all three parts of the definition of enforced disappearance. By using these sections for enforced disappearances we are ignoring the severity of this crime. Moreover these sections are not sufficient to deal with enforced disappearances, as security/intelligence agencies will not be held accountable under these offenses. In order to ensure proper protection of victims there needs to be a move towards specific legislation for enforced disappearances.

Enforced disappearances violate the fundamental rights of the Constitution of Pakistan. The right to life is enshrined under Article 9[69] of the 1973 Constitution of Pakistan. In order to protect this fundamental right the criminalization of enforced disappearances is necessary. The Supreme Court recognized this violation in the Muhabat case and attempted to address the constitutional issue that enforced disappearance raised. Article 4[70] of the Constitution guarantees the right of every person to liberty and protection of the law. When a person is disappeared they are denied access to the courts and removed from the protection of the law. Enforced disappearances must be regulated in light of these fundamental violations.

Article 10A deals with the right to fair trial. Article 10A has been a source of debate recently with the coming in of the Pakistan Protection Act 2014. Enforced disappearances are a violation of a person's right to fair trial and due process. The crime removes a person outside the protection of the law, denying his/her right to due process. Moreover, Article 10 of the Constitution incorporates procedural safeguards against arbitrary arrest and detention. Victims of enforced disappearances do not get these safeguards as provided under Article 10. When these missing persons are detained they are not formally charged nor given any reason as to their detention.[71] These persons are not produced before a magistrate within 48 hours and they are not given access to justice.[72] Even in cases of preventative detention (Article 10(3)[73]), the detainee must be informed of his or her rights. These include the reason for the detention order and the right to make a representation to the government against the detention order.[74] In contrast victims of enforced disappearances are not

[69] Article 9, Security of person: No person shall be deprive of life or liberty save in accordance with law.

[70] Article 4: "to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be…"

[71] (A/HRC/22/45/Add.2 , 2013) (International Commission of Jurists , 2014)

[72] *Id.*

[73] (Hassan, 2009, pp. 24-27)

[74] *Id.*

given such constitutional protections. Enforced disappearances violate the fundamental rights set out in the Constitution yet there is little done to change this.

The lack of attention towards enforced disappearances is not shocking in light of the recent enactment of the Protection of Pakistan Act 2014 (PPA). The PPA is an overly broad counterterrorism legislation, which protects abuses of security forces at the cost of human right violations.[75] It works in favour of enforced disappearances by facilitating security forces to carry out arbitrary detentions. The PPA makes it pertinent to enact legislation for enforced disappearances or to at least criminalize it as an offense of its own in the Penal Code.

Conclusion:

Even if we ignore the obligations imposed by international law to prohibit enforce disappearance these constitutional violations cannot be ignored. It is clear that in light of the constitutional rights discussed above enforced disappearances are in violation of the Constitution of Pakistan. This paper has displayed the problems within the system whether procedural or political. Often the biggest challenge is compelling a state to act. The conflict with fundamental rights in the Constitution should push for criminalizing enforced disappearances in Pakistan. Until enforced disappearances are incorporated into the law there can be no hope for redress for victims or accountability of perpetrators. For now, Pakistan should take the first step and criminalize this heinous crime so that it can move onto enacting specific legislation in the near future. Enforced disappearance will only come to a halt once there is some legal footing for this crime within domestic law.

[75] (Human Rights Watch, 2014)

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Military Courts in Pakistan: Exercising the option of flipping the two tail coin

by Abuzar Salman Khan Niazi[1]

History of Military Courts in the World

During the legendary American Revolutionary War, General George Washington established a Military Commission to try a British official who was accused of espionage and undercover work against American interests. The officer was tried and convicted by the Commission and later received capital punishment. In the famous United States of America-Mexican War (1846-48), the tool of military commissions was vigorously employed in order to prosecute guerrilla fighters and other rebellious combatants. During the Civil War, President Abraham Lincoln declared that all mutineers apprehended within the territory of United States America ("USA") would be subject to martial law and will be tried accordingly. After the assassination of President Lincoln, eight people were accused of hatching the plot of assassination along with the main accused. President Andrew Johnson appointed a Military Commission, which found all the eight alleged conspirators guilty.

Military tribunals were again used during and after the Second World War ("WW2"). In 1942, eight German soldiers dressed as civilians covertly landed on Long Island, New York via a boat with the task to damage sensitive defense installations of USA. The Federal Board of Investigation ("FBI") arrested the saboteurs and handed them to the USA military for trial. The Supreme Court of USA ruled that the since saboteurs were rebels and because they had secretly entered to commit sabotage and destruction, had violated the law of war, therefore they could not be treated as prisoners of war. Apart from USA military tribunals, the world also witnessed establishment of the famous Nuremberg Military Tribunals after WW2 with the purpose of prosecuting political, military, and economic elite of Nazi Germany. The Nuremberg Trials received worldwide

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criticism as it was alleged that during these trials several fundamental human rights were negated, for instance right to fair trial, safe guards against arbitrary detentions, inviolability of dignity etc.

In response to the September 2001 terrorist attacks, President George. W. Bush unleashed a new military order for combating and preventing terrorism. The order is particularly directed towards the members of the banned organizations and notorious terrorist groups, for instance Al Qaeda. Apart from that, it also covers all those who have engaged in, abetted or connived to commit or are planning to commit terrorist acts against the USA or its people. President Bush vehemently supported and defended the use of military tribunals by asserting that, *"We are an open society but we are at war. We must not let foreign terrorists use the forums of liberty to destroy freedom itself."*[2]

History of Military Courts in Pakistan

The establishment of military courts in Pakistan is not a new phenomenon. However, it reflects an appalling episode in the constitutional, political and legal history of Pakistan. In the past, military courts have been specifically used for the purpose of political victimization and suppression of dissent, particularly during dictatorial regimes. Special courts headed by the military officers were established in April, 1977 to try civilians; however, these were declared illegal and unconstitutional by the Lahore High Court in the famous case of *Muhammad Darwesh Arbi.*[3] In the said case, the court was of the view that the armed forces were not acting in aid of civil power but in complete transgression and substitution i.e. against the spirit and essence of Article 245 of the Constitution of Islamic Republic of Pakistan (the "Constitution")[4].

[2] (Bush, 2001)

[3] PLD 1977 Lahore, Page 846

[4] Article 245 of the Constitution of Pakistan, 1973, Functions of Armed Forces.

The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.

(2) The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.

(3) A High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245:

Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power.

The cataclysmic chapter in the political history of Pakistan was the institution of military courts in General Zia's era. During his reign, in order to subdue the opposition, the military junta made bogus and frivolous cases against the political leadership and tried them for political offences or politically motivated criminal offences.[5] Zia's regime is well known for rebuffing fair trials to political prisoners who were being tried by military courts.[6] Military courts in his era employed arbitrary and cruel techniques, for instance, extracting confessions through torture, severe beatings, electric shocks, strapping to blocks of ice and burning with cigarettes.

In 1998, Nawaz Sharif during his second tenure as the Prime Minister of Pakistan, established military courts in Sindh due to the aggravating law and order situation caused by sectarian and ethnic rift.[7] .However, the constitutionality of the military courts was challenged before the Supreme Court of Pakistan (the "Supreme Court") in case of *Sheikh Liaquat Hussain*[8]. The Apex court declared the military courts unconstitutional; the rationale and legal reasoning behind the decision was that by virtue of Article 175 of the Constitution[9], no parallel or analogous legal system can be constructed that circumvents the operation of the existing courts. The court also

(4) Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting.

[5] (Mahmood, 1992)

[6] (Mahmood, 1992)

[7] (The Nation, 2015)

[8] PLD 1999 SC 504

[9] Article 175 of the Constitution of Pakistan, 1973

Establishment and Jurisdiction of Courts.

(1)There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.

Explanation- Unless the context otherwise requires, the words "High Court" wherever occurring in the Constitution shall include "Islamabad High Court.

(2)No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3)The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.

Explanation:- In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002.

adumbrated that cases relating to terrorism should be assigned to special courts already established under the Anti-Terrorism Act, 1997.

Twenty First Constitutional Amendment

Soon after the December 2014 Peshawar School carnage, the Twenty First Amendment Bill to the Constitution was passed by the lawmakers on January 6, 2015, which received the presidential assent on January 7, 2015.[10] It is pertinent to mention here that the Twenty First Amendment (the "Amendment") also has a sunset clause causing the Amendment to perish on January 7, 2017.[11] The Amendment alters Article 175 of the Constitution, First Schedule of the Constitution, Pakistan Army Act, 1952, Pakistan Air Force Act, 1953, The Pakistan Navy Ordinance, 1961 and Protection of Pakistan Act, 2014.[12] The central idea behind the Amendment is that it allows for speedy trials by military courts for offences relating to terrorism, waging of war against Pakistan and acts threatening the defense and security of Pakistan. The Amendment goes further and permits the trial of civilians by military courts. This includes those civilians who claim or who are known to belong to any terrorist group or organization using the name of religion or sect, subject to the condition that their cases are referred by the federal government.

Decision of the Supreme Court Regarding Military Courts

The constitutionality and legality of the Amendment was challenged in Supreme Court under Article 184(3) of the Constitution[13]. To the utter surprise of many, especially the liberal jurists, legal academics, left wing lawyers and human rights organizations, the Supreme Court judgment, announced on August 5th, 2015, upheld the validity of military courts.[14] The

[10] (Dawn News, 2015)

[11] S. 1 (3) of Constitution (Twenty-first Amendment) Act, 2015.

1. Short title and commencement- (3) The provisions of this Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiration of the said period.

[13] Article 184 (3) of the Constitution of Pakistan, 1973

Original Jurisdiction of Supreme Court

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

[14] 2015 PLD Supreme Court 401

Apex Court, however, declared that all decisions of military courts would be subject to judicial review by the High Court and Supreme Court on grounds of being coram non judice, being without jurisdiction or suffering from mala fide. It means any order passed, or sentence awarded by military courts shall be subject to judicial review. The Court also declared that the superior judiciary had the authority to review the government's selection and allotment of cases to military courts and refer them for trial under the Pakistan Army Act, 1952. The detailed judgment makes it crystal clear that the Apex court has the authority to review any sentence awarded by the military courts if the condition of right fair trial is not met and the due process guarantees as enshrined in the Constitution are infringed.

Criticism on Military Courts

While majority of the politicians, analysts and people of Pakistan eulogized and welcomed decision of the Supreme Court; the jurist bodies, left wing intelligentsia and members of civil society organizations considered the endorsement of military courts as a major blow to human rights protections and rule of law in Pakistan. The reservation put forward by those who disagree with the idea of military courts are relatively correct and quite appropriate, as no one can deny the fact that the scheme of military courts trying civilians might lead to grave miscarriages of justice. The reason is that military courts apply different standards of evidence and offer fewer protections to the accused.[15]

Theoretically and ideally, keeping in mind principles of justice, due process guarantees, right to fair trial and rule of law, a society must never negotiate its standards of justice, no matter how tricky the circumstances are. Opponents of military courts also assert that their use serves as a bad model and someday might be used against innocent citizens. They further argue that the use of the military courts will corrode liberties and democratic checks as they are based on the idea of an unconventional and alternate justice system, significantly secreted from public inspection.[16]

[15] (Business Recorder, 2015)

[16] (The Express Tribune, 2016)

Why do we need Military Courts?

The fears raised and doubts casted by the aforementioned groups on the credibility of procedures adopted in military courts may be relevant to some extent but critics forget to remember that the ground realities in Pakistan are not only different but are quite odd. The bitter truth is that we are in a state of war, and it is not a conventional war we are fighting; rather, we are fighting fanatic guerilla fighters who are bent on executing their suicidal missions. Horrendous incidents like the Peshawar School Massacre in 2014[17] and the Charsadda University attack[18] connote an extraordinary hostile situation, wherein enjoying right to life and liberty has become a pipe dream. The irony is that the freethinkers and the religious hawks are on the same page and share a commonality of ideology when we talk about the legitimacy of military courts.

It is true that the constitutionality and legality of military courts can be inquired on the basis of conceptual presumptions or a textbook approach to notions of democracy, rule of law and trichotomy of power. However, it must be remembered that academic models emerge from totally different fronts when they are interpreted or construed in terms of a specific practical political, social and economic context. We have seen that even the most developed countries possessing high democratic credentials often introduce and enforce stringent policies if there is a grave threat to security and tranquility within their boundaries. In the aftermath of the September 2001 attacks, the USA and many other western countries also adopted severe laws limiting individual freedoms and liberties i.e. the USA's Patriot Act to name one.

The current form of terrorism is an unparalleled phenomenon as nowadays terrorists commit atrocities using sophisticated modes. Many countries have taken unusual steps to deal with such kinds of challenging developments. Developed democracies especially the USA and other European countries, despite their firm believe in democratic values and the rule of law, have introduced atypical legal frameworks and statutory schemes to deal with this modern form of terrorism. The USA floated the term of 'illegal combatants' for the terrorists captured in war against terrorism. The sole purpose behind the introduction of the said term was to deny the

[17] (BBC News, 2014)
[18] (Dunya, 2016)

prisoners the rights enshrined in Geneva Convention.[19] Moving even further, the USA also set up the notorious Guantanamo Bay to keep Al-Qaeda and Taliban terrorists out of the jurisdiction of the USA Supreme Court. Keeping these specifics in view, if we compare the harms caused by terrorists to Pakistan with the afflictions caused to rest of the world, we can easily figure out that the sufferings of Pakistan due to terrorism are colossal and almost irreparable.

Pakistan is fighting a war against extremist vultures for its own survival and thus it has to use whatever weapons it has in its arsenal. A pragmatic approach calls for stern action against hardcore militants who consider themselves above the law and believe that no court of the land has the audacity to punish them. These militants are, without any fear, openly committing heinous crimes and are candidly terrorizing the general public. Sadly, the judicial arm of the state has failed to punish and deter them.[20] In order to neutralize the threat these fanatics pose to ordinary courts, for the time being, the only viable solution that can be suggested is that they should be held accountable through military courts.

Critics of the 21st Amendment fail to understand the fact that Pakistan's criminal justice system has completely failed to cope with these combatants. The conviction rate in ordinary courts is very nominal. In addition to that, the special anti-terrorist courts have also not produced expected results. Mumtaz Qadri was sentenced to death by the trial court for committing murderer of Salman Taseer, the Ex -Governor of Punjab[21] However, due to fear of extremist backlash as soon as the concerned judge announced the judgment, he resigned from his post and fled the country.[22] In district courts of Islamabad, an additional session judge was mercilessly murdered during court hours in his own chamber by none other than these miscreants.[23]

The reason behind the failure of ordinary courts to deliver is the fear of retaliation and vengeance. There have been several cases where judges were panic stricken during the trial of terror suspects which in the end resulted in acquittal i.e. a free walk from the court. There are myriad of facilitators, steadfast adherents and staunch supporters of these terrorists all over Pakistan Under

[19] Geneva Convention relative to the Treatment of Prisoners of War, 1950
[20] (Dawn News, 2014)
[21] (BBC, 2011)
[22] (Dawn News, 2011)
[23] (Pakistan Press Club, 2014)

such circumstances, it is extremely difficult to ensure protection of judges, witnesses and prosecutors. Military courts hold their proceedings in remote and unknown surroundings, so that maintaining the anonymity of judges is not a difficult task.

Thousands of Pakistani families are suffering from frustrations and disorders; they have lost their loved ones and are awaiting justice but regrettably these militants have been rarely punished by the ordinary courts. The conviction of terrorists seldom takes place in conditions where there is lack of evidence against an offender. If judges are themselves not safe, then who can expect from a witness to appear in the box and record his evidence? Another problem is the police investigation, since unlike the military, the police employ primitive and obsolete schemes of evidence collection. They are regularly outclassed by these technically advanced trained mercenaries.

Pakistan has suffered irremediable losses due to frequent terrorist attacks on innocent civilians, brave politicians, and police officers, military and paramilitary forces. Approximately, more than fifty thousand people have lost their lives, thousands have been mutilated and scores are suffering from mental agony. Pakistan has suffered US$107 billion in economic losses since the 11 September 2001 terrorist attacks.[24]**.** The horrific episode of the 2014 attack in the Peshawar School is considered as the most heartbreaking moment in the history of Pakistan in which more than 130 innocent school going children were heartlessly martyred by militants belonging to Tehrik-e-Taliban Pakistan (TTP). This atrocious incident jolted foundations of Pakistan and proved to be the final nail in the coffin where after the military took charge and is now calling all the shots especially in relation to counter terrorism policies.

The central idea behind the establishment of military courts was not only to hold the terrorists accountable for their horrific crimes but also to make a strong statement. This statement hopes to place the Taliban and other extremist groups on the level of enemy combatants. It further hopes to give a strong message that these militants are an existential threat and the state will use every single stick in its inventory to eliminate the enemy. In pursuance of the counter terrorism objectives, the government introduced National Action Plan (the "NAP")[25]. This plan provides a rough skeleton on the basis of which anti-terrorism policy will be designed and implemented. Apart from

[24] (Economic Survey of Pakistan, Page 2, 2014-15)

[25] (The Washington Post, 2015)

focusing on terrorist groups, NAP lays stress on curtailing supply of monetary and political support to these terrorists groups and taking stern action against the abettors. NAP also led to acceleration in the continuing security operation in Karachi being conducted by the Rangers; the situation in Karachi has greatly improved in last six months although a lot still needs to be done.[26]

The *Anti-Terrorism (Amendment) Ordinance 2013*, along with the *Investigation for Fair Trial Act* introduced by lawmakers made possible the admissibility of evidence collected through modern means of communications in court of law e.g. audio, video, emails, texts etc. These legislations endorsed the preventive detention of persons involved in any offence linked to the defense of Pakistan, target killing, kidnapping and payoffs. These amendments also projected an apparatus for the security of judges, protection of witnesses and safety of prosecutors. But unfortunately, the government failed to achieve anticipated results Rather, the effects were adverse as the amount of convictions declined even further due to the reason that new admissibility methods increased the duration and complexity of trials. Only Pakistan Army has the latest and sophisticated technical skills in forensics to conduct the trials of modern day terrorists.

The effectiveness of military courts can be discerned from the fact that since their inception; the Taliban and their aides are on the run due to a fear of retribution. We have seen an acute drop in frequency of terrorist attacks. TTP is an organization of ruthless combatants, not civilians. They are like soldiers who are in the business of killing and getting killed in the line of their duty, therefore, they can be tried by military courts.

The history of criminal law and development of its jurisprudence teaches us that the purpose and spirit behind the existence of every criminal justice system is “deterrence” i.e. to deter potential outlaws. However, in Pakistan, achieving the objective of deterrence has become a dream instead the recurrence of terrorism has become a norm. Since reforms of currently prevalent criminal justice system requires a handful amount of time, for the time being the only viable passage available is military courts.

[26] (The Express Tribune, 2015)

Some constitutional experts have raised the argument that the convening of military courts is a clear violation of Article 175 of the Constitution. However, this notion is not completely true because the military courts have been set up on impermanent basis for a small time span to supplement and assist the existing judicial system. Therefore, such a step by no means is tantamount to establishing a parallel judicial system. Even under the Common Law of England and Wales, when the Armed Forces are called in to crush disorders, to put down a rebellion or to suppress violence, they are conferred with the authority to try and punish offenders only when the security situation has deteriorated to such an extent that it has become almost impossible for ordinary courts to successfully operate.

The plurality judgment announced by Supreme Court of Pakistan in 2015 and authored by Justice Azmat Saeed which validated the Amendment actually proposed a middle course. Thus, it reflected a realistic and practical approach of law lords in the higher echelons of judiciary. The legality and constitutionality of the judgment can be questioned on the basis of a text book approach towards fundamental rights, independence of judiciary and separation of powers. However, it must be remembered that sometimes the judges have to take into account ground realities and bizarre circumstances created by peculiar social, economic and political scenarios. The eminent American judge and renowned jurist, Oliver Wendell Holmes, once said, "the life of the law has not been logic, it has been experience"[27] The plurality judgment takes into account the bitter experiences and existential threats, we as a nation are incessantly coping with.

The Supreme Court by adumbrating that the military courts shall operate within the commonly accepted parameters of right to fair trial and that the military court orders will be subject to judicial review, has preserved the sanctity and independence of judiciary and has to a great extent eroded the idea that fundamental rights have been compromised by the Amendment. It is not an easy job to adjudicate on matters which involve public sentiments and aspirations. Complete reliance on public sentiment would have resulted in devastating effects coupled with severe public criticism However, the judges in the Apex court showed signs of collective intelligence and joint pragmatism i.e. by recommending a middle path through allowing the judicial review of military

[27] (Holmes, 1881)

court orders. They have successfully avoided an institutional clash and have appreciated public opinion whilst ensuring that the salient features of the constitution remain intact.

Conclusion and Recommendations

Undoubtedly, the Supreme Court verdict is an uneasy marriage between necessity and Constitutional protections, as on purely theoretical constitutional model, there is no room for establishment of military courts. The Constitution provides for only certain tribunals to share judicial powers with the courts i.e. the Federal Shariat Court, Service Tribunals, and Election Tribunals etc. There is no everlasting constitutional provision regarding the establishment of military courts. Any court or tribunal which is not founded on any of the Articles of the Constitution clearly is in violation of Article 175 and 203. Apart from that Article 245 of the Constitution has a limited scope. It allows the military to act in aid of the executive in exercise of its executive powers; its scope is narrow and cannot be linked to the exercise of judicial powers by military.

Some have tagged the validation of military courts by the Supreme Court of Pakistan as a resort to the notorious 'doctrine of necessity'. The doctrine of necessity was introduced by the Supreme Court of Pakistan in the case of the State v Dosso[28]. However, it turned out to be detrimental to the evolution and development of a democratic system in this country. After its inception, the said doctrine was regularly used by the Apex court to legalize military adventures. However, comparing the current decision with previous decisions of the Supreme Court is unfair and out of context, as now the circumstances are different and peculiar. Military courts have become a necessity under a democratic order. The whole parliament has endorsed the Amendment and welcomed the decision of Supreme Court of Pakistan. The Supreme Court has not validated ambitious escapade of a General rather it has approved a validly passed constitutional bill both by Senate and National Assembly of Pakistan. Apart from that, the Supreme Court has reserved certain review powers through which it can act as watchdog against injustice and procedural irregularities, thereby curtailing the arbitrary tendencies of military courts.

[28] PLD 1958 SC PAK 533

However, it must be noted that the dilemma of religious fanaticism and terrorism to a great extent has literally joggled every single individual in Pakistan. The nationwide presence of this grave and earth-shattering predicament indicates that extraordinary measures are the need of the hour as the State is consistently losing its grip and the significance of its writ is fading with every passing day. History is replete with examples of how nations reacted to challenges posing threat to their existence; almost all of them adopted unusual procedures to ensure their survival.

The establishment of military courts was a difficult choice and was borne out of necessity. Eminent lawyer, Feisal Naqvi rightly coined the term "Necessary Evil" for military courts[29].However, it must be remembered that long term dependence on military courts is a catastrophic idea; the government must prepare for the future and reform its existing criminal justice system. By virtue of the sunset clause in the Amendment, the military courts will no longer be operational after two years. However, keeping in mind the extent and kind of security challenges Pakistan is facing at the moment; it is highly probable that the war against terrorism will continue for many years. The government needs to shun the habit of turning to the military when its own institutions fail to perform.

Too much reliance on the military will result in unfavorable consequences. Firstly, the government will become too lethargic and avoid introducing serious reforms, and secondly, its presence will become redundant. Under such circumstances, the government will lose its moral authority to rule and arguments in favor of military rule will be regularly tossed and welcomed.

The political leadership needs to take charge, show valor and play on the front foot as time will not give them a second chance.

It is understandable that the special state of affairs might compel a State into using law in a different manner and thereby deviate from settled norms. However, it must be kept in mind that in any part of the world, the tool of military courts is not considered a permanent solution or a sagacious idea for maintaining law and order. A compromise on justice to achieve the prompt disposition of cases can hardly be termed as justice. Legal systems are required to strike a balance between the two

[29] (Newsweek Pakistan, 2015)

popularly accepted axioms, "justice delayed is justice denied" and "justice rushed is justice crushed". History is replete with examples of injustices caused by military tribunals, whether they were military tribunals in the USA or Nuremberg, they have attracted worldwide criticism for violating basic human rights.

The government needs to introduce radical and innovative reforms in order to ensure that the uneasy marriage between necessity and Constitution must result in a smooth divorce. If the loopholes in our ordinary court system are not filled and they continue to exist, we will have no other option but to extend the tenure of military courts. If the military courts become a perpetual aspect of our constitutional set up, we will never be able to realize the fruits of genuine democracy. Thus, three major reforms are essential. Firstly, there is a need to set up an effective witness protection program Secondly, there is a need to provide full proof security to Anti-Terrorist Court judges and lastly, there is a need for the introduction of inventive investigation techniques and sophisticated prosecution services.

It can thus be concluded that although the decision by the government to establish military courts and its subsequent validation by Supreme Court of Pakistan was a legal exception; it cannot be forgotten that in order to ensure the existence of Pakistan, the institution of military courts had become an inescapable necessity. In view of the immense level of afflictions suffered by Pakistanis due to rampant terrorism; it is understandable that the state would have adopted extraordinary measures to deal with this challenging warlike situation.

As a famous Chinese war strategist rightly said "*Anger may in time change to gladness; vexation may be succeeded by content. But a kingdom that has once been destroyed can never come again into being; nor can the dead ever be brought back to life*"[30] The aforementioned adage appropriately fits in the situation Pakistanis facing because we have no other option except to condone the temporary existence of military courts, as at the moment our survival is solely dependent upon their presence. Right now, we have a unique kind of a coin in our hands. Although we have the option to toss it in any way we want, the outcome of such a flip will always be a tail

[30] (Ames, 2010)

(*military courts*). Due to the seriousness of the present situation, we don't enjoy the privilege to toss a customary coin which can provide us with the luxury to opt for the head (*ordinary courts*).

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Human Rights Protection and the Need for Double Jeopardy in Pakistani Law

by Waleed Atta[1]

Origins of Double Jeopardy

"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…"[2]

Double jeopardy is a procedural defense that inhibits a defendant from being tried again for the same, or in some instances similar, charges following a legitimate acquittal or conviction. This modern law is derived from the doctrines of *autrefois acquit*[3] and *autrefois convict*[4] continued as part of the common law at the time of the Norman Conquest. These doctrines are regarded as necessary element to the protection of liberty of the accused and to abide by the due process of law that what has been decided should be held final. However, there exist three exceptions to this;

1. The prosecution has a right of appeal against acquittal in summary cases if the decision appears to be wrong in law or in excess of jurisdiction[5]

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[2] 5th Amendment, US Constitution.

[3] Autrefois acquit: A plea made by a defendant, indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offence.

[4] Autrefois convict: A plea made by a defendant, indicted for a crime or misdemeanor, that he has formerly been tried and convicted of the same.

[5] s.28, Supreme Court Act 1981

- (1) Subject to subsection (2), any order, judgment or other Appeals from the decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Crown court to have a case stated by that court for the opinion of the High Court.

(2) Subsection (1) shall not apply to-

(a) a judgment or other decision of the Crown Court relating
to trial on indictment ; or

(b) any decision of that court under the Betting, Gaming and Lotteries Act 1963, the Licensing Act 1964 or 1968 c. 65. The Gaming Act 1968 which, by any provision of any of those Acts, is to be final.

(3) Subject to the provisions of this Act and to rules of court, the High Court shall, in accordance with section 19(2), have jurisdiction to hear and determine-

(a) any application, or any appeal (whether by way of case stated or otherwise), which it has power to hear and determine under or by virtue of this or any other Act ; and

(b) All such other appeals as it had jurisdiction to hear and determine immediately before the commencement of this Act.

2. A retrial is permissible if the interests of justice so require, following appeal against conviction by a defendant[6]
3. A tainted acquittal, where there has been an offence of interference with, or intimidation of, a juror or witness, can be challenged in the High Court[7]

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[6] s.7, Criminal Appeals Act 1968

Power to order retrial.

(1)Where the Court of Appeal allow an appeal against conviction and it appears to the Court that the interests of justice so require, they may order the appellant to be retried.

(2)A person shall not under this section be ordered to be retried for any offence other than—

(a)the offence of which he was convicted at the original trial and in respect of which his appeal is allowed as mentioned in subsection (1) above;

(b)an offence of which he could have been convicted at the original trial on an indictment for the first-mentioned offence; or

(c) An offence charged in an alternative count of the indictment in respect of which the jury were discharged from giving a verdict in consequence of convicting him of the first-mentioned offence.

[7] s.54, Criminal Procedure and Investigations Act 1996

Acquittals tainted by intimidation etc.

(1)This section applies where—

(a)a person has been acquitted of an offence, and

(b) a person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal.

(2)Where it appears to the court before which the person was convicted that—

(a)there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted, and

(b) subsection (5) does not apply,

The court shall certify that it so appears.

(3)Where a court certifies under subsection (2) an application may be made to the High Court for an order quashing the acquittal, and the Court shall make the order if (but shall not do so unless) the four conditions in section 55 are satisfied.

(4)Where an order is made under subsection (3) proceedings may be taken against the acquitted person for the offence of which he was acquitted.

(5)This subsection applies if, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted.

(6)For the purposes of this section the following offences are administration of justice offences—

(a)the offence of perverting the course of justice;

(b)the offence under section 51(1) of the M1Criminal Justice and Public Order Act 1994 (intimidation etc. of witnesses, jurors and others);

(c) an offence of aiding, abetting, counselling, procuring, suborning or inciting another person to commit an offence under section 1 of the M2 Perjury Act 1911.

(7)This section applies in relation to acquittals in respect of offences alleged to be committed on or after the appointed day.

(8)The reference in subsection (7) to the appointed day is to such day as is appointed for the purposes of this section by the Secretary of State by order.

Even though the law has been generally in force in English common law since the12th Century, it would certainly be incorrect to declare that it had been an unopposed foundation of common law. It was in 1487 that King Henry VII passed an Act.[8] This act did not sanction repeated prosecutions by the Crown nor by private parties but only a second prosecution by the other party if the first prosecution had resulted in an acquittal. Even though not often exploited, this law persisted in force until the nineteenth century. It was repealed in 1819in the case of *Ashford v. Thornton* (1818)[9], after an acquittal of the said Thornton for murder.

In the landmark case of *Connelly v DPP* (1964)[10], it was ruled that a defendant cannot be tried again for any offence for which he or she has been either acquitted or convicted unless "special circumstances" are provided by the prosecution. It is important to note that there is relatively no further explanation or case law on the term special circumstances. The limited position available on this does state that a person could be tried again for the aggravated form of that offence committed earlier if the facts were discovered after the first conviction (*R v Thomas*[11]). However, a contrasting picture is available where a person who had been acquitted of a lesser offence could not be tried for an aggravated form even if new evidence comes into light (*R v Beedie*)[12].

Double Jeopardy has now been permitted in England and Wales in certain exceptional circumstances since the Criminal Justice Act 2003. Post 2003, it has been recommended in instances such as in the Macpherson Report[13] that a person could be subject to another trial, if first acquitted, in situations where new evidence later came into light. It was further opined by the Law Commission that exceptions should also extend to other grave offences punishable with life or long terms of imprisonment as Parliament might specify in any statute[14]. Therefore in 2006, in the case of *William Dunlop*[15] where the accused became the first person to be convicted following a prior acquittal 20 years earlier. The case was reinvestigated and the permission to conduct a new trial was granted where Billy Dunlop pleaded guilty to murdering Julie Hogg and was sentenced

[8] (Friedland, 1969)
[9] 1818 106 ER 149
[10] 1964 AC 1254
[11] 1950 1 KB 26
[12] 1998 QB 356
[13] (Macpherson, 1999)
[14] (Lord Justice Auld, 2001)
[15] (The Crown Prosecution Service, 2006)

to life imprisonment. Henceforth, this created a legitimate exception to the double jeopardy rule after the 2003 Act and this position was broadened by more case law concerning the principle of Double Jeopardy and the application of the 2003 Act. In the Julie Hogg case, double jeopardy laws were ushered out and this allowed the Court of Appeal to quash an acquittal and order a retrial when "new and compelling" evidence is produced. Furthermore, the change in the case was and is applied retrospectively, so someone could face a second trial if new evidence, or a witness or a confession comes to light.

However, there are severe limits on retrying an individual for the same offence. This is due to the same reasons that were behind the double jeopardy principle originally, as it would be clearly wrong for the police to be able to prosecute an individual several times not only because this would have a disastrous effect on the individual's life, who may after all be innocent, but will also allow the authorities to be relaxed with their first investigation knowing that they will have another attempt if unsuccessful.

Double Jeopardy in Pakistan

In Pakistani jurisdiction we have the following provisions:

1. Section 403 of the Code of Criminal Procedure, 1898
2. Article 13 of the Constitution of Pakistan, 1973
3. Section 26 of the General Clauses Act, 1897
4. Section 11 of the Code of Civil Procedure, 1908 and
5. Article 54 and 117 of the Qanoon-e-Shahadat Order, 1984

However, we will only discuss the most important provision which protects citizens from being incriminated twice for the same offence. Section 403 of the Code of Criminal Procedure; 1898 embodies the ancient maxim that no one should be twice disturbed for same cause; (*nemo debt bis vexari prone et eadem causa*)[16]. Same principle Autre fois acquit (formerly acquitted) and Autre fois convict (formerly convicted) prevails under common law as a procedural shield. This principle is enunciated under Section 403 of the Code.

[16] *"No one ought to be twice troubled or harassed for one and the same cause."*

Section 403 envisages the principle of double jeopardy.[17] This principle is that a person cannot be compelled to suffer twice for the same wrong. In simple words an accused cannot be punished for the same offence twice if it has been established once. Similarly, he can't be compelled to face criminal trial again if he was acquitted by a court of law in a previous trial. In civil cases when a court of competent jurisdiction adjudicates on any matter; the same parties are barred to file a suit in the same or other court of competent jurisdiction on the same subject matter.

a. Essential requisites to invoke Section 403, CrPC:
   i. The person subject of this section should have undergone a trial before
   ii. If a person against whom proceedings have been taken up by a court of competent jurisdiction have already been tried and either convicted or acquitted in a previous trial; he can get relief under this section. Here the term trial means a complete and fair trial, in which all formalities of law have been followed properly.
   iii. The second trial is intended regarding same offence:
   iv. The same offence means the same act or omission; made punishable under the same or different provision of law. It denotes same transactions.

[17] S. 403, CrPC 1898:
"Persons once convicted or acquitted not to be tried for the same offence. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 36, or for which he might have been convicted under section 237.
(2) A person acquitted or convicted for any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under sections 235, subsection (1).
(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequence had not happened, or were not happened, or were not known to the Court to have happened, at the time when he was convicted.
(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.
(5) Nothing in this section shall affect the provision of section 26 of the General Clauses Act, 1897, or
Section 188 of this Code."

b. Identification of accused:

Section 403 precludes a fresh trial only if the accused in the second case is the same as the accused in the first case.

c. When the previous order is in force:

The bar on a fresh trial under this section will apply only where the previous conviction or acquittal has been by the court of competent jurisdiction.

d. The object of section 403, CrPC:

The purpose of this section is to protect the fundamental right of life and liberty as guaranteed under Article 9 of the Constitution of Pakistan, 1973. The right to life is protected under s.403 CrPC through the fact that no person shall be tried for an offence upon which he has already been convicted or acquitted.

e. Exceptions to Section 403:

i. Distinct offence:

Under Section 403(2), it is provided that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which separate charge might have been made against him in a former trial under Section 235(1).

ii. Consequences of offences causing the act fall within the ambit of a different offence:

A person acquitted or convicted of any offence constituted by any act causing consequences which together with such act constituted a different offence. If the consequences; either didn't happen during the continuous of trial or were unknown to the court. There is also an illustration as provided under the act, as follows:

iii. Second complaint after withdrawal of first one:

A second complaint after withdrawal of first complaint with permission of the court would not be a violation of the protection granted by double jeopardy principles embodied in Section 403. The

principles of double jeopardy enumerated above thus protect citizens' rights under Article 13 of the Constitution of Pakistan, 1973.[18]

Landmark cases on Double Jeopardy in Pakistan:

Nazir Ahmed v Capital City Police Officer, Lahore and another[19]

This case lays down the conditions for the applicability of Article 13 of the Constitution;

1. There must have been a trial of the accused for the offence charged against him.
2. The trial must have been by a court of competent jurisdiction.
3. There must have been a judgment, order or acquittal.
4. The parties in the two trials must be the same.
5. The facts in issue in the earlier trial must be identical with what is sought to be re-agitated in the subsequent trial.

This case presents a clear scope of the extent to which the fundamental rights of citizens can be protected from the principle of double jeopardy. However, due to various procedural delays caused by the judiciary, these restrictions are usually overlooked and s.403 is applied in an arbitrary manner.

Ashfaq Khalid vs The State[20]

It was held in the case that in order to get the benefit of section 403 Cr. P.C or provisions of Article 13 of the Constitution, 1973; it is necessary for an accused person to establish that he has been tried by a Court of competent jurisdiction for an offence and was convicted or acquitted of the offence and the said conviction or acquittal remained in force and the second trial was again for

[18] Article 13 of the Constitution of Pakistan, 1973
Protection against double punishment and self-incrimination.
No person:-
(a) shall be prosecuted or punished for the same offence more than once; or
(b) shall, when accused of an offence, be compelled to be a witness against himself.
[19] 2011 PLC (C.S.) 694
[20] PLD 2005 Quetta 1

the same offence. The protection clearly did not extend to those offences which were completely distinct or those which arose out of facts not at all alleged at the pervious trial.

The instant case thus elaborates upon double jeopardy principles, all the while making sure that the fundamental rights of citizens are protected equally by the State and the individuals alleging infringement of the same.

Abdul Malik and others vs The State and others[21]

An analysis of the afore-cited precedent case law of this Court would show that mostly there were multiple factors which weighed with the Court in not enhancing the sentence and the circumstances where a convict has already undergone his sentence. Article 13 of the Constitution of Islamic Republic of Pakistan is not a bar for enhancement and final determination lies with the Appellate Court established under the law.

Abdul Haq vs Muhammad Amin Alias Manna and others[22]

The court held, in their judgment, that if an accused has served out the substantial/legal sentence for an offence, he cannot be awarded another sentence for the same offence. Additionally it may be added that it would be unfair, unjust and would also be in violation of Article 13 of the Constitution of Pakistan read with section 403 CrPC.

From the afore mentioned case-law and legislation cited, one can essentially argue that while there is a clear cut procedure for the protection of citizens against double jeopardy; there are also several problems in the implementation of such procedures. Magistrates do not understand the demarcation and delicate balance between the protection of the rights of citizens and retributive punishment. Therefore, one of the two is more often than not compromised in achieving an effective and impartial criminal justice system. Moreover, the law in Pakistan has not evolved to the extent where the rights of persons can be protected solely through the implementation of procedure. Hence, citizens need to rely on their substantive rights under Article 13 of the Constitution to ensure that their integrity of person is not violated due to a failure on part of the judicature to fully comply with the procedure set out under s.403 of the CrPC. However, the law

[21] PLD 2006 SC 365

[22] 2004 SCMR 810

in of itself is clear and lays clear outlines for the judiciary to follow. The codified nature of this procedure allows for the laws regarding double jeopardy to be more pragmatic.

A Comparative Analysis with UK Law

Part 10 of the Criminal Justice Act, 2003[23] reforms the law relating to double jeopardy, by permitting retrials in respect of a number of very serious offences, where new and compelling evidence has come to light.

The law has been reformed to permit retrial in cases of serious offences where there has been an acquittal in court, but compelling new evidence has subsequently come to light which indicates that an acquitted person was, in fact guilty. The examples of new evidence include DNA or fingerprint tests, or new witnesses to the offence coming forward. This would only increase the backlog of cases in the system. As a result of this, should the crown prosecution wish to retry somebody for the same offence; they must apply to the Director of Public Prosecutions (DPP) who can only grant permission if they deem it to be in the public interest. This will generally only be done where there is "new and compelling evidence".[24] The reason for this is to uphold the civil liberties of the accused, as per the original position in which an individual could not be retired for the same offence.

The new procedures apply only in respect of serious offences. They are listed in Part 1 of Schedule 5 of the Criminal Justice Act 2003[25].

The provisions enable the prosecuting authorities, with the consent of the DPP, to apply to the Court of Appeal for an order quashing the original acquittal and directing a retrial (a "section 77 order"[26]). The question of communication with the victim, and/or his or her family, or with the wider community will arise at each stage of the case. For example, communication is required

[23] (Criminal Justice Act, 2003)

[24] (The Crown Prosecution Service, 2003)

[25] (Criminal Justice Act, 2003)

[26] "A section 77 order" is:

a) an order by the Court of Appeal under section 77(1)(quashing the acquittal and directing that a retrial shall be held); or

b) in the case of foreign acquittals, under section 77(3)(an order which determines that the foreign acquittal is a bar and orders that it shall be or shall not be a bar); or

c) Section 77(4) (an order declaring that the foreign acquittal is not a bar to a trial).

from the time of the re-investigation through to the conclusion of the retrial. Moreover, if the police are going to take investigative steps, they may consider liaising with the family. If the Crown Prosecution Service (CPS) is not minded to consent to fresh investigative steps; this may require explanation to those affected. Similarly, victims, witnesses and communities may need to be told of a decision to consent, or not to consent, to an application being made to the Court of Appeal for a "section 77 order". It is important that the CPS and the police know how and when to communicate with the victim and the victim's family as appropriate in each case[27]. Such measures must be commended since they ensure greater safeguards to protect an individual's due process rights and their access to justice.

The consent of the DPP also requires a further elaboration to shed some light on the provisions of the act and retrial. Where Part 10 of the CJA requires the consent of the DPP, it must be given personally, i.e. not by a prosecutor on the DPP's behalf. Such personal consent is required in two circumstances:

- To authorize the a re-investigation of an acquitted person under section 85; and
- For a prosecutor to apply to the Court of Appeal to quash the person's acquittal.[28]

The connection to all the provisions and procedures under Part 10 is termed a "qualifying offence". The provisions about retrials only apply to qualifying offences. Qualifying offences are listed in Part 1 of the Schedule 5 of the CJA. An important point to be noted is that a person is charged under the old offence, not the new. The criminal charge has to be placed under the law as it stood at the time of the alleged offence, even if repealed; unless there is any change in the substantive law. This is to prevent any arbitrary or retroactive actions which would infringe Article 7 of the European Convention on Human Rights[29]. The DPP must also consider the public interest in deciding whether or not to make an application to the Court of Appeal to quash an acquittal. An

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[28] (The Crown Prosecution Service, 2003)

[29] Article 7, European Convention on Human Rights

No punishment without law

1. 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 the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

application will usually take place (so long as the other conditions are satisfied) unless there are public interest factors tending against an application which clearly outweigh those factors tending in its favor.

The public interest provision also impacts the role of DPP. The DPP acts on behalf of the public and not just in the interests of a particular individual. However, the DPP should take into account the consequences for the victim in deciding whether or not to make an application to the Court of Appeal, and must also take into account any views expressed by the victim or the victim's family. The protection given by double jeopardy laws in the UK entails that citizens, even if accused, are granted a fair trial and are awarded convictions based on solid reasoning. The principles of double jeopardy in the UK protect both the complainant and the accused. This is because the complainant will be granted or refused relief through a fair and impartial trial with sound reasoning and holistic evidence presented as to the outcome of the case. The accused's right to a fair trial will also be protected under the principle since the trial will be public, and will undergo a process that is transparent and cognizant of the accused's rights as a human being. The merits of such a stringent procedure would be that it takes along with it the protection of human rights. The law of procedure governing double jeopardy ensures that human rights and the maxim of due process is not forgotten in maintaining an effective legal system. However, there are also drawbacks within the system. Allowing repeated trials of the same person for the same offence skews an already imbalanced situation even further in the State's favor. It is for this reason that the maxim, "innocent until proven guilty" has informed the development of many legal systems. We know that the justice system is fallible. Thus repeated trials of the same person for the same offence will increase the probability of a wrongful conviction. In murder cases, this means the guilty party will walk free. Thus, both innocent people will suffer and the perpetrators are free to offend again.

This, if held in contrast to the laws and rules in Pakistan, goes to show us that while UK law has put the rights of parties involved above the judicature and State's own convenience, it has a much more complex system which also causes difficulties.

However, it is now important to weigh the pros and cons of the systems to assess which one protects the rights of citizens in a more effective manner.

Conclusion:

After analyzing double jeopardy laws in the United Kingdom and in Pakistan; it is clear that the approach in Pakistan is more practical. Unlike the UK, Pakistani law does not have any clear exceptions to the rule of double jeopardy. In Pakistan, the approach favors double jeopardy in its entirety. Re-trials are not encouraged and neither are they affordable at this point due to the increasing backlog of cases. This is also mostly because the view of the courts is that the State has far more power to investigate and dig up evidence than an individual. However, this causes an asymmetry when an individual is prosecuted for an alleged crime. The individual will not have the resources to go out and look for the evidence that clears him. Thus, the individual's ability to construct a defence against a charge is quite limited.

Moreover, if the State can prosecute someone repeatedly for the same crime, then this makes the option of politically motivated prosecutions more attractive as a means of harassing an individual whom the State does not like or of whom they are suspicious. Since the State would determine the hurdle to be passed for a repeat prosecution, and also has considerable powers to dig up (or even invent) dirt, the situation becomes heavily loaded in the State's favor.

Another problem with allowing a retrial after an acquittal lies in preserving the presumption of innocence. For example, if the men accused of the murder of Steven Lawrence[30] were to be tried again for that crime, it would be impossible to find a jury that was not aware of the media coverage of the original trial and, therefore, who may be biased against the defendants. This creates an impediment upon their right to a fair trial and thus, one may argue that such loopholes do not exist in the Pakistani criminal justice system.
It is also likely that a retrial will become a *cause celebre*[31], with a great deal of political and public pressure for a conviction regardless of the strength of the evidence.

I believe these reasons give strong support for the retention of the double jeopardy rule on grounds of civil liberties, justice and effective crime combating. The rule was not placed into the legal system without good reason, and certainly should not be abolished without better reason.

Lastly, there is no doubt that Pakistan does need a certain reform in its laws regarding double jeopardy. The law has been scattered into separate provisions and making it more confusing for

[30] [2011] EWCA Crim. 1256

[31]Cause celebre: "*a controversial issue that attracts a great deal of public attention*"

both the courts and public at large. Secondly, there should be an exception to the double jeopardy rule but only if a new prosecution is allowed when the evidence new evidence could not possibly have been presented at the original trial i.e. the technology that revealed the evidence was not available at the original trial. This would ensure that the incentive to present the strongest case at the original trial remains. This incentive is drastically required in Pakistan, and will effectively decrease the risk of more miscarriages of justice.

Double jeopardy is needed to ensure that crimes are investigated effectively and the prosecutions carry out their tasks to the best of their ability and to ensure, as far as it is possible, that no wrongful conviction may be awarded.

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Madrassa Reforms in Pakistan in Light of Human Rights Law

by Hamaad Mustafa[1]

Introduction

There are at least two compelling reasons for undertaking a major revamp of the madrassa system in Pakistan. The first one stems from Article 25A of the Constitution[2] of Pakistan that grants the 'right to education' to all citizens of the country. This article will argue that religious madrassas do not provide an education of a standard sufficient to meet the demands set forth under article 25A. The second reason flows from the perceived role of madrassas in fuelling terrorism in the Country – or at least providing the ideological underpinnings that allow terrorism to flourish. Under the National Action Plan, it was decided that all the madrassas in Pakistan and their curriculum would be reformed and regulated by the state. It will be argued that these reforms must not only ensure that the madrassas do not provide a breeding ground for fundamentalist mindsets, but must also devise madrassa curriculums that provide an acceptable minimum standard of education – both religious and scientific. This article will describe the present situation of madrassas with a historical exposition. It will then discuss some of the reform proposals made in the past, analyzing their various strengths and weaknesses. Finally, it will explore various reforms that may be undertaken at the present time and propose the framework which any scheme of reforms should follow.

Background

Madrassas in Pakistan are divided chiefly along sectarian lines. Ninety percent of madaris in Pakistan belong to either the Deobandi and or the Barelvi sect of Sunni Islam[3]. The ten percent are divided among Salafi, Ahl-e-Hadith, Shia and the non-sectarian madaris. Almost all madaris in the

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[2] 25A, Right to education, Constitution of Pakistan, 1973

The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.

[3] (International Crisis Group, 2002)

country provide completely free or heavily subsidized education, and many also provide free boarding facilities to students.

The first difficulty that is encountered while proposing madrassa reform is reaching an accurate estimate of the number of madrassas operating in the country today. There is a lack of credible primary research determining the number and type of madaris operating across Pakistan. According to research undertaken for the World Bank, most figures for madrassa enrolment have been taken from interviews from different officials and government estimates.[4] The study mentions 'casual empiricism' in reporting enrolment figures and an acute failure to employ statistical tools. These figures are then uncritically circulated in the media and academia, and even used as part of policy reform proposals, without serious effort to determine their legitimacy. For instance, the 9/11 Commission apparently relied on an interview with a Karachi police commander to estimate the number of madrassas in the city[5]. It is difficult to accurately predict the number of children studying in madrassas across Pakistan, with figures ranging from 475,000 to 1.7 million being quoted by different publications[6]. A credible estimate using statistical analysis was made by academics at Pomona College and Harvard University working in collaboration with the World Bank; they estimated the number of madrassas at 50,000. This puts students' enrolment at around 475,000 or around 1% of total enrolment in the country.[7]

In contrast, a report published by The International Crisis Group estimates the number of students enrolled in madrassas to be from 1.5 – 1.7 million[8]. It challenges the validity of the 1998 census which was used by the World Bank study to support it conclusions. It further questions the papers failure to account for the 'Madrassa boom' following the soviet invasion of Afghanistan during the Zia-ul-Haq era. Both studies have taken a serious academic approach but reached vastly diverging conclusions, underlining the difficulty in reliably determining these figures without comprehensive first hand research. For the time being, we are left with the outcome that madrassa enrolment in Pakistan can be anywhere between 475,000 to 1.7 million. This conclusion has serious policy implication. Firstly, it reveals the difficulties involved in even accurately estimating the number of madrassas, suggesting that properly regulating and monitoring them will be even

[4] (Andrabi et al., 2010)

[5] Ibid at page 3.

[6] Ibid at page 6.

[7] Ibid.

[8] (International Crisis Group, 2002)

more difficult. Secondly and perhaps more importantly, it demonstrates how the government has completely failed in all its steps to bring the sprawl of madrassas within state oversight. If any reform proposal is to have a chance of success, it needs to radically depart from the approach adopted by the government in the past.

The Extent of Reform Required

The next question to be considered is; what is the extent of reform that is required in the madrassa system? Or perhaps more importantly, what is the extent of reform being envisaged by the present government? Political and practical consideration may mean that the eventual reform scheme is much less comprehensive than the one being visualised, but at least at the planning stage we need to be clear about what an ideal reform scheme would look like. Do the madrassas only require minor oversight? Should there be stringent regulation that oversees enrolment and curriculum? Should the state itself be setting madrassa curriculum or only overseeing it?

It is submitted that the answer to this question will depend upon what we believe the stimulus for reform is. In so far as madrassa reform is a part of the National Action Plan (NAP), it seems that the main impetus behind this process is the perceived security threat these madrassas create and the need to counter it.

The perception that madrassa education is linked to extremism is not unfounded. When it comes to contribution to radical groups, madrassas are disproportionately represented. In an analysis of the profiles of suicide bombers who have struck in Punjab, the Punjab police found that more than two-thirds had attended madrasas[9]. This is a truly damning indictment, especially when viewed in contrast to the 1 - 5% of total student enrolment these madrassas constitute. The contribution of madrassas to the rise of the Islamic extremism is well documented, with government officials estimating that 10 to 15 per cent of madrasas might have links with sectarian militancy or terrorism (ICG at p 2).

I will argue that although this security threat does provide one compelling reason for the state to act, it is by no means the only or the most important one. A proper understanding of the right to education, as granted under article 25A of our constitution and as understood in the modern world, will lead us to the inescapable conclusion that the madrassa system does not have sufficient checks

[9] (The New York Times, 2009)

and balances to ensure that this right is being provided. On this understanding, the aim of the reform process becomes very different. It is not only to ensure that the madrassas no longer provide a breeding ground for militancy but also to ensure that they provide a reasonable and well-rounded education to the many students who are enrolled in them. There is no cavil with the proposition that the government has a moral and political responsibility to provide such education, but the argument outlined above goes beyond that to argue that there may be a *legal* responsibility on the government, rooted within our constitutional setup. The strength of this argument depends upon our understanding of article 25A of the Constitution and the judicial interpretation of the right to education granted under it.

i. Grounding Madrassa Reform in the Right to Education

The Supreme Court of Pakistan has interpreted Article 25A of the Constitution as the right to an education as meaning the right to a worthwhile or meaningful education. In the matter of *Petitions Regarding Miserable Condition of Schools*[10], the Supreme Court held that many government run schools in Pakistan failed to provide an education of a sufficient degree to conform to the standard laid out by Article 25A. By reaching this conclusion, the Court provided a grounding for an expansive interpretation of the right to education in our jurisprudence. The grounded the right to education in a broad reading of Article 9 of the Constitution[11] (which grants the right to life) and held that "it means something more than mere animal existence" as was held in Shehla Zia v. WAPDA.[12] Chief Justice Iftikhar Chaudhry, writing for a unanimous Supreme Court, held that that both Article 9 and Article 25A are violated when education of a reasonable standard is not provided to the public.[13] Hence, the right to a quality education has been embedded into the constitutional setup of Pakistan by the Higher Judiciary.

The Indian Supreme Court has similarly commented on the exalted status the right to education enjoys within the constitutional setup. In *Avinash Mehrotra v Union of India* the court held that, "*25. Education today remains liberation - a tool for the*

[10] 2014 SCMR 396.

[11] Article9, Security of person, The Constitution of Pakistan, 1973
"No person shall be deprived of life or liberty save in accordance with law."

[12] PLD 1994 SC 693

[13] 2014 SCMR 396.

betterment of our civil institutions, the protection of our civil liberties, and the path to an informed and questioning citizenry."[14]

The Substance of Reform

Having established that the reform proposal needs to have the dual and complementary aims of preventing extremism from taking root in madrassas and ensuring that they provide a reasonable standard of education, this paper will now elaborate on what the substance of these reforms should focus on.

i. Registration

Most past efforts by the government to have a credible registry of madaris have centered on a voluntary registration process, coupled with the occasional threat of punitive action if registration is not done. So far, this strategy – a good recent example of which is the Deeni Madaris Ordinance, 2002 – has yielded little return. In part due to international pressure post 9/11, the Musharraf regime promulgated the Deeni Madaris (Voluntary Registration and Regulation) Ordinance in 2002.[15] Under the Ordinance, no new madrasa would be set up without permission of the relevant district authorities. Existing madrasas, however, were only asked to voluntary register with their respective chapters of the Pakistan Madrassa Education Board (PMEB) within six months of the entry into force of the ordinance. Madrasas that do not comply were to be ineligible for *zakat*, grants or any other government donation. Such threats might have been effective if the majority of madaris were reliant on government grants for survival. However, the reality - as will be discussed in greater detail below – is that private donations, especially from foreign countries, are responsible for keeping these madrassas afloat. These donations ensure that the madaris are not depended on the government for financial aid. As such, the disincentives envisaged in the ordinance proved to be little more than empty posturing.

In the absence of a comprehensive strategy for reform, vacuous calls for registration will prove to be just as ineffective in the future. Only when there is a real incentive to register, coupled with compelling risks involved with non-registration, will the madrassas come into the government

[14] 2010(2)ALT19(SC)

[15] (International Crisis Group, 2002)

fold. The size of the carrots and the stick must be commensurable. In the presence of alternative sources of funding, the government cannot viably offer either.

ii. Foreign Funding

Perhaps the most important reason behind the proliferation of madrassas, particularly those belonging to Deobandi, Salafi and Ahl-e-hadith sects, is the foreign funding these institutions have garnered. These sects are chosen for funding because of their similarity to Wahabism – the brand of Islam sponsored by Saudi Arabia and its neighbouring gulf states. This funding provides an alternative source of income to these madrassas, reducing the incentive they have to agree to official oversight in return for government funding. The ministry of interior in a recent statement stated that foreign countries donate an estimated 313 million rupees (3 million dollars) to madrassas in Pakistan.[16] Other sources estimate this amount to be much greater. According to a US diplomatic cable titled "Extremist Recruitment on the Rise in Southern Punjab" leaked by Wikileaks, "Government and non-governmental sources claimed that financial support estimated at nearly $100 million annually was making its way to Deobandi and Ahl-e-Hadith clerics in the region from "missionary" and "Islamic charitable" organizations in Saudi Arabia and the United Arab Emirates ostensibly with the direct support of those governments."[17] The figure in the cable relates to South Punjab alone, though the cable does not mention which government department gave it this data.

If these figures are to be believed, then there is cause for significant concern. Simply put, the money at offer from these foreign 'friends' surpasses anything the government of Pakistan has allocated for regulating and incentivizing madaris. Under a project launched by the Military regime in 2002, Rs 5.7 billion ($54.4 million) were to be allocated to madrassas that agreed to introduce reforms in religious education by also imparting contemporary education to their students.[18] According to the above estimate, foreign funding for a single year is almost double this amount. This means that in the presence of this downpour of foreign funding, the government of Pakistan is simply unable to compete on a financial level. If the madaris are attracted to the party that is

[16] (The Express Tribune, 2015)

[17] (Wikileaks, n.d.)

[18] (The Express Tribune, 2015)

able to provide them with the best deal, then they simply have no reason to come into the government fold.

It is therefore imperative that foreign funding to unregistered and unregulated madaris is curbed with the utmost of urgency. As a matter of foreign policy, Pakistan should make it clear to donor countries that it these donations – even if given with the best of intentions – cause serious instability and insecurity in Pakistan. Saudi Arabia, Iran, Iraq, Libya, and Kuwait have been identified as some that fund Pakistani madrasas, although none will acknowledge providing direct financial assistance[19]. At a time when Pakistan is reassessing its regional relationships, it should make it clear to its allies that bypassing the Pakistani government while supporting madaris in the region is tantamount to interfering in Pakistan's internal affairs. The foreign office has already categorically denied the claim of the Saudi embassy in Pakistan that it only aids seminaries, mosques or charities after referring the matter to the government of Pakistan through the ministry of foreign affairs.[20] Donations should be received directly by the government of Pakistan and then distributed by it.

Furthermore, private donors in foreign countries must also be required to route their donations to seminaries and madaris through the Pakistani government. These private donors come not only from Muslim majority Arab and Gulf countries, but also many western countries. For example, the Lashkar-e-Tayaba and Jaish-e-Mohammed collect as much as £5 million (U.S. $7.4 million) each year in British mosques in the name of Islam.[21] Although both groups are banned in Britain as well as Pakistan, the expat diaspora -- around one million strong in Britain -- continues to provide these donations.[22] Curbing such donations will prove much more difficult, and can only be done through the cooperation of these countries. It is impractical to expect to detect all such donations, so they can only be sufficiently discouraged by strong punitive measures in place against people who fail to route their donations to religious establishments through the government. **In such a case, we only need to get lucky once. Groups who still accept these donations then give the government credible cause for suspicion.**

[19] (International Crisis Group, 2002)

[20] (Yousaf, 2015)

[21] (Watson, 2002)

[22] Ibid.

This will mean that the madaris will need to follow government policy as opposed to foreign policy in order to access these funds.

Further steps must also be taken. The International Crisis Group recommends that the government must also require all madrassas to declare their assets and to publish annual income, expenditure and audit reports. Under the NAP, the government attempted to implement this to a certain degree, proposing reforms in seminaries by registering them under a new policy where they are required to reveal their assets[23]. Progress on this proposal has faltered following protest and noncooperation from member clerics of The Pakistan Ulema Council (PUC). This policy would be a step in the right direction and needs to be implemented as soon as possible. The Pakistan Ulema Council (PUC) also needs to wake up to the need for reform as opposed to fighting it.

Curriculum

i. State of the curriculum

The madrassa system of Pakistan begins at the primary level – taking in children as young as five years of age – and goes all the way up to the tertiary level, although a very small percentage of students enter the tertiary level. *Darul Ulooms*, the equivalent of universities in the madrassa system, issue certificates equivalent to Bachelor's and Master's degrees. Most madrassa curriculums can be traced back to Dars-e-Nizami, a curriculum developed a group of *ulema* from Lucknow in colonial India in the eighteenth century. While the Dars-e-Nizami was initially a moderate curriculum, deobandi madaris that adopted it refocused it to promote a very orthodox understanding of Islam[24].

Rather than being regulated by the Ministry of Education, most madrassa curriculums are regulated by their affiliated *wafaq*, if they regulated at all. *Wafaqs* can be understood as federations of madaris that are generally organized along sectarian lines. By 1959, Pakistan had four major *wafaqs* operating in the country. These were the *Wafaq al-Madaris al-Arabiya* (Sunni Deobandi); *Tanzim al-Madaris al-Arabiya* (Sunni Barelvi); *Wafaq al-Madaris al-Shia* (*Shia*); and *Wafaq al-Madaris Al- Salafiya* (Ahle-Hadith (*Salafi*). Almost 95 per cent of officially registered Pakistani madrasas are affiliated with these four *wafaqs*. The Jamaat-e-Islami created the *Rabita al-Madaris*, the fifth union of madrasas, in the late 1970s. (ICG)

[23] (The Express Tribune, 2015)

[24] (Nayyar, 1998)

ii. Past efforts to reform

Much like registration attempts, attempts to regulate the curriculum of madaris are not a new development in Pakistan. In fact, the wafaqs mentioned above were created in response to Ayub Khan's plans to reform the madrassa sector to include general secular education that would "to widen the outlook of Darul Uloom students and to increase their mental horizon"[25]. The reforms proposed the same primary education syllabus and teaching schedule for madrasas as in the government sector. Religious content would be added but go beyond the Qur'an, *hadith* (sayings of the Prophet) and other traditional subjects to include issues of national importance, propagation of an Islamic nation or even of an Islamic community (*ummah*).[26] Even Zia-ul-Haq, Pakistani history's patron in chief of the madrassa system, attempted to implement the Halepota Report's recommendation of including modern subjects in madrassa curriculum.

While the Zia government's reforms were keen not to 'undermine the autonomy of the madaris', a more thorough effort to reform the curriculum was envisaged during the government of Benazir Bhutto. PPP interior minister Naseerullah Babar disclosed the government's intention to introduce compulsory audits, new curricula, and registration.[27] Despite some initial promise, this effort too bore little fruit in the end.

Perhaps the most concerted effort in recent times was undertaken during the regime of General Pervaiz Musharraf. In December 1999, the military government's supreme decision-making body, the National Security Council, formed a working group "to suggest ways and means to improve the existing madrasas and to secure fuller coordination among the madrasas and the national education system without affecting the autonomy of madrasas".[28]

The ministry of education seeks 14 billion rupees (U.S. $233 million) for a program to introduce a new curriculum and to "encourage madrasas to register with the government"- Rauf Klasra".[29]

The history of madrassa curriculum reform in Pakistan is a history of political struggle, with governments eventually proving to lack the political will and determination to see reforms through to the last stage, even in the presence of political opposition. Both civilian and military

[25] (Malik, 1996)
[26] ICG at page 7.
[27] (The News, 1995)
[28] (Ministry of Education, 2002)
[29] (The News, 2002,)

governments have simply been unwilling to bear the political costs and short-term ramifications of an unpopular decision, even though the dire need for reform has been clear to most of them. The present government enjoys perhaps the most widespread domestic approval for a serious and concerted reform program. The question is, will it do an incomplete job like the previous ones or actually deliver?

The curriculum *at almost all madaris* is not set or regulated by the ministry of education or any other government department.

Substance of the new curriculum

The reason most governments have attempted to reform madrassa curriculum is because it offers the most direct way to have any real influence over the affairs of madaris. If the madrassa system is seen as a viable alternative to the formal schooling sector, then it must be ensured that the education they provide is sufficient to discharge the requirements of Article 25A of the Constitution. This can only be done through a modern and diverse curriculum, which inculcates the academic outlook and technical understanding that is the aim of any education system.

Furthermore, it must be noted that the one of the reasons why courts and legislatures around the world have stressed on the importance of the right to education is in important role in creating an informed citizenry. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) claims that education is a human right that is essential for the exercise of all other human rights, since it promotes individual freedom and empowerment and yields important development benefits[30]. So the question that must be asked of is whether madrassas are able to discharge this burden.

A central feature of modern education is that it is focused on teaching students 'how to think' as opposed to 'what to think'. One of the main ways in which this is done is by exposing children to a variety of worldviews and explanations, and allowing their curiosity and inclinations to resolve the differences between them. Education, fundamentally, is designed to equip us with the tools to become functioning and engaged citizens of the modern world.

An argument may be made that the education system in Pakistan as a whole is broken, so the state not providing the right to education for other citizens either. While it is true that it is broken, the

[30] (UNESCO, 2016)

argument fails to appreciate the difference between failing madrassas and failing public schools – the lack of any measurable metrics. Failing government schools are identified as failing because they fail to meet the objectively measurable criteria set up by the government i.e. assessing matters such as high dropout rates, high rates of failure, low test scores etc. Madrassas on the other hand do not provide such metrics.

Most past government efforts have relied on creating model madrasas with standard curriculum, and hoping that it can incentivize others to follow these.

The Minhaj ul Qur'an schools 154 are another successful example. They have dropped the emphasis on religious studies and made Dars-e-Nizami optional. Pupils who wish to pursue religious studies and become Islamic scholars can opt for Dars-e-Nizami after ten years of normal regular education.

Are these Grievances Legitimate?

One issue that the religious lobby has raised is that madrassa reform should be headed by the provinces and not the federal government, since after the 18th Amendment education is a provincial subject. This view has been viewed with suspicion by pro-reform voices, with prominent liberal centres calling it "an obvious attempt to avoid regulation all together". However, since the arguments in favor of regulation consistently refer to how the madrassas are the only part of the education system outside state regulation, it would be inconsistent and hypocritical to not abide by the same logic when it comes to determining which body has legislative competence on the issue. There may as well be merit to the claim that the provincial-center tussle is simply used as grounds to evade regulation all together. Be that as it may be, we already allow corporations and private individuals to the exact same argument to evade regulation. The Competition Commission of Pakistan has been challenged in the High Courts precisely on the ground that the federal government did not have legislative competence to enact the Competition Act of 2007.

By allowing such challenges to stand, the justice system makes an important statement. We recognize the legislative spheres carved out for the federation and the provinces, and the constitutional safeguards given to the provincial domain, as not merely technical provisions of law but fundamental pillars of our constitutional setup. They may not be swept aside simply because they make it harder to regulate an area that is in dire need of regulation. At this time, we would do well to remember that the very reason the National Action Plan was formulated was because our

democratic and constitutional values were under threat from extremist forces. It would be a tragic misstep to voluntarily disregard the very same values in our attempts to fight these forces. To employ the lingo frequently used by American diplomats, this would be tantamount to 'letting the terrorists win'.

Convincing four provinces to act on the issue would be undoubtedly be harder than the federal government acting unilaterally. But of course, the very point of federalism is that its provinces should be taken on board before any changes that affect their domain are made. The affect this will have will not be, as some have suggested, to cripple to the entire reform process. It has been suggested that the fact that the federal government acting unilaterally has not been able to make headway on a reform process is compelling evidence that the situations will only get worse when four provinces attempt the same in a disjointed and uncoordinated manner. However, the Constitution offers a way out of this as well. Recognizing that there may be wisdom in allowing federal lawmaking over certain aspects of a provincial subject, Article 144 of the Constitution[31] allows the provinces to delegate their power to Parliament. Article 147 of the Constitution[32] allows for a similar delegation of executive power, which is in any case carved out as a corollary to delegated legislative power. The result of these articles will be that the federal government will still be able to formulate and implement the necessary agenda for reform, being able to utilize and specialized knowledge or expertise it has acquired on the matter. At the same time, it will do so under constitutional cover and with the higher moral mandate that accompanies a decision that enjoys broad-based democratic support.

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[31] Article 144 of the Constitution of Pakistan, 1973

Power of Majlis-e-Shoora (Parliament) to legislate for one or more Provinces by consent.

(1)If one or more Provincial Assemblies pass resolutions to the effect that Majlis-e-Shoora (Parliament) may by law regulate any matter not enumerated the Federal Legislative List in the Fourth Schedule, it shall be lawful for Majlis-e-Shoora (Parliament) to pass an Act for regulating that matter accordingly, but any act so passed may, as respects any Province to which it applies, be amended or repealed by Act of the Assembly of that Province.

[32] Article 147 of the Constitution of Pakistan, 1973

Power of the Provinces to entrust functions to the Federation.

Notwithstanding anything contained in the Constitution, the Government of a Province may, with the consent of the Federal Government, entrust, either conditionally or unconditionally, to the Federal Government, or to its officers, functions in relation to any matter to which the executive authority of the Province extends

Provided that the Provincial Government shall get the functions so entrusted ratified by the Provincial Assembly within sixty days.

Conclusion

There is of course the risk that provincial governments refuse to delegate this power to the federal level. This would put some much needed scrutiny on these governments and force them to take up a firm stance on the issue of madrassa reform. The National Action Plan (NAP), of which madrassa reform is one element, enjoys broad multi-partisan rhetorical support. Requesting the provinces to invoke Article 144 is asking these governments to put their money where their mouth is. If they do not delegate this power to the federal government, they do so at their own peril. They will be under immense pressure to formulate their own reform policy that is at least as effective as the federal one or risk the political backlash that will inevitably come their way.

However, this is a step that must be taken for public policy concerns and to ensure that the right to education of individuals is preserved in the most effective manner possible.

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Pakistan's Obligations under the United Nation's Convention against Torture and the Barriers it faces

by Muhammad Hamza Haider[1]

Introduction

Historically, man has always stood up against any form of savagery committed by his fellow beings and therefore, torture has been universally condemned throughout history. It is considered to be an invasion on human dignity, with consequences that are beyond comprehension. Manfred Nowak describes torture in the following words, "*Torture is quite akin to slavery, which aims at depriving human beings of their humanity*".[2] Today, in almost all states of the world, there is legislation which safeguards provides safeguards to persons against various violations; including torture. The Constitution of the Islamic Republic of Pakistan protects the fundamental rights and freedoms of the citizens of Pakistan. However, the Pakistan Penal Code 1898, the Qanun-e-Shahadat Order 1984 and other legislation, which will be discussed in detail below, fulfil their fair share in granting protection to people against human rights violations. In terms of International law, most treaties adopted by the United Nations contain scores of covenants entailing a respect for the inviolability of man and freedom from torture.

The United Nations holds the issue of torture in such deep disdain that even though under Article 7 of the International Covenant on Civil and Political Rights (ICCPR), they had already proscribed a clear and inalienable safeguard against torture by stating that *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation*"; they still undertook to adopt the Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment (hereinafter referred to as "**UNCAT**") in late 1984[3] followed by the Optional Protocol

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[2] (Nowak & E. McArthur, 2008)

[3] (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984)

referred to popularly as the Istanbul Protocol in 2002[4] with a view to ensure iron-clad protection entailing penal consequences against the perpetrators and compensatory remedies to the victims.

UNCAT prohibits three different forms of ill-treatment: torture, cruelty, inhuman or degrading treatment and cruel and inhuman or degrading punishment[5]. Torture is defined under **Article 1(1)** of UNCAT which inter alia states that:

> *"…the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful"*.

Article 16, distinguishes torture from cruel, inhuman or degrading treatment of punishment and states that:

> *"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".*

After a perusal of the definitions under Articles 1 and 16 reproduced above; certain constitutive elements of the definitional criteria of torture are apparent. Firstly, we must consider the intention and deliberation. Secondly, there is a need for infliction of severe pain (it can be mental and/or physical). It can also be noted that state responsibility or involvement of law enforcement agencies/officials is fundamental in establishing the commission of torture. Lastly, the definitions

[4] (Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2002)

[5] (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984)

include a purposive element, such as punishment, information, confession, intimidation, coercion or any other reason based on political, ethnic or religious discrimination. . Article 1 and 16 fail to clarify the decisive requirement that distinguishes torture from cruel, inhuman and degrading treatment or punishment. Popular academic opinion as well as posturing of various multi-lateral bodies like The European Court and Commission of Human Rights[6] and the United Nations lean in favour of using "*severity of pain or suffering inflicted"* as the distinguishing pennant. In addition, according to the European Commission of Human Rights (an opinion which is endorsed by the UN) inhuman treatment covers at least, "such treatment that deliberately causes suffering, mental or physical, which, in the particular situation, is unjustifiable"."[7]

The UNCAT goes further and delineates the imperativeness of effective legislative, administrative or judicial measures in **Article 2**, reproduced as under:

> *"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". "An order from a superior officer or a public authority may not be invoked as a justification of torture"*.

Article 4 makes it mandatory for each state party to the UNCAT to criminalise torture within its penal code and it states that

> "(1) *Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2)Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature*."

The language in the aforesaid articles has left little doubt in the fact that preventative measures have to be taken by all organs of the signatory state in order to make themselves compliant to the UNCAT. Additionally, UNCAT has been constructed to ensure that there are no exceptions to the

[6] (The Greek Case, 1969)

[7] *Ibid.*

prohibition of torture. UNCAT is one of the few treaties that requires the signatory state parties to make holistic changes to its legislature, criminal codes, etc. In an ideal world, UNCAT's stringent vernacular in itself would have been sufficient cause for signatory state parties to adhere to their commitments. However such is not the case. This article will mainly focus on and discuss legislation against torture in Pakistan- the 149th state to have ratified the UNCAT.

Torture and Pakistan

As a country with a colonial political and constitutional legacy, Pakistan is governed by a hybrid political system comprising of a federal republic with a parliamentary form of government. The inimitability of Pakistan's political system is its unique ability to be able to invent, reinvent and experiment with its provincial and federal systems, with its presidential to parliamentary system and unenviably more often than not, with democratic and dictatorial forms of leadership. Currently, it is governed by the Constitution of Islamic Republic of Pakistan, 1973 and in the parlance of international law Pakistan is a dualist nation-state which needs enabling legislation or domestic laws to give effect to any multi-lateral treaty or international convention.

Pakistan signed the UNCAT on April 17th 2008 and ratified it on June 23rd 2010. Unfortunately till date, no domestic legislation, administrative or judicial measures have been introduced to fulfil Pakistan's legal obligation under UNCAT. Effective measures to eradicate torture are not just our obligation under UNCAT. Such measures are necessary considering the fact that torture and other forms of ill-treatment are widespread and endemic and the perpetrators commit them with impunity. According to the Justice Project Pakistan and the Allard K. Lowenstein International Human Rights Clinic at Yale Law School (Lowenstein Clinic) Report[8]; multiple allegations of abuse have been made in the district of Faisalabad alone from 2006 to 2012. Justice Project Pakistan obtained 1,867 Medico-Legal Certificates (MLCs). Each of these MLCs represent a case where torture was alleged. MLCs are prepared by the District Standing Medical Board (DSMB), which is an independent body setup by the State to conduct medical examinations in response to allegations of torture. The District Standing Medical Board includes four government appointed physicians. These physicians evaluate victims' allegations of police abuse and record any physical marks, psychological trauma, or other signs of mistreatment in MLCs. The District Standing

[8] (Justice Project Pakistan, 2014)

Medical Board found conclusive signs of abuse in 1,424 of the 1,867 cases. In 96 other cases, physicians found signs indicating injury but required further testing to confirm torture. The 1,867 MLCs represent only cases where victims were willing to come forward and allege mistreatment, it is highly likely that the number of cases where torture was committed by the police but due to fear and intimidation of the police the victims decided against reporting it, is far higher than the already extraordinary 1,867 reported cases in 6 years in the District of Faisalabad. Over 1,400 confirmed cases of torture out 1,867 reported cases in 6 years comes to an average of around 240 confirmed cases of torture and this is strictly within District of Faisalabad, it is also pertinent to note that Justice Project Pakistan's report deals entirely with Police custody cases and does not include other security agencies. In a report, by Wajahat Masood[9], written as a result of surveys conducted by Democratic Commission for Human Development (DCHD); prisoners from three separate districts (Faisalabad, Multan and Rahim Yar Khan) in Punjab were questioned about whether were tortured whilst in custody. Out of 937 prisoners, 483 said that they were tortured. That amounts to 57 percent of the total figure. Although the aforementioned reports cannot be said to be holistic and are centred in the province of Punjab; they give a glaring image of the pandemic of institutionalized police torture in Pakistan.

Jurisprudentially, the most important obligation under UNCAT for signatory state parties is their commitment to taking concrete and effective measures to eradicate the scourge of torture from within the state parties territorial jurisdiction, by making sure that all acts of torture have been sufficiently criminalized and proper remedies have been provided[10]. Signatory State parties are also required to apply similar penalties to complicity or participation in the acts of torture or other cruel inhuman and degrading treatment or punishment.

In order to visualise how far the State of Pakistan has come in achieving its obligation under UNCAT, an analysis of all Pakistani legal codes and legislation is highly imperative. The analysis is as follows:

[9] (Masood, 2013)

[10] Art. 4, (Each state party shall ensure that all acts of torture are offences under its criminal law), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

i. The Constitution of Pakistan, 1973

The Constitution envisages several necessary fundamental rights including right to liberty (Article 9), safeguard from unlawful arrest or detention (Article 10), right to fair trial (Article 10A) and the prohibition of slavery (Article 11). The clause in the Constitution which comes closest to discussing the prohibition of torture is Article 14[11].

Article 14(2) is more pertinent but the issue with Article 14(2) is that although it specifically addresses the menace of torture; it has a very narrow ambit i.e. it provides safeguards from torture carried out for extraction of evidence only and therefore denies legal recourse to those victims who are tortured on account of their religious beliefs and ethnicity, or to those tortured for personal agendas or any other arbitrary reason... While there is no doubt about the fact that a sizeable proportion of torture in this country is indeed carried out for the purposes of extracting evidence, the language of Article 14 (2) is very restrictive and those seeking recourse are bound by a very narrow understanding. Furthermore, Article 14 (2) is merely extending a fundamental right; it does not, however, criminalise torture nor does it set out a remedy for the victim as Pakistan is obligated to do so. Despite its critique, Article 14(2) of the Constitution is drafted with the same spirit as UNCAT albeit with imperfections.

The inadequacies of the Constitution in protecting the citizens of Pakistan from torture and cruel, inhuman and degrading treatment or punishment go further than the narrow ambit of Article 14(2). The Constitution on one hand assures citizens of Pakistan with safeguards on fundamental freedoms through the High Court and Supreme Court. However, the exemptions granted under Article 8(3) [12] and Article 199(3)[13] of the Constitution to the rules and laws of the law enforcement agencies, especially the armed forces from being challenged on the grounds of inconsistency with

[11] 14. Inviolability of dignity of man, etc.– (1) the dignity of man and, subject to law, the privacy of home, shall be inviolable. (2) No person shall be subjected to torture for the purpose of extracting evidence."

[12] Article 8 (3) (a) ("The provisions of this Article shall not apply to — any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them;…"), Constitution of the Islamic Republic of Pakistan 1973.

[13] Article. 199 (3), ("An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of Armed Forces of Pakistan, or as a person subject to such law."), Constitution of Islamic Republic of Pakistan.

fundamental rights provided in Chapter I of the Constitution, renders the entire scheme of fundamental freedoms virtually irrelevant, grossly meaningless and at the mercy of personnel of the law enforcement agencies. These exemptions were reaffirmed and given judicial power by the August Supreme Court of Pakistan in ***Mrs. Shahida Zahir Abbasi v. President of Pakistan***[14], whereby the Court observed that, *"…Army Act, 1952 is one of these pieces of legislation which is protected under Article 8 (3) (a) of the Constitution from being challenged on the ground of its inconsistency with the provisions contained in Chapter 1 of Part II of the Constitution.*" This essentially means that the Armed Forces, although functionaries of the state are exempted by the Constitution from being held unaccountable for any activity not consistent with the so called inalienable fundamental rights and freedoms contained in the Constitution. In other similar cases, the courts have maintained a consistent view that their jurisdiction is barred from taking cognizance of any act said to be committed under the Army Act 1952 by either Article 8 (3) (a) or Article 199 (3) of the Constitution of Pakistan. In, ***Farzana Tasneem v. Federation of Pakistan***[15], the Hon'ble Lahore High Court, while dismissing the constitutional petition, concluded; "*…detenus had been arrested in due course of law under Pakistan Army Act, 1952. Matter relating to members of the Armed Forces, was immune from scrutiny of High Court under Art. 199 (3) of the Constitution except where judgment was mala fide, without jurisdiction or coram non judice…"* In the case of ***Asif Mahmood v. Federation of Pakistan***[16], the Hon'ble Lahore High Court observed; "*Accused had been taken into custody by the Army Authorities under S. 2 (1) (d) (i) of the Pakistan Army Act, 1952. The non-production of accused within 24 hours of his arrest before a Magistrate in accordance with the provisions of Art.10 (2) of the Constitution for obtaining his remand was of no consequence. Arrest of accused under an oral order of C.O.A.S. was also permissible under the Pakistan Army Act though not preferable. Accused had been arrested under the Pakistan Army Act in due course of law. Matters relating to the members of the Army force were immune from scrutiny by High Court in view of sub-Article (3) of Art. 199 of the Constitution, except where the judgment is mala fide, without jurisdiction or coram non judice. Accused detenu although had not been an Army personnel, yet he had been arrested under the Army Act and his' case was covered with the bar as contained in Art.199 (3) of the Constitution"*.

[14] PLD 1996, S.C. 632

[15] PLD 2005, LHC 391

[16] PLD 2005, LHC 721

The constitutional petition was consequently held to be not maintainable and the same was dismissed accordingly. In view of above judgments, it is evident that courts are reluctant to intervene in the matters of law enforcement agencies thereby granting them a carte blanche of arbitrary and discretionary powers. In simpler words, the light of the freedoms and rights provided by the Constitution are over shadowed by the exemptions provided to the armed forces. If we look to other jurisdictions for a similar 'carte blanche' clause, the closest we can get is Article 13 of the Constitution of India, 1949[17] read with Article 33[18] and 34[19] of the Constitution of India, 1949, which does imply, inter alia, that if the parliament makes law concerning the armed forces or the 'maintenance of public order or for maintenance or restoration of order, it shall not be considered to be inconsistent with the protections and freedoms provided for in the Constitution of India. The only real difference is that the jurisprudence connected with this depicts that the Indian exemption clause is hardly as strict and one sided as Article 8(3) (a) and its supporting case law. The major element that is similar in these constitutional articles is that they have both opened room for Acts

[17] Article 13, Constitution of India, 1949

Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law,

rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

[18] Article 33, Constitution of India, 1949

Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,— (a) the members of the Armed Forces; or (b) the members of the Forces charged with the maintenance of public order; or (c) persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or (d) person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

[19] Article 34, Constitution of India, 1949

Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

of Parliament that would, under the guise of maintenance of public order or protection against terrorism, be exempt from being declared inconsistent with the their respective Constitutions i.e. Protection of Pakistan Act 2015 in Pakistan and Prevention of Terrorism Act 2002 in India, which shall be discussed later in this paper.

Another ousting provision, which restricts the Pakistani higher courts from taking cognizance of cases of persons subjected to the laws of the Armed forces, is the sub-clause 3 of Article 199 of the Constitution of Pakistan. By contrast, the sub-clause 4 of Article 227 of the Constitution of India 1950, bars the inspection of the Indian higher courts over the military tribunals. In Pakistan's case, the very fundamental rights of every detenu to be treated fairly, not to be compelled to render self- incriminatory statements and the right to appeal against the arbitrary treatments by the officials and judgments of the military courts, are restricted. While in the case of India, only the superintendence of the higher courts is barred. Without few exceptions, where higher courts have taken cognizance of the violations of fundamental rights by the Armed Forces, the arbitrary arrests, tortures and extra-judicial executions are either not taken cognizance of, or are exempted from cognizance by the higher courts. From the preceding deliberation, it is very well established, that neither the executive nor the legislature has right to curtail the fundamental rights of the citizens in any manner and under any circumstances.

A major reason behind the legislator and the judiciaries' hesitation in curtailing the exemptions granted to the armed forces by the Constitution is the political and popular strength of the armed forces, which is evident from the decade long regimes of military dictators.

ii. Pakistan Penal Code (PPC), 1860

The most relevant and pertinent provisions relating to Torture or Cruel, Inhuman and degrading treatment or punishment are Section 337-K and 348 of the Pakistan Penal Code (PPC), 1860. A cursory glance might lead lawyers and academics to assume that they are comprehensive enough to prevent and eradicate the malice of torture. However, a closer look Section 337-K provides for "hurt" not "torture", which might amount to one of the three definitions of prohibited treatment under UNCAT. For deliberation, Section 337-K and Section 348 are reproduced hereunder;

> "*Whosoever causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the*

> *sufferer, or any person interested in the sufferer, to restore or cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security shall, in addition to qisas, arsh or daman as the case may be, provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years as tazir."*[20]

Likewise Section 348 reads;

> "*Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine*"[21]

The preceding provisions although are definitely a step in the right direction but they are far from being exhaustive. In fact, they are incompatible with Pakistan obligations envisaged under UNCAT. As can clearly be seen, causing "hurt" and "wrongful confinement" have been criminalized with substantial punishment of 10 years and 3 years and a fine respectively, but even if we assume for a little while that they are defined in a way which can be interpreted in a way to include the definition of torture as prescribed by Article 1 of UNCAT, it is still evident that both these provisions fail to address cruel, inhuman and degrading treatment or punishment as provided under Article 16 of the UNCAT. To sum it up, although Section 337-K and Section 348 are valid and necessary provisions, they still are not up to the mark when it comes to being compatible with UNCAT. Furthermore, apart from the deficiencies in the definitions, the aforesaid provisions of the Pakistan Penal Code are also incompatible with Article 14 of the UNCAT, which envisages

[20] Section 337-K, Pakistan Penal Code 1860.

[21] Section 348, Pakistan Penal Code, 1860

full and adequate compensation for the victim, which would amount to means for as full a rehabilitation as possible. There is no such provision in any legislation in the Pakistan Penal system. The main reason I have considered these provisions as a 'step in the right direction' is because they leave the ball in the court of the Parliament to make appropriate amendments to these aforementioned sections without changing legislation holistically. Simply put, I do not ask for the recreation of the wheel but merely improvements to it.

iii. Qanoon-e-Shahadat Order (X of 1984)

Qanoon-e-Shahadat Order, after repealing the Evidence Act, 1872 was promulgated on October 28, 1984 by General Zia-ul-Haq. According to Section 1(2), it applies to all judicial and quasi-judicial proceedings in courts, tribunals and military courts. Qanun-e-Shahadat is the central statute governing evidence, deposition procedure, confessions and examination of witnesses and accused. It refreshingly provides some of the safeguards suggested by the UNCAT. For example Article 37 of the Qanun-e-Shahadat safeguards the accused from confessions that appear to be caused through inducement, threat etc. Article 38-39, in spirit at least, protect the accused from being forced into confession by the police by stating essentially that a confession is effective only if it is made in front of a magistrate. Unfortunately, despite the vernacular used in these Articles being pertinently clear, the law in practice is drastically different. There have been vast amounts of reports and data that have shown that police torture usually to extrapolate false confessions from detenus is widespread and institutionalised. In 2007 alone, the independent Human Rights Commission of Pakistan (HRCP) recorded 147 cases of police torture and 65 deaths in custody[22].

This blatant violation of the law is usually blamed on biases and corruption. However, a large amount of it is because of lack of training and skill of the police investigation team. As noted in International Crises Group Report[23], the police and prosecutors hugely rely upon torture-induced confessions by the accused owing to the absence of modern scientific evidence collection methods. Forensic labs have been set up which boast of having state of the art equipment and technicians with training on modern evidence collection methods but these labs are too few (only one in the Province of Punjab). However, promises have been made as to more labs being set up. Thus, presently in a vast majority of the country; no modern methods of collection of evidence are used.

[22] (The Nation, 2008)

[23] (International Crises Group, 2008)

Furthermore, another point of significance is the fact that the First Information Report is controlled almost entirely by the Police, which invalidates all procedural protections available to the accused. Section 59 of the Qanoon-e-Shahadat Order provide for the 'expert evidence', or the evidence by the 'third person' on point of foreign law, science or art or in question as to identity of hand writing, or finger impressions. Ostensibly, the provisions of the aforementioned section seem exhaustive, yet the need for specific legislation as to the admissibility of uncorroborated expert opinions and witness protection must be incorporated in the Qanoon-e-Shahadat Order to sensitize the respect for and observance of human rights in especially those granting emancipation form torture and ill-treatments.

iv. Pakistan Army Act 1952

On 6 January 2015, less than a month after a terrorist attack on an army public school in Peshawar that killed nearly 150 people, most of them being children, the Pakistani Parliament unanimously voted to amend the Constitution of Pakistan, 1973, and the Pakistan Army Act, 1952, to allow military courts to try civilians for offences relating to terrorism. President Mamnoon Hussain signed the amendments into law on 7th January, 2015. The offences newly included apply to all persons who claim to, or are known to, belong to "any terrorist group or organization using the name of religion or a sect" and are carrying out acts of violence and terrorism, including 1) attacking military officers or installations; 2) kidnapping for ransom; 3) possessing, storing or transporting explosives, firearms, suicide jackets or other articles; 4) using or designing vehicles for terrorist attacks; 5) causing death or injury; 6) possessing firearms designed for terrorist acts; 7) acting in any way to "over-awe the state" or the general public; 8) creating terror or insecurity in Pakistan 9) attempting to commit any of the above listed acts within or outside of Pakistan 10) providing or receiving funding for any of the above-listed acts 11) waging war against the state.

In addition, the amendments bring certain offences included in Protection of Pakistan Act, 2014 within the jurisdiction of military courts. These include instances when the offences are alleged to have been committed by those claiming to, or known to, belong to *"any terrorist group or organization using the name of religion or a sect"*. These offences include: 1)crimes against minorities; 2) killing, kidnapping, extortion, attacks or assaults on government officials, members of the judiciary, foreign officials, tourists, media personnel, social workers or "other important personalities"; 3) destruction of or attacks on energy facilities, gas or oil pipelines, aircrafts and

airports, national defence materials and institutions, and educational institutions; 4) illegally crossing national boundaries "in connection with" any of the above-mentioned offences.

The reason for these extra-ordinary legislations can best be portrayed by the preamble of Pakistan Army (Amendment) Act, 2015 which are as follows:

"…extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relative to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by the terrorist groups using the name of religion or a sect and also by the members of armed groups, wings and militias…"

"…there exists grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution by the framers of the Constitution, from the terrorist groups by raising of arms and insurgency using the name of religion or a sect, or from the foreign and locally funded anti-state elements…"

"…it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect, captured or to be captured in combat with the Armed Forces or otherwise are tried by the courts established under the Acts mentioned hereinafter in section 2.."

"…the people of Pakistan have expressed their firm resolve through their chosen representatives in the all parties conferences held in aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan, it is expedient to provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan…"[24]

It must be noted that following the 9/11 terrorist attacks, the U.S. through Congressional legislation established the Department of Homeland Security to counter terrorist attacks committed on American soil. The Homeland Security Department, unlike the Pakistan Army Act, is an institution headed by a Secretary vested with executive powers only whereas the Pakistan Army Act is a piece of legislation which grants vast and unfettered executive and adjudicative powers to the Armed Forces of Pakistan. The UK Parliament, in response to the September 11 attacks, amended the *Terrorism Act 2000* with the *Anti-Terrorism, Crime and Security Act 2001*. In **A and others v**

[24] Preamble, Constitution (Twenty First Amendment) Act 2015.

Secretary of State for the Home Department[25], the House of Lords held the indefinite detention of foreign prisoners in Belmarsh without trial as the violation of right of fair trial. Thus Part 4, section 23 of the *Anti-Terrorism, Crime and Security Act 2001* was declared as incompatible with the European Convention of Human Rights (ECHR) and the United Kingdom's Human Rights Act 1998. This landmark judgment brought about a great deal of transformation in the thinking of legislature, judiciary and executive qua fundamental rights of the citizens in UK. The UK Parliament had to introduce Prevention of Terrorism Act 2005 to replace part 4 of the *Anti-Terrorism, Crime and Security Act 2001*. The new anti-terror legislation envisages the issuance of 'control orders' to apprehend the terrorists and their sabotaging activities. Hence, the very fundamental rights of the citizens of the United Kingdom are well protected in the anti-terror legislation at home.

The new amendment along-with the exemptions provided to the armed forces by the aforementioned Article 8(3)a and Article 199(3) of the Constitution of Pakistan has further given the executive complete control and discretion to use its arbitrary powers whichever way they prefer without any real checks or balances.

v. Police Order (22 of 2002)

The Police Order was promulgated with the proclaimed objectives of making the police more publicly accountable, democratically controlled, professional and more efficient in fulfilling the needs of the citizens. A major tool it intended on using was to establish District Public Safety and Police Complaints Commissions, an independent board that would monitor, report and reprimand police officers but despite it being over 13 years since the promulgation of the Police Order 2002 most of the district public safety and police complaints commissions have not been set up yet. "District safety commissions are still being put in place", said a senior police officer in Lahore. He added: "The pace at which this is happening is miserably slow; in any case, the commissions have no funds and no real powers, and as a consequence, neither the police nor the government listens to them"[26].

Additionally, Article 114 of the Police Order 2002 envisaged a code of conduct for all police stations which would include regulating police practices inter alia the detention, treatment and

[25] [2004] UKHL 56

[26] Ibid, page 8.

questioning of persons by police officers. Article 114(2) set up punishments for anyone who contravened the code of conduct. It is refreshing to note that The Punjab Police Code of Conduct Code F takes notice of police inflicted torture:

"No police officer may inflict, instigate or tolerate any act of torture or other cruel, in-human, or degrading treatment or punishment nor any police officer may invoke superior orders, on the pretext of a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, in-human, or degrading treatment or punishment"[27]

This is the only place in the Pakistani legislature where the vernacular of UNCAT i.e. cruel, inhuman or degrading treatment or punishment has been used. Considering it is in the Code of Conduct, which are constructed entirely by the Punjab Police department is even more encouraging. Despite the encouraging legislation, torture is yet to be defined and in practice, police officers hardly ever get reprimanded for their actions- even in cases where police torture has been proved[28].

Public Emergencies and Torture

The UNCAT provides for the absolute prohibition of torture. This this cannot be made clearer than by the language of the convention itself which states that, "*...No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture…"*[29]. Under domestic law of various signatory states, not just Pakistan, state enforcement agencies have been claiming extraordinary circumstances e.g. war, public order problems or public emergencies as a means to justify violations of fundamental rights and freedoms. Many Constitutions of the world necessarily provide a set of emergency provisions to suspend the fundamental rights and civil liberties of citizens under specific circumstances. There has always been a debate amongst the constitutional lawyers and legal academics as to whether the fundamental rights can be suspended through such emergencies. Theoretically speaking, emergency provisions have been a part of almost all Constitutions of modern nation-states. In the sub-continent, emergency provisions locate their

[27] (The Punjab Police, 2002)

[28] (Justice Project Pakistan, 2014)

[29] Article 2(2), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment New York, 10 December 1984.

origin from the Government of India Act 1935. The 1935 Act was passed by the British Parliament for managing the affairs of the Indian Colony. There were various provisions in the 1935 Act which established the executive's supremacy over other branches of the government. The head of the executive was the Governor General, a nominee of the British government, who had enormous powers over his dominion. They were two provisions in the Government of India Act, 1935 that relate to the proclamation of emergency; Article 45[30] and Article 102[31]. In Pakistan, the 1956 Constitution, provided for similar emergency provisions in articles 191, 192, 193 and 194 entitling the President to declare the state of emergency in whole of Pakistan or any part thereof at any time if he is satisfied that the federation cannot be carried on in accordance with the provisions of the Constitution[32]. Subsequently, the constitution of Pakistan 1962 laid down the emergency provision under Article 30[33]. Presently, the emergency provisions have been provided for in Articles 232-235 of the Constitution of the Islamic Republic of Pakistan 1973. Pakistan, in its 68 year history, has suffered through decades of various military regimes, which have used these aforementioned provisions shamelessly to topple the democratic government and gain power. The arbitrariness of these regimes has been evident in that they have manipulated the higher courts of Pakistan into legitimising them. Initially, the Courts have rationalised these autocratic rules by using Kelsen's oversimplified 'doctrine of necessity'[34]. However, the courts have quickly manifested careful departure from the "state necessity" doctrine and gave judgments in a progressive and clinical manner against the excessive use of executive authority. The Supreme Court of Pakistan, for instance, while giving its judgment in the Asma Jilani Case[35] ruled out its previously held assumptions of Kelsen's Doctrine of Necessity. In another similar case, the Supreme Court maintains[36]:

"The fundamental rights guaranteed by the Constitution are essential human rights which inherently belong to every citizen of a country governed in a civilized mode. Not one of these

[30] Article 45, Government of India Act, 1935

[31] Article 102, Government of India Act, 1935

[32] Constitution of Islamic Republic of Pakistan 1956

[33] Constitution of Islamic Republic of Pakistan, 1962.

[34] PLD 1958 SC 533

[35] PLD 1972 SC 139 (the Supreme Court observing; "Kelsen's Theory was by no means a universally accepted one, nor was it a theory that could claim to have become a basic doctrine of the science of the modern jurisprudence, nor did Kelsen even attempt to formulate any theory which favors totalitarianism…")

[36] PLD 1999 SC 57

safeguards can, the president of Pakistan, the Parliament, the Executive or the Judiciary, disturb under the scheme of the Constitution, except those having a reasonable nexus with the object of the Proclamation of Emergency during its continuance….if arbitrary and unlimited powers for suspending fundamental rights is conceded to the Government, during the period of Emergency, the dangers to human liberty are frightful to contemplate"

The role of the judiciary as the watchdog over the executive's transgressions is of paramount significance which can ensure just and reasonable dignity to the person of man. It is of utmost importance that Pakistan needs to do away with these emergency provisions entirely or at the very least, these provisions need to be constructed in a way that any loopholes that have been manipulated into meaning that the executive has the power to put the Constitution including the fundamental rights and freedom envisaged within in abeyance.

War on Terror and Torture

The UNCAT however as stated above maintains no such possibility, It rather explicitly stipulates the absolutism and precedence of fundamental rights over exceptional circumstances. Unfortunately the incidents of 9/11 and the subsequent international "war on terror" has changed the perception of society radically. Immediately after 9/11 the United States of America passed the Patriot Act 2001. The United Kingdom Parliament first passed the Anti-Terrorism, Crime and Security Act 2001, Prevention of Terrorism act 2005 and the Terrorism Act 2006. India also added its own legislation called Prevention of Terrorism Act. All these legislation although with different specifications have given law enforcement agencies the licence to detain individuals on the basis of what is largely suspicion. These means of detention have opened up a plethora of tools that have been used to legitimise torture and various other violations of fundamental rights.

Pakistan already had the Maintenance of Public Order Ordinance 1960, which gives the Government powers to detain and arrest persons just based on suspicion that the alleged persons might be a threat to the maintenance of public order. This can clearly be seen as an easy way for the Government to put a legal veil on any violations of fundamental freedoms made by its officers in the guise of maintenance of public order. Section 3 of the Punjab Maintenance of Public Order 1960 (other provinces have similar legislation) states that if the Government is satisfied that in order to prevent a person from acting against public safety or for maintenance of public order, it

may arrest and detain a person for a period of up to 6 months at a time[37]. These prolonged periods of detention under the guise of maintenance of public order or public safety again open the door horrendous violations of fundamental rights.

In July 2014, Pakistan further imbedded itself in the sea of 'carte blanche legislations' by passing the Protection of Pakistan Ordinance and enacting Protection of Pakistan Act 2014 (PPA 2014). In my opinion is as a draconian law, which seems to undermine the fundamental rights of the citizens. It is particularly violate of the Articles 9: Right to Life, 10: Freedom from detention and arrest and 10A: Right to fair trial of the Constitution of Pakistan 1973. The PPA gives 'civil and military' armed forces which includes the police the power to use force as long as they can justify it by claiming it to be used to prevent offenses detailed in PPA. Section 3 of Protection of Pakistan Act 2014 can essentially be classified as a license to kill provision as it entrusts law enforcement agencies to fire at an individual on reasonable suspicion that he may participate in the commission of an offense which effect public safety. Section 6 allows for preventative detention of individuals if the government has sufficient grounds to believe that the individual might be 'acting in a manner prejudicial to the integrity, security, defence of Pakistan…'[38] This practically gives law enforcement agencies an almost unchecked and unhindered arbitrary power to mutilate the fundamental rights and freedoms provided for in the Constitution.

Recommendations

Clearly, Pakistan has a lot of barriers and hindrances to overcome, before it even begins to comply with UNCAT but Pakistanis have always been known for their resilience and there is definitely light at the end of the tunnel. I believe the following recommendations if implemented would go a

[37] Section 3, Punjab Maintenance of Public Order Ordinance, 1960

[38] Section 6, Protection of Pakistan Act 2014

Preventive Detention.- (1) The Government may, by an order in writing, authorize the detention of a person or a period specified in the order shall not exceed ninety days if the Government has reasonable grounds to believe that such person is acting in a manner prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services: Provided that detention of such person shall be in accordance with the provisions of Article 10 of the Constitution: Provided further that without prejudice to the above, an enemy alien may be detained by the Government to prevent him from acting as aforesaid For such period as may be determined by it from time to time in accordance with Article 10 of the Constitution.

long way with eradicating the scourge of torture from the territorial jurisdiction of Pakistan. My recommendations are as follows:

1. Incorporation of special anti-torture legislation with a clear definition of torture and cruel, inhuman and degrading treatment or punishment which is compliant with the definitions set out in Article 1 and 16 of the UNCAT. This Act should clearly have jurisdiction over civilian and military law enforcement personnel.
2. Article 8(3) (a) and Article 199(3) of the Constitution of Pakistan 1973 need to be brought in conformity with international standards of human rights as envisaged in international human rights instruments and other democratic constitutions of the civilized countries.
3. Section 337-K and 348 of the Pakistan Penal Code 1860, though partly compatible UNCAT and Pakistan's obligations under it, need to be thoroughly surveyed and exclusive legislation on Torture and other Cruel Treatments be incorporated, giving thereby the victims a mandatory civil redress and compensation for rehabilitation of physical and psychological syndromes they have experienced out of torture and ill treatments.
4. Sufficient legislative arrangements be incorporated in Criminal Procedure, calling for summary trial of the offences committed by the state functionaries in relation to torture and cruel treatments. Also provisions be introduced to accommodate the National Commission for Human Rights (NCHR), Provincial Commissions for Human Rights (PCHR) and Human Rights Courts (HRCs) at district and sub-district levels.
5. Though Qanoon-e-Shahadat Order (QSO) explicates safeguards against self-incrimination and forbids the detaining authority from torturing the detainee and renders the confessional statements, if extracted though coercion, meaningless in the trial proceedings; the FIRs are manipulated and the Magistrates are least interested in exploring the real facts behind the case. The huge reliance on dishonest, ill-trained and corrupt Investigation Officers paves way for wrong incrimination of the hapless detainees, who after being convicted from the trial courts cannot move to higher courts owing to lack of resources and intimidations from the police and the party concerned. Adequate provisions be incorporated in the QSO mandating the reliance on scientific evidence collection and production in the court. Forensic laboratories must be established in the capitals of each province and the federation with sub-branches at district and sub-district levels.

6. Magistrates must be specifically equipped with skills and knowledge to sort out and discourage frivolous, vexatious and vindictive proceedings and decide the cases prudently and judiciously. Since de-politicization of the police is neither conceivable nor a practical pursuit in at least foreseeable future, however, computerized FIRs and access to citizens to the electronic data will ensure a degree of transparency. The viable alternative to police highhandedness and politicization is the juxtaposed empowerment and awareness of the masses of their rights and obligations towards the police department.
7. The establishment of National and Provincial Commissions for Human Rights will discourage the law enforcers from going arbitrary and brutal. Though higher courts, through suo motu actions have encouraged the citizens to come forward and seek justice, yet many languish in the lethargic and delayed procedures as the courts, besides being overburdened with backlog of cases, often confront ever brewing political cases which tend to dominate rights proceedings, the establishment of rights courts at district and sub-district levels will significantly reduce the burden over higher courts and put exaggerated pressure on the law enforcement personnel. Additionally, a congruent legislation on modern patterns of policing with some component of oversight by private persons from media and judiciary help will replace the politicization of police syndrome.
8. The State must ensure the incorporation of the courses and workshops in the trainings of the law enforcement personnel, civil or military, medical personnel, public officials and other persons involved in the custody, interrogation or treatment of the individuals likely to fall victims of the abuse of power.
9. The Government of Pakistan must also sign and ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment to ensure maximum protections to the citizens of Pakistan against the torture and ill-treatments.
10. The Government of Pakistan through public service messages on electronic, print and social media, should impart necessary awareness to the masses of their rights and obligations and encourage reporting to National Human Rights Commission, should they experience any arbitrary and tyrannical behaviour of the Law enforcement personnel.
11. The Government of Pakistan must also ensure the incorporation of human rights literature especially to which Pakistan is a state party, in the syllabi of all public and private sector

institutions at secondary or higher secondary school level as means of social enlightenment and awareness.

12. There is a serious need to review and reform our current laws of criminal procedures. While new laws and rules should be drafted, the existing legislations need to be implemented in letter and spirit to ensure their effective utilisation.
13. A dedicated campaign needs to be launched in order to raise awareness regarding rights in general and torture in particular.
14. The forensic procedures and laws need to be fine-tuned and an implementation policy needs to be formed for their effective utilisation. The forensic department should be made an autonomous body, independent of the government. Detailed examination, such as gun powder analysis and finger printing, should be made an integral part of the investigation procedure.
15. Medico-legal officers need to be incentivised through recognition as a highly skilled group of people, provision of monetary benefits and reduction of political pressure.
16. All interrogations should be conducted in the presence of a lawyer or a third party. Grounds of arrest should be clearly defined; rules governing the act of arrest should be clearly spelled out. Arrest should not be made without a prior arrest warrant. Moreover, arrest warrant should be based on clear facts and evidence. The provision of a 14 day physical remand should be removed. Courts should not rely upon oral evidence, especially that of the police. The police testimonies should, at best, be advisory only.

Conclusion

Even though I disagree with the 21st Amendment of the Constitution and the subsequent amendment to the Pakistan Army Act, 1952 along with the passing of the Protection of Pakistan Act 2014, which are all steps which contradict the UNCAT and Pakistan's obligations towards the Convention; I also believe that, considering the Supreme Court in its very recent decision has declared the 21st amendment to the constitution to be lawful[39], the steps taken seem to be permanent. Despite these draconian bits of legislation, I still believe that Pakistan has been moving in the right direction when it comes to conforming to its obligations under UNCAT. This is evident

[39] (Malik, 2015)

from the Punjab Police Code of Conduct, by Article 13(2) of the Constitution of Pakistan 1973, Section 337-K and 348 of the Pakistan Penal Code, etc. As illustrated above, Pakistan has a long way to go in fulfilling its obligations to the UNCAT but what this article had hoped for was to show that Pakistan, due to its unprecedented history and its undesirable role in fighting the "war on terror" has legitimate reasons for not meeting the UNCAT requirements. It will be nearly impossible for institutions of the state of Pakistan to work effectively towards a torture free Pakistan until or unless the state apparatus finds a way to grasp or control the prevailing danger and risk to public safety caused by terrorism.

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Delayed Justice and its Impact on Human Rights in Pakistan

by Owais Maqbool Bari[1]

Introduction:

The challenge of delayed justice is not a new one but has remained a subject of discussion and deliberation for eminent Jurists, Scholars and various Law Commissions/Committees constituted by the Government in order to evolve ways and means to meet the challenge of delayed justice. Delayed justice is an impediment upon an individual's right to due process and may adversely and arbitrarily affect the rights of citizens.

In our country, one serious drawback of the administration of justice is delay. Delays invariably occur in the disposal of civil and criminal cases. It is normal for an ordinary civil suit to linger on for as long as two decades, and on the completion of the trial, perhaps another half a decade passes by in the execution of the decree. In criminal cases also, the situation is quite dismal. Unusual delays occur in the disposal of cases by the courts. An example of unusual delays is manifested by the fact that, according to a rough figure, currently more than two-thirds of the jail inmates comprise of under-trial prisoners. Such phenomenon erodes the trust of the people and their confidence in the administration of justice. Delays in the settlement of civil disputes, besides causing frustration to the litigant public, also hamper the socio-economic development of the society. It serves as a disincentive to foreign investment in our economy and affects our trade relations with foreign governments/multi-national companies.

What Constitutes Procedural Delays?

An ineffective judicial system is an elemental fetter on a state's ability to protect fundamental and qualified rights. The effect of this fetter has been ignored by the State while considering reformation of the system. Those who claim to be the enlightened quarter of this nation have conveniently ignored any discussion of the cause of this problem in their narratives.

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Reforms Undertaken

Reforms have been proposed time and again by the executive and the legislature but they have been marginally effective. These reforms have been pre-dominantly focusing on the perceived causes of an ineffective judicial system rather than analyzing the actual causes. In this article, the focus would be to analyze the actual causes that demand the executive's attention and should be the subject of reform.

Since 1956, successive governments have come up with a large number of Commissions and Committees on judicial reforms[2] but substantive issues concerning day-to-day dispensation of justice, such as those concerning court facilities, buildings, salaries of the judges, changes in process serving, production of witnesses, improvements in investigation and prosecution of criminal cases, implementation of rules and codes to cut down on delay and prolonged inaction and prison reforms[3] have not been implemented despite their repeated articulation in reports. Even where some reforms have been implemented they have been marginally effective.

What Factors Can be attributed to Procedural Delays?

The causes of backlog and delays are diverse and profound, arising due to factors both inside and outside courts, and legal/procedural gaps/lacunae. Justice delayed is, undoubtedly, justice denied. Consequently, it has always been the primary concern of civilized societies to address the issue of delayed justice with a view to find ways and means of removing defect/deficiencies in the administration of justice. It would be wrong to assume that the problem of backlog/delays has been totally neglected in the past. However, it hasn't been adequately addressed as well.

The chief causes which have been the subject matter of reform as well are as follows:

a) Lack of financial incentives for the lower judiciary and facilities to administer justice[4]
b) Judicial impartiality[5]

[2] Commission on Marriage and Family Laws, 1956;
[3] Law Reform Commission, 1958;

[4] Law Reform Commission, 1967
[5] High Powered Law Reform Committee, 1974

c) Reforms in procedural law to curtail delay[6]

However, some major practical reasons for delayed justice which have been ignored categorically in any discussion of reform are as follows:

I. Weaknesses in the policing system. (reporting, investigation and prevention of crimes)
II. Unionization and politicization of Bar councils
III. Judicial incompetence and negligence
IV. Lack of sanctions and enforcement of procedural law.
V. Lack of checks and balances by the superior courts on lower courts.

In the following paragraphs, the focus would be to analyze the stated causes for delayed justice to differentiate between the actual and perceived causes of delayed justice.

i. Financial Constraints

The issue of lack of financial incentives for the judiciary has largely been resolved. Since 2008 there has been a threefold increase in the salaries of the lower judiciary.[7] Importantly, salary was never an issue for the Superior judiciary. However, court facilities given to the lower judiciary in the metropolitans and the lesser developed districts need to be revamped.[8] It is the responsibility of the executive to ensure that power cuts and the adverse weather should never be allowed to become a reason for delay in the dispensation of justice. The amount of delay currently experienced by litigants in our judicial system cannot be attributed to lack of court facilities or salaries of the judiciary. Even before 2008 despite nominal salaries and inadequate facilities the lower courts had been deciding cases and dispensing justice albeit with delay. In 2015, the salary increase has not affected the delay in any manner. More than three million cases of various natures are pending for adjudication before the entire judiciary of the country. According to statistics[9], 19,362 cases of various natures including criminal, civil and constitutional petitions are pending before the Supreme Court. There is a backlog of 1,903 cases before the Federal Shariat Court (FSC). The backlog of cases before the Lahore High Court is 124,587. As

[6] Law Committee for Recommending Measures for Speedy Disposal of Civil Litigation, 1978

[7] Secretaries' Committee set up by the President to Examine the Recommendations of the Law Committee set up for Recommending Measures for Speedy Disposal of Civil Litigation, 1979

[8] Committee to Formulate Concrete Proposals for Simplifying the Present Legal Procedure

[9] (National Judicial (Policy Making) Committee, 2009)

many as 36,612 cases are pending before the Sindh High Court, whereas 9,776 cases are pending before the Peshawar High Court. As many as 5,619 cases are pending before the Baluchistan High Court. In the district judiciary of Punjab, there is a backlog of 895,213 cases. In the district judiciary of Sindh, there is a backlog of 103,899 cases[10]. In the district judiciary of Khyber Pakhtunkhwa, there are 97,721 cases pending for adjudication, whereas in the district judiciary of Baluchistan, the backlog of cases is 7,461[11]. The question is that if a superior court judge takes a 5 lack per month take home salary then clearly the delay in disposal of cases and backlogs in the Superior Court cannot be attributed to lack of financial incentives for the judiciary. The statistics refute the argument in its entirety.

ii. A Biased Judiciary

Another issue that has been deemed to be a pertinent reason behind delayed justice is the lack of judicial impartiality. It is perceived in society that since judges can easily be bribed and approached by any of the litigating parties; the judicial system is arbitrary. The litigating parties can alter the pace of the proceedings whether civil or criminal if they control the presiding officer. This is indeed is a cause of concern but the lack of judicial impartiality can affect the merits of a decision thus making it just or unjust. However, judicial bias cannot be attributed to indecisions in the judicial process whereby cases are left undecided for decades. In a few instances, the indecision might be due to a bias or partiality. However, this does not hold true for the majority of undecided cases. Lack of impartiality is more or less the same as ineffectiveness; but as far as delayed justice is concerned there other causes which need to be focused upon by any constructive discussion on reform.

iii. Complexity of the Procedure Itself

Apart from addressing the aforesaid issues, the reformers and policy makers have focused on bringing a change within the procedural law to expedite the disposal of cases. The complexity of procedural law i.e. the Civil Procedure Code (C.P.C) has been presumed to be one of the reasons for delay and ineffective civil trials. It is a concern of litigants and lawyers alike that the procedural law can be used to delay the proceedings unnecessarily. The C.P.C is cumbersome and complex; there is an inherent possibility of abuse within the current structure of C.P.C. However, what

[10] (National Judicial (Policy Making) Committee, 2009)

[11] (National Judicial (Policy Making) Committee, 2009)

people forget is that procedural law like any other law is subject to its application by the presiding judge. It is the judge who has to ensure that the law is not used maliciously to thwart the ends of justice by the litigants. Despite its complexity, the C.P.C has ample provisions[12] that provide powers to the judge to expeditiously dispose of cases on merits and otherwise. If complexity of procedural law was a reason for delay and ineffectiveness of the judicial system then, by comparison, criminal trials should proceed without any delays. However, this is not the case in criminal trials either. The question thus remains; if procedural law has provisions to expedite trials and curtail delays in the proceedings then does the real problem lie in the implementation and enforcement of these provisions? It is this premise that has been neglected in the reforms.

iv. Arbitrary Decisions

There are many reasons for non-implementation of these provisions. The chief among those reasons is the lack of discretion that trial judges have in the civil and criminal justice system. The powers of the lower judiciary have been hijacked and a parallel customary procedure is in place.

v. Stakeholders

There are broadly four stakeholders of the judicial system i.e. the judiciary, litigants, lawyers and the state. The relationship between these stakeholders, if balanced, will ensure that the judicial system remains effective. A stakeholder analysis is necessary to expose the root cause of non-implementation of the procedural law. Unfortunately, in our country the proper upkeep and administration of the justice system has never been the priority of democratic or dictatorial governments. Reforms if any have been reactionary in nature and lacked foresight. It is the duty of the state to provide facilities and incentives to the lower judiciary so that it may function effectively. Such incentives include court facilities, staff, proper salaries, job security and protection from duress and pressurization from all external elements.

The second major stakeholder is the lawyer community. The lawyers are officers of the court and have the primary duty of assisting the Court on evidence and law as and when required by it. It is ironical that lawyers were the fulcrum in the *Save the Judiciary Movement*[13]. The movement was predicated on the promise to protect the independence of judiciary. However, the movement has

[12] Order 17 Rule 2& 3, Order 9 Rule 2,3,5 &6, Order 15 Rule 1,2,3& 4 of the Code of Civil Procedure 1908

[13] (Dawn News, 2007)

left the officers of the court politicized and unionized to a point where the legal fraternity considers themselves above the law. The independence of the judiciary has been compromised by those who vowed to protect it. The State as a stake holder has allowed the lawyers to enjoy a power whose existence is detrimental to the system. Lawyers as a body can coerce the lower judiciary into delaying the proceedings, getting favorable decisions etc. Today, an inferior court judge is afraid that he might be beaten up or harassed and eventually transferred if he tries to expedite the process or enforce the procedure law in letter and spirit.

An example might illustrate the matter. A lawyer's father was accused for committing fraud and a 14th F.I.R was registered against him in this regard. The Learned Additional Sessions judge as per law denied him bail. The lawyers appearing in the bail petition beat the judge[14] and closed down the court for 4 days. Eventually the judge was transferred. Neither the state, the High Court or the Bar Council intervened to punish the aggressor. This is the true reflection of the lack of power of the lower court judiciary and the incentives they have to enforce due process.

On the civil side, a suit can be filed without jurisdiction since the same would be marked to a civil judge without scrutiny as per practice. The law requires the Senior Civil Judge to look into the questions of jurisdiction, maintainability at the very inception of a suit and if it is not maintainable, then the judge may dismiss it. The reason why the Senior Civil judge would not dismiss suits at the very outset is clear. The judge would not want to incur the wrath of an influential member of the Bar or it might be the negligence of the Judge. There is a lack of scrutiny and both harassment and incompetence are reasons because of which frivolous litigation is not curtailed at the very outset.

There is also a trend to file two suits on the same cause of action to seek stay and if the one of the two courts are willing to give the stay, the other suit is withdrawn. The three examples highlight an alarming trend and a devastating weakness in the judicial system. The third stakeholders are the litigants which in today's system can conduct vexatious litigation without any fear of punishment. Due to lack of scrutiny, suits bad in law or barred by law will still be tried in courts already burdened with a backlog of old cases. The existing cases are still pending because the lower

[14] (Jang, 2010)

judiciary is afraid to pass an adverse order against a litigant or a lawyer who is delaying proceedings unnecessarily. This in effect means that the C.P.C and Cr.P.C have become ineffective. The validity of law must be internalized by the people; people accept law as valid only if it is effective. Now, over a period of time procedural law has lost its validity in the minds of the litigants and lawyers alike. It is now a norm that unethical legal practices or abuse of the process will remain unpunished.

In the words of John Austin "*law is the command of the sovereign backed by a threat of a sanction, a command, wish and desire without sanction is no law*"[15].

Judges and Procedural Delays

The sanctions provided by procedural law need to be enforced if this norm is to be broken and this can only be done through widespread reform involving the lawyer's community which has not been previously considered by any judicial or executive committee overseeing reforms. Increasing the number of judges has always been considered a premier solution to the problem of ineffectiveness of judiciary. Hon'ble Justice (r) Javed Iqbal succinctly summed the argument against doing so[16].

"*Another factor contributing to delayed justice is that sufficient numbers of Judges are not available at various levels to cope with the countless number of cases before the Courts. This needs to be seriously tackled. For years the issue has been treated as merely a talking point with no serious steps taken to address the problem. However, it must not be forgotten that while this may be partly correct to my mind neither is the situation ripe for it, nor can we find the suitable Judges to yield the coveted results. You do not appoint just a Judge but establish a*
Court and it is neither an inexpensive exercise nor so simple to do. A Court to work efficiently needs efficient and experienced staff and also combines a number of other factors, failing which it will prove counterproductive. Unfortunately, the idea of addition of more Judges to the present strength has been emphasized so much and so often by so many eminent people that now, it is being considered as the only cure of the malady irrespective of the difficult factors involved. The rule to be followed in such a situation, in my humble view, should be that before adding to it, it

[15] (Austin, 1863)
[16] (Iqbal J, 2013)

must be seen if the present capacity is being fully utilized and if not, can its productivity be increased? If inefficiency is added to inefficiency, it will not bring efficiency: it will instead simply multiply it. It may not be out of place to mention here that the backlog is not much affected but corruption has increased proportionately, or much more, and the quality and efficiency have decreased likewise."

In light of the argument made in the preceding paragraph, it is clear that the objective of any future reform in addressing delays in the judicial process should focus on the aspect of de politicization and de-unionization of lawyers. The bar councils need to have a stringent licensing requirement which involves competitive exams for the right of appearance before the lower courts. This would help control the quality of legal representation available to the general people and sift those who intend to rely on harassment and political pressurization as a method of legal practice. This will also increase the effectiveness of the judiciary in protecting the fundamental rights of citizens. Moreover, licenses should be cancelled in case of any misdemeanor in any court. The legal fraternity has a duty to assist the judiciary rather than being an impediment in its proper functioning. In order to bring the legal practitioners within the limits of ethical legal practice, it is very necessary that sanctions be applied on all those who abuse the process or unduly influence/coerce the court and its impartiality. It is the imperative duty of the State to protect the impartiality of the judiciary. Now is the time for state to step up and fulfill its duty that for long it has conveniently ignored. The situation can thus be summed up as follows. There is a competent judge who intends to apply the law and expedite the process in a trial. Litigating parties fail to present to evidence or delay the trial on one pretext or other e.g. seeking unnecessary adjournments. In order to curb the delay in such a scenario, the judge will have to pass adverse orders severing possibly the right to present evidence or cross-examine a witness in order to punish the party causing delay. In majority of instances, the pressure from the local bar would result in the judge inhibiting and restricting himself from passing an adverse order in order to protect himself from subsequent pressure and harassment of the lawyers.

On the other hand, there is an incompetent judge who knows that he will not be held accountable despite his indecision and ineffectiveness. Such a judge who allows the litigants and lawyers to thwart the ends of justice by entertaining frivolous suits and applications within suits/trials must also be rooted out of the system if delayed justice is to be curbed at all. Therefore, it is imperative that the Superior Judiciary starts stepping up in protecting the lower courts from harassment and

pressurization. Moreover, the Superior Courts also need to actively review the performances of lower courts to ensure ineffective and incompetent judges are dismissed from service. Possible dismissal from service can be a far effective incentive and a sanction that can act as deterrent for incompetent or lazy judges. The reforms to curtail judicial incompetence cannot be solely based in sanctions applied by the superior courts but it lies in the proper hiring and training of these judges as well. The backlog of cases can be attributed to the ease with which litigating parties can delay proceedings and erroneous decisions passed by the trial courts that lead to appeals, revisions, etc. which is evidence of judicial incompetence. This incompetence is rooted at times in a basic lack of analytical skills and understanding of the law.

According to statistics mentioned earlier, a lot of cases in the existing backlog are pending for want of an order or a judgment to be passed on an interim or final stage. It is a trend that arguments are heard 15 to 16 times by a judge and he still isn't able to pass a judgment on the issue before him. The judges should be trained to be pro-active and they should be the ones who should seek precise and targeted assistance from a lawyer and decide the case expeditiously. The judges should decide/dispose of interim applications and matters expeditiously. The Supreme Court of Pakistan has time and again reiterated that

"*It is the final duty of the presiding officers to regulate proceedings in the court they are not to sit as silent spectators watching about being played before them*".[17]

In order to curtail delayed justice, it is imperative that the judges be independent and competent to decide the cases effectively and curb any delay. On these two fronts "Independence and competence"; no real reform has been proposed. When the judicial system becomes ineffective societies create their own structures to exact flawed justice. A "*jirgah*" or "*panchayat*" are examples of parallel systems where fate of people's rights and liberties is decided. A girl is ordered to be stoned to death by a panchayat who find her guilty of indecency. If fundamental rights are left at the whim and mercy of arbitrary powers, then the Constitution remains no longer valid since it ceases to be effective safeguard of rights.

[17] PLD 2011 SC 350, Headnote E

A Fault in the System

The judiciary alone is not responsible for delay in deciding cases the Police is at fault for contributing to the inception of frivolous litigation and consequent delays in the system.

It is common knowledge that the police are understaffed, uneducated and not adequately trained or compensated for that matter. The primary aim of any policing system is the prevention of crime and the secondary focus is to timely investigate a crime and submit their report to the trial court for dispensation of justice. Our police has failed to achieve both. The Criminal Justice System and to an extent, the Civil Justice System both rely on the effectiveness of the Police to execute orders and maintain the deterrence of law.

"Law is the primary norm that stipulates a sanction as a direction to officials to apply the law on citizens when they commit a delict…"[18]

The effectiveness of law therefore depends on the internalization of law by the officials. Unfortunately in our case the police have no or little understanding of law pertaining to evidence, recovery etc. The departments are understaffed and underpaid consequently this being the foremost reason for the bribery culture's existence in the ranks of Police. The people do not trust the police to be a safeguard of rights at the first instance.

The police are notoriously negligent in completing investigations and submitting their investigation reports before the courts. At times, the suspect is not apprehended for months and years, till the time the proceedings remain pending. If the suspect is timely apprehended, a substantial amount of delay in trial is attributable to the delays caused by the Investigation Officer in completing his investigation or submitting the same before the trial court. However, delay in completion of investigation contributes partly to the systematic problem of delay.

The major issue is the registration of false and frivolous cases which take up the trial court's time and resources unnecessarily and there have been no efforts to curtail this trend. On the contrary, in recent times, the Police's unreasonable reluctance in registering F.I.R's has increased the number of petitions presented to the justices of peace under section 22-A/22-B of the Criminal Procedure Code, 1898 for the registration of criminal cases. These petitions are administrative in

[18] (Kelsen, 1992)

nature but still add up to the cause list of a trial judge which is already numbering into hundreds. The Police needs to be reformed and revamped with the objective of recruiting and training educated officers. These officers must be trained to investigate crimes properly within the parameters of law. However, the police have only a part to play at the pre-trial stage after this stage has been completed. The speed and quality of due process is the responsibility of the judiciary.

Indeed, it goes without saying that reforming the police department is the job of the executive. In the near future, the current executive does not plan to do so but it is a necessary condition for an effective justice system. The people need to trust the primary enforcers of law and in order to regain their trust. Fundamental reforms in the way the law enforcement system operates must be made.

Conclusion

Throughout the course of this essay various causes and reasons for delayed justice have been analyzed with respect to specific focus on lower courts and their functioning. However, the element of lack of judicial will in the superior courts to expedite the judicial process is what requires our attention. The statistics show that thousands of cases are pending before the Hon'ble Supreme Court and the High Courts of Pakistan. The reason for this backlog cannot be attributed to lack of facilities and economic incentives. It can also not be pinned on the negligence of the lower courts. The drive and ambition to administer justice is what lacks within those who have a secure tenure at the bench. Practically, these judges are unaccountable to anyone except themselves. The torch bearers of justice cannot fall asleep. The National Judicial Policy has a paid lip service to the problem of delayed justice but the sum practical effect of the policy is negligible. It is so because there is a lack of will to overcome this problem. That lack of will is either attributable to political differences within the higher judiciary or the current judicial work ethic. In any way perceived, it is not acceptable and it has to change. The Superior Courts need to take responsibility of the judiciary as a unit and expedite the judicial process by giving timely decisions. They need to set a bench mark for lower courts to follow. The factors enunciated as actual causes of delayed justice need to be addressed by bringing meaningful reforms in the current judicial system. The reform process should be focused on all tiers of the judiciary since delayed justice is a problem faced at all hierarchical levels in the judiciary. Our justice system lies at the heart of this democracy. It serves as the primary protector of the rights and liberties guaranteed by the Constitution. It sustains

the rule of law. It is in the courts where our people feel the keen cutting edge of the rule of law. In order to fulfill this role, the subordinate courts must maintain the trust and confidence of the public. They must be better understood and made more accountable and responsible to the concerns of the people. History teaches us that the future is always uncertain; discontinuities cannot be foreseen. We must therefore inculcate and internalize a court culture that endures and administers justice. We must change our approach towards administration of justice; we must plan for bringing a meaningful change. We must execute change skillfully. We must drive the change process; we cannot wait for change to knock at our doors.

Combatting the Impact of Corruption on Human Rights in Pakistan

by Usama Malik[1]

Introduction

Corruption is most rightly called "the mother of all evils".[2] It is a global phenomenon that prevails in almost all the countries throughout the world. However, the poorest and most under developed nations are most affected by this social evil. Corruption in normal parlance is defined as, "dishonest or fraudulent conduct by those in power, typically involving bribery."[3] According to Transparency International, corruption is said to be "the abuse of entrusted power for private gain".[4]

Corruption in Pakistan has become a viral disease that has permeated all quarters of the society. It has not only undermined the writ of the Government and the legitimacy of its institutions but has also gravely impacted every aspect of social, economic and political activity. Looking at the past 67 years of Pakistan's turbulent political and economic history, this social and moral vile has impeded the country's progress massively. It has not only depleted the national exchequer but can also be seen as a major cause of moral decay in the society. Over the past six decades since the inception of Pakistan, various policies and strategies have been implemented to uproot the menace of corruption. However, none of the initiatives have yielded the desired outcome. Corruption in the country exhibits itself in various forms. This includes pervasive financial and political corruption, nepotism and abuse of authority.[5]

This essay shall in part one, dwell on the causes of rampant corruption in Pakistan; both social and political ones. It shall then provide an overview of various laws and policies enacted in Pakistan to eliminate corruption in part two of the paper. The current legal framework that has been put in place to counter corruption shall also be examined. The effectiveness and flaws of these structures

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[2] (Khalid, 2009)

[3] (Oxford Dictionaries, 2015)

[4] (Transparency E.V., 2015)

[5] (Javaid, 2010)

shall also be discussed in part three and whether these schemes are sufficient to eradicate corrupt practices in the country. Part four my essay will elaborate on the impact corruption has on the implementation of human rights in Pakistan. Finally part five of my discourse shall elaborate on what needs to be done to coherently grapple with this malady of corruption in Pakistan.

Causes of Corruption

Corruption in Pakistan is deeply rooted in the social fabric of the society. There is hardly any area or aspect of the society, which is not contaminated by this disease. In the year 2014, Pakistan has been ranked at 126 out of 175 countries in the corruption perception index (CPI) issued by the Transparency international.[6] The former chief of Pakistan's top anti-corruption agency (hereafter ACA) i.e. National Accountability Bureau (hereafter NAB), Mr. Fasih Bokhari said that the country is suffering from a heavy economic loss of 10-12 billion rupees on a daily basis due to corruption. [7]

The founder of Pakistan in Muhammad Ali Jinnah said in his address on 11th August, 1947 that:

"*One of the biggest curses from which India is suffering - I do not say that other countries are free from it, but I think, our condition is much worse - is bribery and corruption. That really is a poison. We must put that down with an iron hand and I hope that you will take adequate measures as soon as it is possible*."[8]

There are myriad reasons for the high level of corruption being experienced by the country. The roots of corruption can be traced back to the partition of Pakistan in 1947. According to certain analysts, the newly created nation inherited a bureaucracy dominated by the British tradition of exploitative, intrusive and elitist form of administration. The civil servants filled the void created by the lack of experienced politicians to govern the country. They were giving charge of running ministries and in certain cases even assuming the role of Prime ministers, Governor General and Presidents.[9] This led the civil servants to assume the function of primary rulers of the country and

[6] (The Express Tribune, 2014)

[7] (Business Recorder, 2012)

[8] (Jinnah, 1947)

[9] (Government Of Pakistan, 2002)

governed without any form of accountability. The situation worsened due to an increase in foreign aid during the dictatorial rule of General Ayub Khan and the urge to indulge in corrupt practices increased manifold. Furthermore, the nationalization of major industries in the seventies presented the corrupt civil service with increased opportunities to procure money through corruption.[10]

Government officials were put in charge of nationalized businesses, having access to the profits and revenues, which these industries generated. The corrupt officials started filling their pockets harming the national exchequer and spreading the culture of corruption in every sector of the society.[11] The involvement of public servants in commercial activities gave further impetus to high levels of corruption within ranks of the civil service and many industries were bankrupted or collapsed due to this wide scale plundering.

Another major cause of the colossal level of corruption in Pakistan is the elitist political system of the country. The political system of any country defines the moral standards of any nation. Unfortunately, the political class of Pakistan has set a dreadful ethical criterion by looting the national treasury, using the public office for personal gain and breaching the public trust. The political leadership of the country comprises mainly of the feudal and industrialist class.[12] Politics became an affair only for the rich and affluent. Party tickets are conveniently offered for sale and sold to the highest bidder. Contesting elections requires huge sums of investment, which an average middle-class citizen cannot afford.[13]

Politics in Pakistan became a lucrative business for the elite subjugating the downtrodden people of the country. Corrupt politicians availed every opportunity to gain personal profits at the expense of the poor. They skewed the laws and policies of the country to serve their personal interests spreading unbridled corruption throughout the society. The political leadership of the country in connivance with the incompetent and corrupt bureaucracy made corruption their utmost agenda.

Another major cause of rapid corruption in Pakistan is the absence of audit and accountability rules being applied to the military and its officials. There has never been a detailed discussion on the

[10] ibid PP.11-12

[11] (Zahoor M, 2011)

[12] (Government Of Pakistan, 2002)

[13] Ibid PP.16

armed forces budget in the parliament.[14] The situation is further aggravated due to the prohibition on civilian ACA's to review military accounts. Furthermore, army officials do not fall within the ambit of civilian ACA's of the country. The chief of Transparency International in Pakistan identifies the military as one of the most corrupt institutions in the country.[15]

Pakistan's military gets a lion's share of the states total budget. It is estimated that the military received almost 28.2% of the nation's total budget during the fiscal year of 2014-15.[16] This essentially means that a large chunk of the country's budget is unaccounted for, which paves way for large-scale corruption within the military ranks. The military personnel in Pakistan are seen as untouchables, which encourage them to get involved in corrupt practices. The situation is exacerbated due to the successive military takeovers in the country.

Another important cause of corruption is the low wages given to civil servants. The meager salaries do not guarantee a decent life style for the government functionaries and their families.[17] This in turn breeds corruption among officials since they are unable to fulfill their basic necessities within the remuneration given to them by the Government. As a result, even honest and dignified officials look for illegal ways to earn more in order to support their families in times of rising inflation. This has facilitated the prevalent bribery culture in the country and citizens have to offer pay offs to get their simplest of work done in government departments. These are some of the major reasons of corruption in Pakistan, which continue to exist despite various policies and strategies implemented by successive governments. These practices are violative of Article 25 of the Constitution of Pakistan, 1973 whereby the State has a duty to protect all individuals without discrimination. Corruption gravely impedes the protection laid down by this Fundamental Right and therefore, this calls for a radical change in the present system.

Anti-corruption framework in Pakistan

In Pakistan corruption engulfs every sector of the government machinery. It has been generally accepted as a social norm in the society. However the increased level of tolerance and acceptance

[14] (Ahmed, 2013)

[15] ibid PP.6

[16] (The Express Tribune, 2014)

[17] (Ahmed, 2013)

does not imply in any way that people and successive governments have been apathetic about this ailment.[18]

Over the past six decades, several laws have been promulgated and institutions have been established to curb this nuisance. The penal code of 1860 defines bribery as an offence under section 161 and 165-A. Section 161 deals with passive bribery while 165 covers the offence of active bribery. These sections covers both monetary and non-monetary bribes offered to the public officials. These sections formed the basis of future anti-corruption drives in the country.[19]

However, Pakistan inherited its first anti-corruption law, the Prevention of Corruption Act, 1947 from the British government. This legal initiative was then supplemented by the Public Representatives (Disqualification) Act of 1949.[20] In 1959, under the dictatorial regime of President Ayub Khan, the Elected Bodies (Disqualification) Act was introduced to deter dishonest politicians from holding public office. All these laws were enacted to cleanse the administrative ranks from corrupt practices.[21]

Furthermore, in order to enhance efficiency and orderliness among civil servants, the civil servants (Efficiency and Discipline) Rules 1973 were promulgated. These rules were passed to promote honesty and effectiveness among public officials. This was to be achieved by imposing penalties on those officers who were found liable of misconduct and corrupt behavior. The sanctions, which could be levied on those, found guilty of corruption included early retirement from service, reduction to lower pay scale and in certain cases, dismissal from service.[22] Such harsh punishments were to be used to deter government functionaries from indulging in illegal behavior, primarily corruption.

Another important legislation aimed towards eradicating corruption was the Ehtesab Ordinance, 1996. It brought within its purview both the bureaucracy and the politicians including the Prime Minister and the President. The ordinance also made possession of assets beyond ones income an offence for both the political class and public officials.[23] Under this ordinance, which later took

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[18] (Government Of Pakistan, 2002)

[19] (Asian Development Bank, 2010)

[20] (Ahmed, 2013)

[21] (Iftikhar, 2010)

[22] Ibid PP.44-45

[23] (Khan, M., et al., 2004)

the shape of the Ehtesab Act 1997, an Ehtesab Bureau was set up whose role was to augment the Ehtesab commission established in 1996. The bureau was given the responsibility of investigation while the commission was put at the helm of prosecuting those charged with corruption offences.[24] The Ehtesab Act remained operational for almost three years, but unfortunately could not bring about the preferred results. It was seen as a tool of political exploitation and intimidation being used against political rivals.[25]

The National Accountability Ordinance (hereafter NAO) replaced the Ehtesab Act in 1999. Under this Ordinance, which was passed during the military rule of General Pervez Musharraf, the nation's most dominant ACA i.e. (NAB) was established. The bureau was given the duty of preventing corruption and also to increase public awareness about this ever-growing disease.[26] Its principal responsibility was to eliminate corruption and to recover national assets and income embezzled by corrupt politicians and public servants. The bureau used its power under the NAO 1999, in order to restrain wide scale corruption and improve accountability.[27] The felony of corruption was sanctioned with 14 years of rigorous detention. Like its predecessor, the NAO brought within its ambit all the people holding public office including bureaucrats and politicians. Under the ordinance, separate accountability courts were also established which specifically dealt with corruption cases.[28]

There are other public accountability bodies in Pakistan, which aim to rein in on the rising levels of corruption in the country. The leading ones include the Federal Investigation Agency (hereafter FIA), The Auditor General of Pakistan's department (hereafter AGP) and the office of the Ombudsman. The FIA replaced the Pakistan Special Police Establishment (PSPE) in 1975. Under its current mandate, FIA is operational in areas of immigration, economic crimes and seeks to eradicate corrupt practices of public officials in various ministries and corporations.[29] Apart from the FIA, the AGP is situated at the forefront of financial accountability of the government by

[24] (Tariq, 2012)

[25] (Khan, M., et al., 2004)

[26] (Iftikhar, 2010)

[27] (Ahmed, 2013)

[28] (Khan, M., et al., 2004)

[29] (Government Of Pakistan, 2002)

uprising the legislature about the usage of public funds by the executive. Its main function is to monitor and audit the use of financial resources by various departments of the government. [30]

Furthermore, the institution of the Ombudsman was established to entertain complaints from individual members of the public about instances of inefficiency and malpractice in government departments. It has the power to financially indemnify victims, who have suffered injustice at the hands of various government functionaries. The office of the ombudsman tackles individual cases of misused authority and corruption by public officials.[31]

Apart from all these institutions a National Anti-corruption Strategy (NACS) was also created in 2002 under the patronage of NAB to intensify and realign efforts to combat increasing levels of corruption. The main object of NACS was to review the causes of corruption in the country and to invent a broad based strategic framework to address the issue of corruption.[32] However, this strategic framework has been held in abeyance due to lack of political support within the ranks of the government including the bureau itself and poor publicity and exposure to the general public.[33]

It is evident that Pakistan has a well-established configuration of multiple institutions and laws to grapple with the nuisance of corruption. However, the ever-rising levels of corruption within the country questions the integrity and implementation of these statutes and the effectiveness of various ACA's. Despite all the efforts by successive governments to control corruption, this social malady is soaring with the passage of time. The escalating rate of corruption in Pakistan depicts various systemic inadequacies and defects within the anti-corruption structure. These weaknesses need to be properly understood and addressed in order to effectively tackle the issue.

Flaws within the anti-corruption structure

The paradox of Pakistan in its battle against corruption lies in the fact that it suffers from various systemic failures and institutional inefficiencies. Corruption flourishes where institutions are weak and there are issues of poor governance. Systemic corruption rises where there are inefficacious legislative restrains.[34] The first and foremost deficiency in the framework comes from a weak and

[30] Ibid PP.45

[31] Ibid PP.46

[32] (Schultz, 2007)

[33] (Javaid, 2010)

[34] (Caliyurt & Idowu, S., 2012)

inept Parliament. The legislature of any state is seen as the basis of its national ethical system. However, due to the elitist political culture prevalent in the country, it has become a base for legislators having low integrity. Corrupt practices among parliamentarians are wide spread, which has contaminated the legislature, derailing it from its actual function of having a strong check on the acts of the executive.[35]

There are no laws relating to conflict of interest and members of the parliament are often involved in corrupt practices like nepotistic recruitments and appointment. Various parliamentary committees are established to oversee the conduct of the executive but their workings have remained unproductive due to lack of interest showed by the MP's.[36] Apart from this, the legislature has always drafted anti-corruption laws that sustains and enhances their corrupt practices. The legislators have enacted poor and substandard anti-corruption laws, which has lead the country's fight against corruption into complete disarray. The parliament has failed to emancipate anti-corruption institutions from undue political influence, which hinders fair investigation of corruption cases.[37]

Furthermore, the role of the parliament has been undermined by successive military takeovers. The function of the parliament was reduced to nothing more than a mere rubber stamp during these various military regimes.[38] The executive for the most part remains without an effective parliamentary oversight, which essentially leads to increased corruption within the ranks of the administration. These inadequacies within the parliamentary system of the country in practice hamper the anti-corruption drive of the government.

The fragility and incompetence of the civil service has been another key detriment in tackling the issue of institutional corruption. Public officials discharge their duties in a politicized atmosphere where they depend heavily on their political benefactors for appointments on important posts. One of the main reasons government functionaries rely on political support is due to the non-existence of job security.[39] The constitutional safeguard, which was enjoyed by the bureaucracy, was eliminated by the civil services reforms 1973. The civil service has been unable to target high-

[35] (Government Of Pakistan, 2002)

[36] Ibid PP.18

[37] (Taj, 2012)

[38] (Transparency International , 2014)

[39] (Iftikhar, 2010)

level perpetrators among the influential political class, mainly due to this vulnerability, and tends to collaborate instead with their political bosses in corrupt acts. Apart from this, public officials' ability to handle corruption is also impeded due to complex and obsolete rules and policies and ambiguous institutional frameworks and lack of clear job descriptions.[40]

Furthermore merit is also compromised when it comes to promotions of these civil servants. Elevation of officers in the next cadre is not based on professional integrity and competence. The whole promotional system relies heavily on the method of Annual Confidential Reports (ACR), which are predominantly used against upright officers to pressurize them. [41] Such circumstances deter even the most honest of officers to engage in accountability in order to subdue corruption. This curbs their ability to hold the influential, answerable for their corrupt acts as doing this not only diminishes their chances of progression but also poses a threat to their employment as well.

Apart from these systemic imperfections various institutions that have been established to curb corruption are riddled with inherent flaws. Pakistan's top ACA; NAB is no exception to this. The NAB is created by following the Hong Kong model i.e. its main purpose are to prevent, prosecute, investigate and raise awareness regarding corruption. However the success of this structure hinges on a number of factors, which includes support from the government, lack of political interference and a strong governance mechanism that motivates activities to reduce corruption. Unfortunately, the situation in Pakistan is far from favorable to replicate the model on which NAB originated.[42]

Besides these unsuitable conditions the NAO 1999 which created the Bureau is not free from irregularities as well. The ordinance excludes the Judiciary and the armed forces from the reach of the bureau.[43] The exclusion of these key institutions leads to unchecked corruption within the ranks of the judiciary and armed forces.

It is seen merely as an instrument to prosecute junior and low ranking civil servants, and the high profile politicians, generals and judges are seen as being immune from accountability.[44] Another criticism leveled at NAB is that it is used as a tool for political intimidation and pressurizing. Governments have used this organization to initiate proceedings against political rivals, which

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[40] Ibid PP.28

[41] Ibid PP.29

[42] (Jamal, 2012)

[43] (Khan, M., et al., 2004)

[44] Ibid PP.10-11

leads to unjust and politically motivated anti-corruption trials.[45] All this tarnishes the repute and integrity of the bureau, and those actually responsible for corrupt acts goes unpunished.

The FIA, which is one of the prime ACA's, is not free from structural deficiencies. This organization has also fallen prey to rapid political influence as appointments in the agency are predominantly gained through political patronage. Furthermore, the organization is unable to proceed against certain departments and groups like medical practitioners, the army and the judiciary including those involved in legal practice.[46] The agency reports to the interior ministry, which further curtails its ability to effectively move against corrupt individuals due to prior permission, required from the interior division. This prolongs the process and investigations are carried out at a sluggish pace. The department's anti-corruption activities are dwindled due to its multifarious mandate, which includes immigration crimes, anti-terrorism activities and economic crimes.[47]

The office of the Ombudsman and the AGP's department has inherent inadequacies as well. According to the Asian Development Bank the AGP has failed in satisfactory scrutinizing procurement and projects predominantly because of its substandard reporting and auditing mechanisms.[48] Certain experts have opined that the Auditor General office lacks the required human resource and is under staffed obstructing its function of financial oversight. Furthermore allegations of political appointments are also leveled against the department damaging its credibility. Instances of petty corruption in the department are also on the rise and individual auditors often collude and accept favors from other public sector employees violating their code of ethics.[49] Such activities and systemic hindrances leave the government without an effective financial oversight increasing instances of financial mismanagement and corruption.

The office of the Ombudsman has largely been rendered ineffective due to limited technical coordination between its various offices that leads to delays and inconsistencies in its decisions.[50] The institution is not immune from external badgering from key political players and the executive

[45] (Ahmed, 2013)

[46] (Taj, 2012)

[47] (Government Of Pakistan, 2002)

[48] (Dawn News, 2009)

[49] (Transparency International , 2014)

[50] (Khan, M., et al., 2004)

branch. Politicians mostly influence appointments in the department, which declines the efficacy of the organization.[51]

Pakistan has a multifaceted anti-corruption system with numerous laws and institutions to counter corruption. However, these enactments and agencies are unable to perform their desired role due to the imbedded weaknesses in the structure. The country does not need more laws and organizations as this would only complicate the situation and would create more confusion rather than tackling the issue. There needs to be an approach towards reforming the current system, amending the flaws within it.

Corruption and Human Rights

Corruption is an epidemic which largely affects the human rights norms of a country. The evident connection can be seen when one realizes that corrupt lawmakers in appropriating an accruing extra benefits for themselves, will always marginalize and overlook the rights of individuals it has a duty to safeguard. Corrupt practices by lawmakers also violate international human rights covenants such as the ICESCR[52] whereby individuals' political, social and economic rights are protected.[53] Not only does corruption hinder an individual's access to their rights; it also violates their fundamental rights as enshrined within the Constitution of Pakistan, 1973. One such right being violated is the 'right to life' under Article 9, whereby life does not only mean mere existence but also includes a holistic and nurturing environment which encourages the growth of persons. When the State is plagued with corruption, it substantially disallows resources and economic benefits from reaching the masses. This, in essence, hinders the citizens' enjoyment of life.

In order to curb the menace that has so adversely affected human rights in Pakistan; we must establish concrete reforms for anti-corruption within the State apparatus.

What needs to be done?

There are several measures and initiatives, which should be taken on part of the government to constraint rising levels of corruption in the country. The most important component in a successful

[51] (Global Integrity, 2010)

[52] International Covenant on Economic, Social and Cultural Rights

[53] (OHCHR, 2016)

anti-corruption strategy is political will. The anti-corruption drive of any country is bound to fail if the political leadership of the state does not sincerely back it. Political will is interpreted as the genuine intent of political actors to strike perceived reasons and effects of corruption at a systemic level. Without this vital requirement, the government's resolve to improve accountability and transparency remains a mere rhetoric.[54] The political class of Pakistan should jointly demonstrate their will to curb corruption in the country through across the board accountability without excluding any group or sector of the society.

Furthermore the ACA's of Pakistan should be made independent, free from political interference and influence of any kind. These organizations should be staffed and lead by honorable and honest individuals. This is so because corruption within the ranks of anti-corruption agencies would prevent these agencies from performing their role of eliminating corruption.[55] This can be achieved by severely punishing those who are found guilty of corrupt practices within the ranks of these ACA's. This would not only enhance the legitimacy and effectiveness of these agencies to counter corruption but would be vital in improving the public image and perception of these organizations.

One of the reasons corruption thrives in Pakistan is that many see it as being a "low risk, high reward" activity. This is so because much of the corruption goes undiscovered and thus the perpetrators are not punished for their embezzlements. In order to reduce corruption it should be made a "high risk, low reward" activity by severely punishing those who are found guilty of corrupt behavior.[56] This would diminish corruption by inculcating a strong sense of deterrence in the society. Severe sanctions should be imposed on those found liable of corrupt acts in order to establish a precedent.

The challenge of eradicating corruption among the civil service can be subdued by improving transparency and providing equal opportunity during the recruitment and promotion process. This can be done by providing clear criteria and simplifying procedures for hiring. Furthermore, vacant positions should be advertised through the mass media. This would not only lead to a more fair selection but would also attract more competent and educated individuals.[57] Additionally, merit and professionalism should be the key element for promotion in the civil service. Nepotism and

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[54] (Quah, 2011)

[55] Ibid PP.460-462

[56] Ibid Ch.1 PP.19

[57] (Asian Development Bank, 2004)

political interference should be eliminated from the process of promotion and only those officers who fulfill the set criterion for promotion should be moved to the next cadre. Moreover, the salaries of public officials should also be raised as scanty pays often increases the temptation to indulge in corrupt practices.[58] The remuneration of civil servants should be increased in line with rising levels of inflation so that they sustain themselves and their families without resorting to corruption. The role of media is also of paramount importance in highlighting instances of corruption. The electronic and print media can act as a tool to increase public pressure on the government to tackle the issue of corruption effectively. Furthermore, social media can also be used to curb corruption in the society. It can prove fruitful in reporting cases of corruption and can be used in improving transparency and openness.[59]All these reforms and initiatives can be taken by the government to efficiently grapple with this nuisance and to curtail it.

Conclusion

Pakistan is a country that has faced the phenomenon of corruption ever since its inception. It has spread across all sectors of the society severely damaging them. Various attempts have been made throughout the course of the nation's history to counter corruption but all in vain. The multitude of laws and institutions that were established to combat corruption has proved to be futile. The political intrusion and bureaucratic hurdles have time and again sabotaged the states anti-corruption efforts. Various regimes including military and democratic governments have failed to eradicate corruption despite numerous commitments and political rhetoric.

However, with consistency and political will, the country can be successful in its battle against this social evil. Political obstacles and systemic faults needs to be fixed in order to efficiently curb the rising levels of corruption witnessed in the country. There needs to be increased accountability and transparency in all affairs of the government and at all levels. Persistent and genuine endeavors can lead to the elimination of corruption from the society. The usual rhetoric and commitments of politicians to curb corruption have proved to be worthless in the past. Only a strong, multi-pronged strategy which seeks to remedy the systemic flaws in the anti-corruption framework would be successful in Pakistan.

[58] Ibid PP. 7-8

[59] (Klitgaard, 2013)

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STUDENTS

What Is and What Should Be: Child Sexual Abuse Legislation in Pakistan in Light of International Law

by Fatima Mehmood[1]

Abstract:

From the mass sexual abuse of one hundred young boys by Javed Iqbal in 1999[1] to the latest child abuse case of 380 children reported from Kasur[2], Pakistan has witnessed somewhat perpetual exploitation of the most vulnerable segment of the population. Social, psychological and economic factors aside, the most significant driving force behind such incidents is the dearth of adequate legislation which deals with each aspect of this mounting social problem and tackles it with appropriate punishment. This essay shall, therefore, critically examine child sexual abuse (hereinafter referred to as, "**CSA**") laws in the country and will thus, evaluate the extent to which they are effective in curbing this form of child abuse. An analysis of the present legislation on CSA, in light of the Convention on the Rights of the Child (CRC) and its Optional Protocols, shall reveal a number of inadequacies and omissions whereby potential reforms shall also be suggested which can make the law more effective at employing pragmatic means of protecting children.

What Comprises Child Sexual Abuse?

Due to the lack of a well-grounded and substantive definition of CSA in domestic legislation, for the purposes of this essay, CSA shall be taken to encompass rape (including marital rape of minor girls), sodomy, child pornography, exposure to seduction and child prostitution[3].

State of the Current Domestic Legislation:

i. Child Pornography and Exposure to Seduction:

The most recent development, and therefore the one to be considered foremost, in domestic legislation on CSA is the Criminal Law Amendment Act, 2015. For the very first time, this Act contains provisions

[1] (The Guardian, 2000)

[2] (Human Rights Commission of Pakistan, 2015)

[3] (World Health Organisation Consultation on Child Abuse Prevention, 1999)

dealing specifically with child pornography[4] and exposure to seduction.[5] For the former, the punishment is imprisonment for two to seven years or a fine of Rs. 200,000 to Rs 700,000 or both. As for the latter, the punishment entails imprisonment from one to seven years or a fine from Rs 100,000 to Rs 500,000 or both. Prima facie, the mere fact that such facets of CSA are now being specifically criminalized by our domestic law appears to be a welcome move. However, the fact of the matter is that this is yet another redundant "toothless law"[6].

To begin with, the punishments set forth are not severe enough to act as real deterrents. In fact, they appear to be quite compromising and facile thereby fail to dissuade child sexual abusers. Moreover, child pornography and exposure to seduction are taken in the Criminal Law (Amendment Act), 2015 as all-encompassing, broad terms whereas they can be further broken down into different categories and each category can carry a differing level of punishment. This model is followed by the United Kingdom. Section 9 of the Sexual Offences Act[7], for instance, breaks down CSA into various categories depending on extent of penetration combined with a consideration of mitigating and aggravating factors. After due regard for all these, this section then assigns an appropriate range of punishments for each. This appears to be more effective and adequate at tackling the issue instead of one wide-ranging accusation carrying a wide range of sentencing options. Therefore, even though this latest development has provided legal protection for two very important areas of CSA, it can be seen no more than a starting point with much more required. This is evidenced by the fact that when it comes to child pornography, the Criminal Law (Amendment Act), 2015, like section 292 of the Pakistan Penal Code[8] and section 13(u) of the Punjab Control of Goondas Ordinance 1959[9], fails to define what "obscene" content actually amounts to. Even,

[4] S. 292B, Criminal Law (Amendment Act), 2015

[5] S. 292A, Criminal Law (Amendment Act), 2015

[6] (Malik, 2015)

[7] Section 9 (2) reads as: "A person guilty of an offence under this section, if the touching involved—
(a) penetration of B's anus or vagina with a part of A's body or anything else,
(b) penetration of B's mouth with A's penis,
(c) penetration of A's anus or vagina with a part of B's body, or
(d) penetration of A's mouth with B's penis, is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years. "

[8] This section reads as "whoever sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale. hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, shall be punished with imprisonment of either description for a term which may extend to three months, or which tine or with both."

[9] This section refers to "whoever, publishes, distributes, circulates, sells or offers for sale any obscene book or picture or other object..."

Article 37 of the Constitution of Pakistan[10] refers to prohibiting the circulation of "obscene" material. Given the significance of this word to potential child pornographers being brought to justice, the absence of a succinct definition for it converges into the greater problem which the Kasur scandal brought to light in 2015.

ii. Child Prostitution:

The Punjab Suppression of Prostitution Ordinance 1961[11] clearly proscribes encouraging, procuring, or causing the seduction or prostitution of girls. However, the law does not define what constitutes child prostitution in itself and moreover fails to punish the act of having sex with a child for payment. Moreover, this Ordinance is regrettably very female centric.[12] It fails altogether to cater to male child prostitutes which studies and researches reveal to be at a higher risk of being caught up in the vicious circle of prostitution.[13] Another law which deals with child prostitution is the Punjab Destitute and Neglected Children's Act 2004. Section 40 of the said law specifically outlaws child prostitution with punishment of up to three years or fine of up to Rs.50, 000. The fact that the only two legislative pieces specifically dealing with child prostitution are provincial laws specific to the province of Punjab and not federal laws which offer uniform protection from child prostitution throughout the country, is redolent of the problems which exist with CSA legislation at the grassroots level.[14]

iii. Rape and sodomy:

The offence of rape, although not particular to underage girls, is dealt with by the Zina Ordinance 1979[15] and s. 375 of the Pakistan Penal Code[16]. Marital rape is recognized when the wife is under sixteen years,

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[10] This reads as: "The State shall prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements."

[11] Section 7 of this Act reads as:" If any person having custody, charge or care of any girl under the age of sixteen years, causes or encourages or abets the seduction or prostitution of that girl, he shall be punished with rigorous imprisonment for a term which may extend to three years, [and] with fine which may extend to one thousand rupees, and if the person convicted is a male, shall also be liable to whipping."

[12] (Situational Analysis Report on Prostitution of Boys in Pakistan , 2006)

[13] (Hussain, 2004)

[14] (OMCT, 2003)

[15] Section 5A reads as: "No case to be converted, lodged or registered under certain provisions:-
No complaint of Zina under section 5 read with section 203A of the Code of Criminal Procedure, 1898 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496A of the Pakistan Penal Code (Act XLV of 1860)"

[16] Section 375 reads as: "A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions, (i)against her will (ii)without her consent (iii)with her consent, when the consent has been obtained by putting her in fear of death or of hurt, (iv)with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man

in which case section 375 of the Penal Code provides punishment in the form of imprisonment for a maximum of 2 years and fine. Marital rape of a girl over sixteen is not criminalized by Pakistani law. No cogent rationale for this age limit can be seen. The Child Marriage Restraint Act 1929 declares that marriage can take place over 18 years of age for a male and over 16 years for a female. The fact that girls from the ages of 12 to 16 are not entitled to the protection of CSA laws is one of the bigger lacunas in our domestic legislation.

As far as sodomy is concerned, the reality of the situation is that forced acts of sodomy against young boys remain a crime wholly uncovered to for by our current law. This requires aggressive legislative reform considering the fact that between 2007 and 2009, sodomy versus rape cases showed an increased ratio of 30% against the ratio of 29% in the other years.[17] Even the highly-acclaimed and notable documentary by the British Channel 4, "Pakistan's Hidden Shame", reveals the shockingly great extent to which forced acts of sodomy prevail against young boys.[18] Since the sexual abuse of young boys does not come under the definition of rape[19], there is a dire need for the creation of a new offence which deals with this intensifying CSA issue.

The unfilled gaps in current CSA laws:

The current legislation on CSA does not deal with sexual abuse which takes place in educational institutions at all. There is not a single provision which addresses the pressing issue of CSA in schools and colleges. It is not clear how cases of CSA in the school environment are to be reported and if abuse is found, then it is not clear whether the individual(s) will be prosecuted or the educational institution or both. This is a serious issue which requires immediate consideration by our lawmakers. Trends show that the ratio of children abused by their teachers has increased by more than 8 times during the years 2007 to 2011.[20] Here, Pakistan needs to follow in the footsteps of various US states as well as the United Kingdom which have developed and implemented precise legal framework for monitoring and reporting CSA at schools.[21] Moreover, Australia too has mandatory reporting laws for CSA in schools.[22]

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is another person to whom she is or believes herself to be married; or (v) With or without her consent when she is under sixteen years of age.

[17] (Sahil, 2011)

[18] (Dawn News, 2014)

[19] The offence of rape under S. 375, PPC requires an act of penetration by a male and therefore, can only be committed by a male on a female.

[20] (Sahil, 2011)

[21] (Smallbone, 2013)

[22] (Mathews, 2014)

Domestic legislation on CSA has failed altogether to address the critical issue of CSA in the home environment, by the victim's own family members. Statistics reveal that CSA by acquaintances continues to take the lead.[23] According to the findings of a research by UNICEF (2009), child sexual abuse is the least reported, especially when committed by parents or close family members.[24] Pakistan needs to follow the lead of UK lawmakers in this arena; Sections 25 to 29 of the Sexual Offences Act 2003 deal solely with CSA offences by family members.

According to Pakistan's Universal Periodic Review[25], offences such as child molestation are not currently provided legal protection against. The Anti-Terrorism Act 1997 is stated in this Review to be the only partial exception since it recognizes the offence of child molestation only when it is charged in combination with rape. Moreover, this Review highlighted the plight of transgender children and street children without families who are at a particular risk of being sexually abused and caught up in prostitution at early ages. There is no legal provision at the federal level which offers them special protection; the only existing pieces of legislation have been enacted at a provincial level. For example, The Punjab Destitute and Neglected Children Act 2004 makes provisions for the rescue of destitute and neglected children who are to be taken into custody and relocated to child protection centers. However, this law has not been implemented properly to date as child protection centers are numerically very few. In Khyber Pakhtunkhwa, the Child Protection and Welfare Act 2010 gives an expansive definition of a 'child at risk' and gives protection against various CSA offences. This is certainly a step ahead than the other pieces of provincial legislation. However, this law has faced non-implementation ever since it was enacted which suggests that it in fact may not be as wide-ranging and effective as originally promulgated to be. In Sindh, the Child Protection Authority Act 2011requires an implementation mechanism, even 5 years since coming into force. More importantly, no laws providing for child protection centers in Balochistan, Islamabad Capital Territory or Gilgit Baltistan and the 25 tribal areas exist. This marked disparity in the legal protection offered to the most exposed and unsafe segment of children demands an immediate programme of legislative reforms. Without catering for these fractions of children, protection against CSA cannot reach the desired level.

The province of Balochistan has no exclusive CSA law till date. The Balochistan Child Welfare and Protection Bill 2011 was the foremost proposed legislation in the right direction. It included comprehensive provisions for the protection of children from violence, harm, injury, abuse, neglect or negligent treatment, maltreatment and exploitation. Unfortunately, this Bill has not received the status of

[23] (Sahil, 2011)

[24] (UNICEF, 2009)

[25] (Human Rights Commission Pakistan, 2015)

an Act to date and seems to have been lost in the quagmire of legislative consultations.[26] In order to ensure that children across Pakistan receive equal legal protection, regardless of provincial orientation, it is pertinent that a special provincial law be enacted for Balochistan and that law be harmonized with other provincial and federal legislation as well as the Convention on the Rights of the Child (CRC).

Effect of the Convention on the Rights of the Child and its Optional Protocols:

The Child Rights Convention (CRC) came into force on 2 September 1990 and was ratified by Pakistan on 12 November 1990. Being a dualist state like the UK, Conventions are not enforceable in Pakistan until there is enabling legislation making them law of the land. Pakistan has not introduced any such law with regard to the CRC and therefore the Convention cannot be invoked in the courts. In order to stand parallel to the other 192 countries[27] which have ratified the CRC, Pakistan needs to enact legislation whereby the CRC can become directly enforceable.

Moreover, Pakistan ratified and entered into force on 5th August 2011 the Optional Protocols to the CRC which criminalize the sale of children, child prostitution and child pornography. This set of Optional Protocols was originally enacted in the year 2000. The fact that Pakistan ratified it 11 years later suggests a fairly reluctant trend towards accepting, and more importantly implementing, its international obligations into domestic law. It is strongly suggested that Pakistan picks up pace in the future in ratifying and implementing such Protocols.

The World Organization against Torture (OMCT) believes that Pakistan is yet to undergo the important task of bringing its legislation in line with the CRC, especially in three regards.[28] Firstly, it suggests that the age defining a child should be brought up to 18 years because protection against CSA needs to be guaranteed to all minors equally. Secondly, it proposes that equal legal treatment for everybody should be ensured. Female children's protection needs to be brought up to an internationally acceptable standard. For instance, for Zina crimes, the female child victim should not be punished for an abuse she suffers. Finally, OMCT's last suggestion is a provision of stricter punishments against CSA offenders, an issue which has been pointed out earlier in this essay as well.

Conclusion:

After due consideration of the various merits as well as demerits of the current state of CSA legislation in the country, it can be confidently concluded that the status quo is in dire need of an uplift. Not only do

[26] (SPARC, 2013)

[27] (United Nations Treaty Collection, 2016)

[28] (OMCT, 2003)

our lawmakers need to make the law CRC-compliant but as detailed above, the wide gaps in our legislation demand to be filled with new offences. Unless and until CSA legislation does not meet acceptable standards, the rates of CSA in the home, school and street alike will continue to soar. To ensure that childhood remains a protected age for all, as promised by the Constitution of Pakistan[29], each child needs to be protected against CSA at all times and in all places, without discrimination.

[29] Article 25 (3) of the Constitution of the Islamic Republic of Pakistan recognizes special right of protection for children due to their vulnerability. The Article reads;

25 Equality of citizens.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

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Child labor in Pakistan: an Inclination towards Societal Rot?

by Rafae Naguib[1]

Introduction

At the age of four, Iqbal Masih was sold into bondage as security for the repayment of a debt his family took from a local employer involved in a carpet weaving business.[2] He worked fourteen hour shifts a day every day of the week whilst being paid an astonishing three cents a day. Subsequent to a Supreme Court decision in 1990[3] that declared bonded labor as illegal, he escaped his slavery going on to campaign for the eradication of this practice by joining the Bonded Labor Liberation Front. Shortly afterwards, at the age of twelve he was fatally shot. This is the story of a child who stood less than four feet tall and yet still managed to help over three thousand Pakistani children that were in bonded labor to escape to freedom. Child labor continues to remain one of the country's foremost problems. The fact that over one quarter of the working population comprises of children indicates trouble as per a study conducted by Fair Trade Sports.[4] This social practice continues to take place in all platforms of society, be them domestic household child laborers, or those undertaking employment in factories. The situation seems to be aggravating as a survey conducted by the Federal Bureau of Statistics that showed a staggering 9.5% of the child population (5-14 years of age) of Pakistan as child laborers in 2014.[5]

The paper will embark upon a concise analysis of the socio-economic notions that primarily lead to this practice and the legislative and governmental efforts towards the elimination of child labor. The paper will then advance a more evaluative approach, with the aid of statistical information, to conclude whether governmental efforts are addressing the issue satisfactorily. This will be followed by a section dedicated to the proposal of a potential framework to curb the issue. The

[1] The student is a final year LLB student studying at the University of London International Programmes.

[2] (Hobbs, et al., 1999)

[3] (Darshan Masih v The State, 1990)

[4] (SPARC, 2014)

[5] (SPARC, 2014)

conclusion will urge that state activity needs to 'ramp up' in this sector so as to ensure that this abhorrent practice is abolished.

Tracing the roots of child labor

The term 'child labor' is often defined as work that deprives children of their childhood, their intellectual potential and their dignity, and that is harmful to physical and mental development.[6] The basic cause of child labor in developing countries is considered to be poverty.[7] Researchers have associated child work with the mode of production and the structure of the labor market.[8] They found that in an economy, like Pakistan, where labor intensive production techniques are used, child work is common.[9] Analysts also highlight how the economic viability of many houses depends on them placing as many members of the family as possible in the labor market.[10]

Furthermore, a lack of access to education plays a pivotal role in driving children to harmful labor due to the fact that they have nothing else to do in their time.[11] Sometimes it may also be the case that the standard of education is so low that the opportunity cost of abandoning school for heading on to work is very low. This was evidenced by a case study conducted on child labor in the fishing sector in Baluchistan[12] where it was found that a main reason for drop-outs and low literacy rates was the poor quality of education.

The National Child Labor Survey 1996[13] indicated poverty, a high population growth rate, and discriminating social attitudes towards girls as the major factors responsible for child labor in Pakistan. It remains to be one of the major problems afflicting the country and one which, unfortunately, has received the slightest of attention. Pakistan has passed laws in an attempt to limit child labor and indentured servitude, but those laws do not seem to be operating to the fullest as the statistics indicate otherwise.

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[6] (Basu, 1999)
[7] (Rodgers & Standing, G., 1981)
[8] (Rodgers & Standing, G., 1981)
[9] (Basu & Van, P.H., 1998)
[10] (Boyden, 1991)
[11] (Silvers, 1996)
[12] (Hai, et al., 2010)
[13] (ILO, 1996)

Legislative and governmental efforts to curtail child labor

Before moving on to the specifics of labor laws, an examination of the constitutional provisions will provide some valuable insight. The Constitution of Pakistan highlights in Article 11(3)[14] that no child below the age of 14 years shall be engaged in any factory or any other hazardous employment. Moreover, Article 25A of the Constitution[15] lays down that the State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as determined by law.

The current federal law in regards to child labor is encompassed within the 'Employment of Children Act (ECA)' which was passed by the National Assembly of Pakistan in 1991.[16] It remains the apex legislation, for some provinces, against the employment of children until such time that they come up with their own legislation against the issue. The statute deals with child labor issues exclusively unlike previously enacted legislative authorities. A child is defined, again, as a person below 14 years of age and an adolescent as below 18 years of age (but older than 14 years).[17] The current labor laws need to be reviewed in order to be brought in line with Article 25A of the Constitution. This is because labor laws dictate the minimum age of employment to be of 14 years whilst the Constitution asserts how each child has a right to education up till the age of 16 years. If the two laws are brought into harmony via increasing the minimum age of employment to 16 years, this will achieve maximized protection to the children of the country.

The Schedule to the Act provides exceptions to where a child is not to be employed in any occupation or process defined as hazardous to children .The employment of a child in the banned occupations and processes mentioned in the Schedule is punishable with imprisonment which may

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[14] Article 11(3), Constitution of Pakistan, 1973 Slavery, forced labor, etc. prohibited
(3)No child below the age of fourteen years shall be engaged in any factory or mine or any other hazardous employment.

[15] Article 25A, The Constitution of Pakistan, 1973
Right to education:
The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.

[16] (Jillani, 1997)

[17] S.2 (iii), Employment of Children Act, 1991, Definitions
Section 2. Definitions. In this Act. unless the context otherwise requires,
(iii) "child" means a person who has not completed his fourteenth year of age;

extend to one year or with a fine of up to Rs20, 000 or both. Section 17 of the Act[18] obligates the government to appoint inspectors for ensuring compliance with the statute. Till date, successive governments have failed to appoint these Inspectors and instead, the government has directed labor inspectors appointed under the Factories Act 1934 (one of the former legislations pertaining to child labor laws) to conduct child labor inspections under the Employment of Children Act 1991.

Subsequent to the 18th Amendment[19], the subject matter on legislation pertaining to labor has been delegated to provinces.

Provincial efforts – an examination:

There have been varying approaches adopted by each province in regards to the subject. Some have acted promptly on the matter by enacting legislation whilst others continue to be engaged in the process. It is to be noted that the Punjab provincial assembly failed to pass an anti-child labor legislation with the Secretary Labor confirming that it would be placed before the law department for vetting and ratification. Officials from the Punjab Labor Department confirmed that the minimum age for employment would be 14 whilst employment in hazardous occupation for adolescents (14-18 years) would be completely off the table.[20] The Bill further called for a Provincial Commission to monitor Child Labor in the province. Till then, a provincial appropriation of the ECA, 1991 remains intact.[21]

On the other hand, the provincial assembly of Baluchistan has failed to pass the Baluchistan Prohibition of Employment of Children Bill, 2014.[22] It is less stringent than its counterparts which are evidenced by Section 3 of the proposed Bill which allows a child not less than 12 years old to assist his parents in light work, provided that the work does not exceed two hours per day. It is absolutely imperative that the Bill be amended so as to comprehensively ban the employment of children who are 14 years of age or below. Moreover, there is no definition as to what is 'light

[18] Section 17, Employment of Children Act, 1991
The appropriate Government may appoint Inspectors for the purpose of securing compliance with the provisions of this Act and any Inspector so appointed shall be deemed to be a public servant within the meaning of the Pakistan Penal Code.

[19] (The News, 2015)

[20] (Labor Watch Pakistan, 2013)

[21] Employment of Children (Amendment) Act, 2011.

[22] (Labor Watch Pakistan, 2013)

work' nor is there a monitoring mechanism as to the child assisting his or her parents for two hours a day. Such monitoring would invade the privacy of home and would also be a violation of fundamental rights. Therefore, this remains a tricky gap to fill in current times.

Khyber Pakhtunkhwa's Employment of Children Bill 2014, similar to its federal counterpart, also bans the employment of children under the age of 14. Section 3 contains provision in regards to banning the employment of adolescents (14-18 years) in hazardous occupation. Additionally, the provincial bill seems to address a shortcoming present in the federal legislation in that it goes on to define 'hazardous work'. Section 15 of the Bill encompasses punishments for persons found guilty of employing an underage employee whereby such a person may be punished with imprisonment of up to six months and a fine of 50,000 rupees or with both - if the said child is employed in a hazardous occupation then the fine may to be extended to 100,000 rupees and an imprisonment of up to three years.

The Sindh Government's approach also seems much more prompt in the sense that the provincial bill contains a provision on the outright ban of any child under the age of 14 years in any such occupation in contrast to the federal legislation which regulates the employment of children by providing a list of occupations in which the employment of children is prohibited.[23] It also dictates how the employment of adolescents in hazardous occupations is prohibited. This is a bold step in stark contrast to the other provinces. Unfortunately, the bill failed to pass in 2014.[24]

Evaluating governmental efforts

Despite continued and elaborate "efforts" in aspiring to the eradication of child labor, the general attitude reflects neglect and consistent failure in championing human rights. This is evidenced by the fact that the last and only survey in regards to underage employment was conducted in 1996 which estimated that there were 3.3 million under aged laborers in the country.[25] According to the ILO, the number of child laborers in Pakistan exceeded 12 million in 2012.[26] In April 2012,

[23] (Dawn News, 2014)
[24] (Labor Watch Pakistan, 2013)
[25] (The Express Tribune, 2015)
[26] (ILO, 2013)

UNICEF reported that around 7.3 million children of primary school going age do not attend school.[27]

A Global Slavery Index Report released by the 'Walk Free Association of Australia' revealed that Pakistan is home to 2 million people suffering from debt bondage, trafficking, forced marriage and forced labor.[28] The lack of interest and prompt response to this issue has already set the country to major economic setbacks – Walt Disney, in 2014, halted all forms of orders from Pakistan as a result of the inefficiencies towards policing under aged labor in the textile industry.[29] This was subsequent to a period of eight months over which the company persistently kept warning the government, which did not take timely action. The result caused an annual loss estimated to be of 500 million dollars.[30]

The economy is not the only victim of this plague; the society also suffers. Child domestic workers are the subject of invisible exploitation credited to their cruel and inhumane working environments where they are the victims of physical and psychological forms of violence. Moreover, it is very common for these workers to have their wages delayed several months, their working hours may not be defined, and furthermore, they may be prevented from leaving their employment to visit their families.

There are several cases of violence recorded that have resulted in unfortunate deaths at the hands of employers who seek to institute a 'master-slave' relationship. Between January 2010 and December 2014, there were 47 cases of violence against child domestic workers reported from different parts of the country.[31] In 2010, a 15 year old domestic worker, Yasmin, was torched by her employers from which she suffered severe injuries that turned fatal five days later.[32] In 2014, there was also the case of 10 year old Iram, a domestic worker, who was beaten to death with a plastic pipe to her death on the suspicion of her stealing Rs.30, 000 in 2014.[33] Moreover, the case of 10 year old Jameel cannot be forgotten. A domestic 'helper' who, after accidentally losing his

[27] (UNICEF, 2012)
[28] (Walk Free Association of Australia, 2013)
[29] (The Express Tribune, 2014)
[30] (Dawn News, 2014)
[31] (Akhtar, S & Razzaq, 2005)
[32] (The News, 2010)
[33] (The Express Tribune, 2014)

grip over a jug, was subjected to a beating, on his head, by a shard of broken glass, which, as a result, he suffered from critical injuries and was left lying dead on the floor for the next two days.[34] These are merely a few cases from the many that occur throughout the country due to a lack of regulations and legal retribution.

Although the inefficiency by the government in this regard seems tantamount to being 'criminal', there is still some hope. After the 18th Amendment, provinces were empowered to appoint inspectors under the ECA 1991. Till date, none of the provinces have appointed such inspectors under the ECA 1991. However, the inspections that have been carried out are governed under the regime of the Factories Act 1934. In December 2014, the Punjab Labor Minister informed that a total of 598,565 child labor inspections were conducted in a four year time period (between 2010 and 2014) whereby the inspectors identified 6,339 infringements of law with regards to underage employment.[35] The total fine imposed on the perpetrators amounted to Rs. 1,202,000.[36] In 2014, the provincial labor department of Khyber Pakhtunkhwa appointed 7 'social mobilizers' under Section 17 of the ECA 1991. The term used for the appointments in Section 17 is 'Child Labor Inspectors'. [37] Governmental response, however, admittedly remains disproportionate to the rising numbers of domestic child laborers and the urgency of reform in this sector is not being met with.

It is lucid, as the evaluation indicates, that state responsibility in this sector needs to 'ramp up' at the earliest given that the aftermath of this inactivity has been fatal. Only if there is prompt response to this issue can we ensure there will be no more 'Shazias' or 'Jameels'.

Recommendations:

Amidst the seemingly hopeless battle against child labor in Pakistan, a certain framework of formalized policy needs to be brought into immediate effect in order to curb this issue. Primarily, the government needs to undertake a national child labor survey in order to gauge the magnitude of the problem. This survey should encompass child labor employment in both formal (corporate) and informal (domestic) sectors of the economy. Furthermore, an official notification must be given by the Federal Government through which child domestic labor must be comprehensively

[34] (The Express Tribune, 2013)
[35] (SPARC, 2014)
[36] (SPARC, 2014)
[37] (SPARC, 2014)

banned in the Schedule of 'Banned Occupations' under the ECA 1991. This will aid in the instillation of a general fear in regards to punitive sanctions being imposed on employers of child laborers which, if not to a great extent, will somewhat act as a deterrent. Since Article 25A of the Constitution of Pakistan, 1973 asserts the absolute right to a child's education up till 16 years of age, there should remain no such cushion for the employment of minors – which should be outrightly banned. Therefore, the minimum age of employment laid down under the ECA 1991 must be brought into line within that of Article 25A of the Constitution. This will ensure minimal contradictions between the statute and Constitution.

In order to minimize this practice, it would be best if Pakistan accorded to the various international models formulated in order to achieve the abolition of child labor. In 2011, the ILO adopted the Domestic Workers Convention 2011 (C189) which aims to recognize and protect the various forms of informal and 'invisible' labor done by domestic workers around the world.[38] It also calls for the protection of child domestic workers laying down conditions such as setting the minimum age for employment of domestic child workers, ensuring decent working conditions, and guaranteeing workers under the age of 18, but above the age of minimum employment a right to ensure that their work does not deprive them of compulsory education, or interfere with their desires to pursue opportunities enabling them to participate in further education. The Pakistani Government should ratify this convention by enacting legislation to ban child domestic labor and to grant domestic workers their rights.

S. 17 of the ECA, 1991 is currently not being implemented with the necessary drive required by any of the provinces. Up till 2014, the Sindh Labor Department did not conduct any labor inspections under the ECA, and the greater bulk of inspections were carried out under the Factories Act 1934.[39] Focus should be dedicated towards employing child inspectors under the provincial regime of the 1991 Act which will enable them to monitor underage employment in a much more comprehensive manner in comparison to the inspections governed under previous statutes. Nevertheless, until and unless the provinces do not pass all pending legislation against child labor in both formal and informal sectors of the economy, there remains little hope for a change in tide.

[38] (Human Rights Watch, 2013)

[39] (Dawn News, 2014)

Conclusion

The global decline in child labor, as reported by the ILO figures in 2014, has had no effect on Pakistan.[40] This is due to a consistent failure in governmental responsibility to address the issue. The fundamental cause to this scourge remains entrenched poverty only to be coupled by an absence of legislative and administrative framework to child labor. Subsequent to the 18th Amendment, the dawn of a new era seemed to have taken place with provinces being delegated powers to legislate on issues pertaining to child labor. Unfortunately, this was not taken advantage of and this opportunity became marred with bureaucratic delays whereby none of the provinces have passed legislation in respect to child labor till date. To conclude, it would be superficial to say that it is solely the government's duty to ensure the safety of the children of Pakistan. Social responsibility needs to be undertaken by each individual residing with the perimeters of this country to ensure that this abhorrent practice does not take place at any institutional or domestic platform. To remain neutral in times of moral crisis is to be exactly as culpable as the one who commits the crime and paves the path towards societal rot.

[40] (ILO, 2013)

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Human Trafficking: the Human Rights of Victims

by Hijab Waseem Khan[1]

"Slavery is such an atrocious debasement of human nature, that its very extirpation, if not performed with solicitous care, may sometimes *open a source of serious evils." – Benjamin Franklin*

"No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." Article 4, Universal Declaration of Human Rights 1948

Introduction

When one puts a price on a person, that person becomes a product. That is when one has compromised the basic foundation of human integrity. Slavery has existed throughout history and even though it has been abolished, contemporary slavery continues to curtail fundamental human rights till date. No country is free from this social evil. Like many states; Pakistan also prohibits slavery. The *Constitution of Pakistan, 1973*, expressly states the prohibition of slavery.[2] Yet, Pakistan is on the Tier 2 Watch List [3] and despite various measures taken such as the promulgation of *Prevention and Control of Human Trafficking Ordinance 2002*, the number of victims continues to rise. There is very little legislative development in the area pertaining to protection and rehabilitation of victims despite the growing problem.

This paper focuses on what happens to women after they have fallen victim to this trade and whether the state successfully provides them with rights stated in the *Constitution*.[4] The author believes that there is a dire need to introduce a comprehensive legislative bill that addresses problems concerning lack of executive action in provision of rights after victims have been

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[2] (Anon., 1973) Article 11

[3] (State, 2015)

[4] (Anon., 1973) Article 9, Article 10A

rescued. Various case studies reveal that if a victim does escape the supply chain of the trade, they remain under threat and are actively denied access to justice. Very few are repatriated, and nationals remain in government shelters with little or no hope of rehabilitation. Pakistan's lack of legislation pertaining to the above is not just a violation of rights but also of *Article 4* of the *Universal Declaration of Human Rights 1948* ('UDHR'). And so in light of the current situation, the country needs a new action plan, and not just one that suppresses trafficking, but one that caters to the victims' rights. Punishing and suppressing trafficking is a partial solution. Only provision of rights eradicates the source of serious evils which negatively contribute to society. This paper will discuss failings of local legislation in providing protection and right to legal aid. And how corruption and lack of executive function is exacerbating the situation. It will also look at how after provision of legal aid, victims are denied access to justice and a right to a fair trial. The focus of this section will be *The Offence of Zina (Enforcement of Hudood) Ordinance 1979*, and finally what the State and judiciary can do to protect victims of this trade.

Where do we stand?

Pakistan is an origin, transit and a destination country where trafficking takes places within and across borders[5] and ranks 6 out of a 167 countries on The Global Slavery Index with 2.1 million people in modern slavery.[6] The problem is far from linear: to understand trafficking one has to consider various factors which make people vulnerable to exploitive measures and in turn hinder their basic human rights. A lack of employment opportunity, education, and awareness of the issue, internal displacement and cultural practices contribute to the problem. Trafficking is the third most lucrative organized crime in the world.[7] A great percentage of the trade's income comes from exploitation of women. This paper pertains to adult females, and so the general victim profiles are young girls from poor families, victims of domestic violence and victims from indebted families.[8] Despite the secretive nature of this business, it's not discrete but operates behind other illegal activities and a staggering increase in crime rate is one the biggest facilitator of the trade.[9]

[5] (Guedes, 2014)
[6] (Index, 2014)
[7] (Karim, 2014)
[8] (Guedes, 2014)
[9] (Gonzalez, 2013)

Legal Aid and Security

There is no legislation specific to internal trafficking in Pakistan. Prevention and Control of Human Trafficking Ordinance, 2002 (Hereinafter referred to as, the "**PACHTO, 2002**"), specific to external trafficking, focuses on punishment of traffickers. For the most part the Ordinance turns a blind eye to violation of rights after victims have been recovered. Section 6 is the only part of the ordinance that caters to victims.[10] Furthermore, *Prevention and Control of Human Trafficking Rules 2004* govern how PACHTO is to be exercised. Rules 4[11] and 6[12] are means of providing security and legal aid. However, simply stating these rights in a set of rules does not mean they are given effect. It's noteworthy that the only piece of document which somewhat recognizes these rights specific to trafficked victims is a set of rules, not legislation. And that recognition only concerns procedure and not express definition of these rights. PACHTO does not take other factors into account such as corruption or what happens after provision of legal aid.

There are around 200,000 Bangladeshi women in Pakistan and some 2,000 in jails and shelters. Women who manage to escape are arrested and charged with Zina. Since majority of the victims are illegal immigrants, they usually spend an additional four years in jail.[13] Despite PACHTO and the *Rules* these women are not given legal aid or access to justice and their freedom of movement

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[10] Section 6 reads :

"Compensation etc. to the victim. ---The court trying an offence under this Ordinance may where appropriate direct:

(i) the competent authorities of the Government, at any stage of the trial to allow or extend the stay of the victim in Pakistan till such time, as the court deems necessary;

(ii) payment of compensation and expenses to the victim in accordance with section 545 of the Code;

(iii) Government to make arrangements for the shelter, food and medical treatment of victim being an unaccompanied child or a destitute woman."

[11] Rule 4 reads :

"Establishment of shelter homes and security arrangements. –

The Government shall establish shelter homes for safe custody of the victims and shall also make necessary security arrangement for the protection of the victims in the shelter homes whether established by the Government or the Non-Governmental Organizations."

[12] Rule 6 reads:

Legal assistance to the victim.-

(1) The Government shall and the Non-Governmental Organizations may provide necessary legal assistance to the victim during trial of the case and other legal proceedings under the Ordinance.

(2) The Government shall allocate appropriate funds for providing legal assistance to the victims.

[13] (Munir, 2012)

violated. There is no evidence to suggest that the government allocates funds for their repatriation as stated under *Rule 7(4).*[14] This situation seriously hampers the psychological and medical health of all victims. NGO's have been assigned the duty to provide shelter, food and medical care. Very few victims enjoy that. It is evident that PACHTO is not strictly adhered to and there are glaring violations of the rules set out in the Ordinance. Current legislation, specific to trafficking into and out of Pakistan is ineffective.

There is no legislation to control trafficking with in borders, and so the police cannot file a report under any law pertaining to this crime, but for kidnapping for the purpose of prostitution[15] or rape.[16] Like many other local victims, Kulsoom's case reveals a blatant disregard for her rights. After recovery, Kulsoom's family tried to record her statement, but visits to the police station only resulted in more threats to coerce them into dropping the charges. The family was repeatedly advised against pursuing the case because the traffickers were well connected. Even after her statement was recorded and was provided a lawyer by an NGO, the police continued to threaten the family.[17] Upon judge's orders, provision of a shelter home, governmental or non-governmental, does not necessarily mean the victim is safe, especially with underprivileged nationals like Kulsoom. An NGO did provide her with legal aid but that did not guarantee that she had access to justice. Even if PACHTO was to apply to her case, it is unlikely that it would have made a difference since the problem is not just legislative but procedural too. As mentioned earlier, executive function plays a pivotal role here. Unlike Kulsoom, Sabina opted for an out of court settlement after being deceived into prostitution with marriage. Both her sisters and she constantly received threats after two of the four offenders were jailed. She had to settle simply because she was deprived of her right to security despite being sent to a shelter. There is no evidence of legal aid provision in her case.[18] Legislation should extend security not just for the victim but also her family to avoid outcomes like Sabina's case.

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[14] Rule 7 (4) reads:
"The government shall establish special funds for the repatriation of the victim."

[15] Act XLV of 1860 Section 371A, 496A, 493A

[16] Act XLV of 1860 Section 375

[17] (Aurat Foundation, 2012)

[18] (Aurat Foundation, 2012)

The objective to punish traffickers cannot be severed from the aim to provide victims their rights. Only after victims have a right to legal representation, the State can prosecute the traffickers. And so it is safe to say that provision of rights, is in itself, a way to suppress and punish trafficking. Both objectives need to be integrated in legislation. If they co-exist, they only partially address the problem, as PACHTO does, rather than its entirety. Both aims needs to go hand in hand when drafting a comprehensive legislative bill that helps victims post recovery.

After the provision of rights to all parties, procedure needs to be followed through. While the procedure pertaining to reporting a case or recording a statement has been laid down in the *Rules* and in the *Code of Criminal Procedure*, there seems to be a flagrant disregard for it. Statements are almost never recorded in the case for foreigners; Burmese and Bangladeshi women and instead they are treated like criminals.[19] There have been accounts when the police has refused to file an FIR and rather than facilitating the victims, created more hardship.[20] Failure of executive function is not limited to the police. Personnel in the Federal Investigation Agency have been accused of involvement in the trade.[21] There is a pressing need for checks and balances concerning executive function. Rights on paper, can only be enforced on ground level if all State bodies function in accordance with law. There is a need for new legislation pertaining to the above where the executive should be held at a higher standard to discourage corruption.

Access to Justice and a Right to a Fair Trial

Legal representation should be a bridge for a victim's right to a fair trial. It is every victim's right to seek justice for any inhuman treatment or torture she may have suffered before recovery. Given the nature of the trade, women are sexually exploited and those who do seek justice it is for rape and abduction. *Protection of Women (Criminal Laws Amendment) Act, 2006* has brought about much needed changes in the Pakistan Penal Code and Code of Criminal Procedure. Zina bil jabr is now an offence under the Code allowing victims to immediately file an FIR and the punishment is life imprisonment or death. The *Offence of Zina (Enforcement of Hudood) Ordinance, 1979*, still places an unfair evidentiary burden on the victims to bring 4 witnesses to prove the offence which was a violation of the constitutional right to a fair trial. Reporting a case usually gets a

[19] (Munir, 2012)
[20] (Ilyas, 2015)
[21] (Labour Watch Pakistan , 2013)

family unwanted attention because of the social stigma associated with rape. Superficially, this amendment makes it easier for women to report their case. However statistics do not support this statement. In Punjab, 12,795 registered cases only resulted in 949 convictions. And while reported cases have increased over time, conviction rates remain low.[22] As stated earlier, executive function plays a fundamental role in enforcement of rights. Police has been accused of using delaying tactics in such cases, which makes it harder to collect crucial evidence.[23]

Laws are in place but there is a need for new legislation to bring about procedural changes to give women access to justice and a right to a fair trial. Circumstantial evidence cannot be given the same weight as medical and scientific evidence. Rape cases should be dealt by female officers because of the sensitive nature of the situation. These officers need to be trained on how to procure and record evidence. If this step is carried out successfully, victims should face no obstacles during trial. Legislation should make medical examination of the victim and DNA testing compulsory. This works in the favor of the victim and the accused when executing justice. This task should be appointed to a separate medical body, fully funded by the State and accountable to the courts. In Kulsoom's case the lower staff at the hospital made demands from the family in order to proceed with the medical exam.[24] With a separate medical body, under-privileged families will not have to pay any person in order to obtain evidence for trial. It will also reduce chances of evidence tampering and any impediment in obtaining the certificate.

The Council of Islamic Ideology (CII) has rejected the use of DNA evidence as primary evidence.[25] Law is evolutionary. It will always cater to changes in society and economic activity. It will however retain its single most important purpose: to do justice. And that is the golden thread found throughout Islam and law. Provided we retain the essence of Islam which is giving effect to justice, technological and scientific advancements should not be seen as a threat, but a promotor of justice.

Conclusion

Having assessed the violation of human rights in this trade, Pakistan needs to take necessary steps to rectify legislative and procedural failings in order to be taken off the Tier 2 Watch list. The

[22] (Mussadaq, 2014)
[23] (Mussadaq, 2014)
[24] (Aurat Foundation, 2012)
[25] (Tunio, 2014)

author strongly believes that first step is to sign and ratify the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000* and to work towards the objectives set out in the protocol. Trafficking is a transnational crime, and until neighbouring States do not cooperate to control trafficking, the aim cannot be achieved. The next step is to introduce new legislation that prevents both internal and external trafficking, in amalgamation with giving effect to fundamental human rights of victims of this trade. There needs to be strict adherence to new laws pertaining to executive function which punish officials guilty of corruption. And most of all the State needs to adhere to the law of proportionality. Steps taken must be proportionate to the aim. And therefore bold steps need to be taken to eradicate this social evil.

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The Human Rights of Juvenile Terrorists in Pakistan

by Mahnoor Saeed[1]

Introduction:

Statistics show that over 60 percent of the terrorist suspects arrested within the country are juveniles.[2] According to the laws operating in Pakistan if and when an underage terrorist is caught they will be tried and sentenced in the same manner as adult convicts.[3] In Pakistan, there is a legislative framework that is intended to be uses to combat acts like terrorism. This legislative framework has defined terrorism in such a wide-ranging manner that has had the effect of not only swallowing the entire purpose of the laws but also put accused juvenile terrorists in an extremely unsafe and unjust position before the law. One such Act is the Anti-Terrorism Act (ATA) which was passed in 1997. Under this Act, trials are not only rushed but more often than not the Anti-terrorism courts (ATCs) deny lawyers of the accused individual enough time to present a full proper defense before it. Additionally, fundamental rights of the accused are explicitly suspended.

Due to its broad definitions the legislation is overused and a vast number of defendants whose alleged crimes in fact bear no or very little relation to terrorism are given death penalties having gone through tremendously unfair trials. As this article will set out, these laws have not only been unable to achieve their objective as to work as deterrents but have in turn led to unfair trials, unsafe sentencing and executions. Children accused of terrorism under the vague legislative framework are going through torturous and unjust trials while terrorism in the country continues unabated.

Legislation operating in Pakistan related to Juvenile Offenders and Terrorism

When Pakistan ratified to the United Nations Convention on the Rights of the Child (UNCRC) in 1990[4] it made a commitment to ensure the rights of children without discrimination. The intention behind having a separate juvenile justice is system is to rehabilitate convicted juveniles back into society and to protect their fundamental rights. After ten years of ratification to UNCRC, in 2000

[1] The author is currently pursuing her LLB degree with the University of London International Programmes.

[2] (Dawn News, 2015)

[3] (Dawn News, 2015)

[4] (UNICEF, 2010)

Pakistani Parliament passed the Juvenile Justice System Ordinance (JJSO)[5] which was aimed to focus on juvenile justice in the criminal justice process. Section 14 of JJSO which states "*Provision of this ordinance shall be in addition to, and not in derogation of, any other law for the time being in force*" has led the public to be muddled over what the basic aim of introducing this legislation was if it was to have no over-riding effect over other laws that it was in conflict with, especially the Anti-terrorism Act. The JJSO according to this section does not have an overriding effect over the Anti-terrorism Act 1997.This means that a convicted juvenile charged with any offence covered by the ATA is vulnerable to a sentence of death penalty and life imprisonment. Under the ATA, an underage child was to be tried in an Anti-terrorism court and was to be treated in the same way as an adult convict. More panic was created and matters got even worse when an attack on the army Public school Peshawar (APS attack) took place. The government introduced the 21st amendment in 2015 and allowed military courts under the Pakistan Army (Amendment) Act, 2015 to try all terrorist related cases due to their fast procedure and resort to capital punishment.[6] These measures are undoubtedly in direct conflict with the binding provisions under the UNCRC which Pakistan agreed to adhere.

The objective behind military and Anti-terrorism courts is to focus on speedy trials. While speedy trials and quick results may seem to please those who believe 'justice delayed is justice denied'; there should be no uncertainty over the fact that at times justice rushed may lead to justice being crushed. There are several aspects of these courts which lead to numerous injustices such as the concept of presenting evidence in absence of the Defendant and not providing the convicts lawyer to respond to the case against him properly. The definition given in ATA of "terrorism" is an extremely broad and vague one. The primary piece of legislation governing the arrest, detention, prosecution, and sentencing of terrorism has been the Anti-terrorism Act, 1997 ('ATA'). The

[5] (Child Rights International Network, 2015)

[6] (Justice Project Pakistan, Repreive , 2014)

definition of terrorism is found in Section 6(1) of the ATA, 1997[7], which was recently amended in March 2013[8].

Understandably, any murder can be considered to 'intimidate' the public; any sort of common battery possibly will involve 'attacking' civilians. Undeniably, democratic and religious rallies are the only public action that lie well outside the definition of terrorism given in the Act.

Thus, as a consequence of the vague and wide ranging definitions present in the Act, requirements needed for a case to be labeled as an 'act of terror' have often been met in situations which fall well short from an actual act terrorism as properly understood. Furthermore, Section 6(2) of the Act[9] lists about 18 acts that fall within the meaning of 'terrorism' Some of these may well apply to some acts of terrorism the list generally refers to can be deemed to be no more or less than common crimes. Section 7[10] then goes on to state that 'death or imprisonment for life' is the

[7] S. 6(1) of the ATA, 1997 reads,
In this Act, "terrorism" means the use or threat of action where: (a) The action falls with the meaning of sub-section (2). And (b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or 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.

[8] (Pakistan Today, 2013)

[9] In this Act "terrorism" means the use or threat of action where:
(b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or
(c) The use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause, or intimidating and terrorizing the public, social 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.'

[10] S.7, ATA, 1997, "Punishment for acts of terrorism.- whoever commits an act of terrorism under Section 6, whereby (a) death of any person is caused, shall be punishable, on conviction, with death or with imprisonment for life, and with fine; or (b) he does anything like to cause death or endangers life, but death or hurt is not caused, shall be punishable, on conviction, with imprisonment for description for a term which shall be not less than five years but may extend to fourteen years and with fine: (c) grievous bodily harm or injury is caused to any person, shall be punishable, on conviction, with imprisonment of either but may extend to imprisonment for life and shall also be liable to a fine; or (d) grievous damage to property is caused, shall be punishable on conviction, with imprisonment, of either description for a term not less than ten years and not exceeding fourteen years, and shall also be liable to a fine: or (e) the offence of kidnapping for ransom or hostage-taking has been committed, shall be punishable, on conviction, with death or imprisonment for life and shall be liable to forfeiture of property; or (f) the offence of hijacking, has been committed, shall be punishable, on conviction, with death or imprisonment for life, and shall also be liable to forfeiture of property and fine; (g) the act of terrorism committed falls under Section 6(2) (f) and (g), shall be punishable, on conviction, with imprisonment of not less than six months and not more than three years

available punishment for certain actions. To give such a piece of legislation precedence over the JJSO has led to a number of unjust trials and convictions of juvenile terrorists.

An example of an unsafe convictions was seen in the case of Zafar Iqbal[11] who was alleged to have shot his father during a heated argument during a dispute over Zafar's inheritance and has been fronting a death penalty sentence since the age of eleven when convicted on 6th April, 2003. A case such as this quiet and evidently does not fall within the realm of the 'terrorism' envisaged by the Anti-terrorism Act.

However, Zafar was still tried as a terrorist based on the view of the trial judge that the murder of father in cold blood by the son was sufficient enough to create an environment of insecurity as well as terror for the people within the locality: Zafar was set to be executed in 2008 but was granted a pardon by his family members. According to sharia law, the family of the deceased can pardon the accused and halt his execution. However the ATA has the power to suspend any mercy provision granted to the convict. Thus Zafar still faced the possibility of execution under the ATA and the pardon had on effect on his sentence.

A similar case to consider is that of Shafqat Hussain[12], who was arrested at the age of 14 and was tried and given the death penalty sentence by an anti-terrorism court after reaching majority. Shafqat was convicted for allegedly kidnapping and murdering. His conviction was based on a single piece of evidence: a 'confession' that he had made after 'nine days of savage beating and torture' as stated by Shafqat himself. There was no other evidence that linked Shafqat to the crime. Yet, on August 25th 2015, Shafqat was executed as a result of the harsh sentence given to him under the ATA[13]. More recently, the Peshawar High Court (PHC) has suspended a death penalty sentence given to Haider Ali, a juvenile offender[14]. Ali's lawyer petitioned the court to review the case as a result of which the court stayed the execution while the case is reviewed. Haider Ali was arrested during the military operation for suspicion involvement in terrorist activities and was given the death penalty by a military court. His lawyer argued that Ali was 14 years of age when

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and with fine; or (h) the act of terrorism committed falls under clauses (h) to (n) of sub-section (2) of Section 6, shall be punishable, on conviction, to imprisonment of not less than one year and not more than ten years and with fine; and (i) any other act of terrorism not falling under Clauses (a) to (h) above or under any other provision of this Act, shall be punishable, and not less than six months and not more than five years or with fine or with both"

[11] (Justice Project Pakistan, Repreive , 2014)

[12] (Justice Project Pakistan, Repreive , 2014)

[13] (Dawn News, 2015)

[14] (Dunya News, 2015)

arrested and was never informed of the charges held against him. Sentencing a juvenile offender to death is prohibited by international law[15]. To give a child a sentence of execution without even informing him of the charges against him is a world away from being fair or just. Thus it is safe to say that a recent report by the Justice Project Pakistan[16] has rightly pointed out five major flaws within the ATA. The report states as follows:-

"*1. The definition of 'terrorism' under the current legislation is vague and overly broad, bearing little relationship to terrorism as it is commonly understood;*

2. Pakistan's anti-terror laws are being grossly overused, often in cases that bear no relation to terrorism;

3. By consequence, an alarmingly high number of defendants have been sentenced to death after being rushed through trials in which many fundamental rights were explicitly suspended;

4. These defendants faced a greatly heightened risk of torture by police, an endemic problem in Pakistan;

5. All the while, the legislation as it currently stands has failed to create a meaningful deterrent effect against acts of terrorism; and this will only be exacerbated by forthcoming anti-terror legislation."

Purpose behind Anti-terrorism laws and Their Impact

Where it seems as though these Acts and measures introduced were all a part of the Pakistani Government fulfilling its role under Article 35[17] of the Constitution and for matters related to national security. It must be noted that Article 35 of the Constitution of Pakistan imposes a duty on the government to 'protect the marriage, the family, the mother and the child.' The apparent justification behind these newly amended laws can in fact be based on this very Article of the Constitution. However, how can one justify potentially taking the life of one child for saving the life of another? Such laws especially in relation to children should be aimed at rehabilitation as opposed to retribution or incapacitation. The hastiness with which these laws were amended after

[15] (Cornell Law School, 2011)

[16] (Justice Project Pakistan, Repreive , 2014)

[17] Article 35, Protection of family, etc.
"The State shall protect the marriage, the family, the mother and the child."

the APS attack in Peshawar[18], is somewhat indicative of the fact that they may not have been given proper thought nor had they been debated over long enough. For laws that take such drastic measures to fight terrorism, one would think it is crucial that they first be well debated over and considered before being passed. Their inadequacy is put forth not merely by the fact that they disregard Pakistan's international obligations and standards required internationally to try juvenile offenders. These laws take away all the basic rights enshrined for children under the JJSO as well as the UNCRC ratified by the Pakistani Government in 1990.

However, Pakistan is not the only country that has taken steps towards enabling its justice system to try juvenile offenders as adults. For instance, India changed its rape laws and reduced the juvenile delinquency age from eighteen to sixteen. The reason for this was the release of a young offender who was seventeen and a half when he partook in the gang-rape of Jyoti Singh popularly referred to as 'Nirbhaya' by the Indian media in 2012.[19] The case generated outrage not only in Delhi but all across the world and various reforms were presented to end violence against women living in India. The biggest concern for people propagating the cause was that had the offender been six months older, he would have been fronting the prospect of capital punishment. However, unlike his fellow convicts the young offender instead was sent to a juvenile reformation home and has since his release been under the care of a non-profit organization.[20] Thus to due to the pressure caused by certain pressure groups, the public at large and the hauntingly vast number of women facing sexual violence; India too changed its laws and reduced the age at which a younger offender could face custodial sentences to sixteen years hoping to prevent such occurrences in the future.[21]

Whilst this prima facie, is seemingly a progressive step towards eradicating incidences which may lead to a miscarriage of justice due to the offender's age and the law requiring juveniles to be treated with care and not being subjected to harsh sentences. Critics, scholars and journalists soon began to identify a number of drawbacks related to this change. They argue, that the system is already poorly equipped with infrastructure and due to a backlog of cases, the juvenile justice system is under public pressure whereby it succumbs to the influence of media trials and protests and allows the fate of juveniles to be determined in an arbitrary fashion. Secondly, the change in

[18] (BBC News, 2014)
[19] (The New York Times, 2013)
[20] (CNN News, 2015)
[21] (First Post India, 2015)

law clearly focuses on retributive justice as opposed to rehabilitating juvenile offenders which is meant to be the primary aim of the law.

The Terrorism laws of Pakistan too seem to have the same flaws. Juvenile offenders as per international standards are not only entitled to all internationally recognized fair trial guarantees that are applicable to adults but courts dealing with such offenders are supposed to take special care and additional protection in ensuring that the rights of juveniles are safeguarded. Proceedings before military courts in Pakistan do not only fall short of these fair trial standards i.e. being tried before a fair and impartial court, the judges in these military courts are not legally trained let alone trained specifically on trying under age offenders the rights that these juveniles have and the principles of juvenile justice. Additionally no right to appeal to a civilian court is available. A written judgment which includes the essential findings evidence and legal basis of the findings is also denied and there is no guarantee that the hearing will be a public one.[22]. The 21st Amendment to the Constitution of Pakistan reiterates the necessity of such courts. However, the extra safeguards provided for the rights of children must be taken into consideration by the lawmakers as well.

It is the duty of the prosecution to refute the presumption of *doli incapax*[23] and prove that the convicted juvenile was able at the time of committing the crime to sufficiently distinguish between right and wrong. A trial can successfully result in a conviction only if the prosecution manages to adequately rebut this presumption. As discussed earlier, this was not the case in Shafqat Hussain's trial and in spite of that he was executed last year. Also in Zafar Iqbal's case, the evidence presented during the trial against him was, on the judge's own valuation flawed.[24] The judge also admitted that the prosecution had failed to credibly prove motive. Moreover the judge excluded the ballistics evidence since the police was not able to have it forensically examined and the eyewitness testimony was held to be "not confidence inspiring". Yet Zafar, a juvenile, was deemed a convicted terrorist who received the death penalty in less than three weeks [25]

[22] (Omer, 2015)

[23] *Doli Incapax*:

"Deemed incapable of forming the intent to commit a crime or tort, especially by reason of age (under ten years old)."

[24] (Justice Project Pakistan, Repreive , 2014)

[25] (Justice Project Pakistan, Repreive , 2014)

It seems rather ironic how steps taken to avoid any more children from being killed from terrorist attacks are now putting the lives of underage convicts on the line. In jurisdictions all over the world it is believed that no custodial punishment in any situation should be applicable to children let alone capital punishment.

Why must Juveniles be Treated Differently from Adults?

Statistics and studies show that the adult criminal justice system is ill equipped to meet the needs and requirements of juvenile offenders.[26] Studies carried out in various jurisdictions shows that juveniles offenders tried as adults or moved to adult institutions show a greater rate of recidivism. Thus such measures have a greater tendency to fail as opposed to meeting the objectives they were supposed to achieve in the first place. For instance, a study carried out in the United States of America generated information on how 'transfer laws' had effected general deterrence.[27] The researchers found that the threat of adult criminal sanctions had no effect on the levels of serious juvenile crime.' Additionally according to Singer and McDowell's study, despite widely applied and publicized in the media the law had no deterrent effect. According to Donna Bishop, a Northeastern University researcher, "*Adult processing of youths in criminal court actually increases recidivism rather than [having] any incapacitative effects on crime control and community protection*." [28]

On top of having an already vague legislative frame work to combat terrorism, Pakistan introduced the 21st Amendment and allowed young terrorists to be tried by military courts with the possibility of facing capital punishment in order to avoid monstrosities similar to those which took place at APS in December, 2014 in the future and to decrease the rate of terrorist activities. Despite statistics showing a 70 percent decrease in terrorist Attack by the end of September, 2015; Bacha Khan University was attacked by insurgent groups in January, 2016, [29] thus repeating the atrocities that occurred during the APS attack. A child should never have to face the possibility of facing the death penalty and should be given the greatest chance to be rehabilitated into civil society. How can it be that a child is labeled as a criminal mastermind when underage terrorists are in fact

[26] (UCLA School of Law, 2010)
[27] (UCLA School of Law, 2010)
[28] (The Future of Children, 2008)
[29] (Al-Jazeera, 2016)

themselves victims of terrorist groups? Their impressionable minds are, in fact, targeted by terrorists groups who instill within them perverse ideological beliefs and eventually lure them into becoming soldiers in a war they cannot comprehend or understand.[30] It has been argued that adolescence is a time of complex physiological, psychological and social change.[31] Progression through puberty has been shown to be associated with statistically significant changes in behavior in both males and females and may be linked to an increase in aggression and delinquency.[32]

Conclusion

The fact that such young children are being used by terrorist groups as tools to achieve their motives itself proves that the government has failed to protect these children already and should avoid failing to protect their rights for a second time.
Key policy areas should instead be to rehabilitate juvenile convicts to build a safer community as opposed to giving up on the nation's children and putting an end to their lives altogether or not treating them according to the care and attention a person of their age requires. Rehabilitation being the basis of any sentence given to a child is not only the most just way to deal with his or her case the objective of rehabilitation is also far more easier to achieve because of the child's impressionable mind and the fact that his belief system is still in a developmental stage. Juveniles, in spite of their conduct, must be given a chance to improve and reform themselves. Even if one juvenile is rehabilitated effectively; their narrative can change the way civil society approaches the plight of juvenile delinquents.

[30] (Spiked, 2015)
[31] (National Academies Press, 1999)
[32] Najman et al. 2009

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Savior or Destroyer? Loopholes in the Protection of Pakistan Act, 2014 and its Effect on Human Rights of Citizens

by Sahibzadi Mahnoor Anwar[1]

Abstract

Regardless of the availability of anti-terrorism Laws, Pakistan was undeniably in need of a new legislation, which accorded protection to its citizens and also catered to rising terrorist activities. The need turned dire with events like the attacks on the Jinnah International Airport in Karachi on the 8th June, 2014[2] or the killing of Shia pilgrims in Baluchistan,[3] to name a few. Keeping in mind the posed threats and the urgency of upgrading security, the Parliament soon emerged with a new law; the Protection of Pakistan Act, 2014 (PoPA). The law aims at providing protection to the citizens against "insurrection, waging of war against Pakistan and also for prevention of Acts threatening the security of Pakistan"[4]. The law is in effect two years from its promulgation and is expected to last till mid-2016.[5]

Introduction

PoPA, 2014 is the recent addition to the plethora of laws pertaining to the epidemic like terrorism. The government had initially drafted the Pakistan Protection Ordinance in view of the violence raked up by the Islamist Taliban insurgency all across Pakistan. The Act was expected to be innovative and extensive in nature, effectively guarding the lives and concurrently the rights of the people of Pakistan. The law tabled was quite contrary to what was envisioned. PoPA seemingly contains harsh provisions that promote suspension of rights, accords excessive powers to officials

[1] The author is a student of University of London External Program.

[2] (Dawn News, 2014)

[3] (Dawn News, 2014)

[4] Preamble, The Protection of Pakistan Act, 2014

"WHEREAS it is expedient to provide for protection against waging of war or insurrection against Pakistan, prevention of acts threatening the security of Pakistan and for speedy trial of offences falling in the Schedule and for matters connected therewith or incidental thereto"

[5] S.1 of the Protection of Pakistan Act, 2014

"Provided that this Act shall remain in force for a period of two years from the date it comes into force."

supplemented with a blanket of immunity in case of misuse and linguistic flaws imminent in the final draft are daunting as they are capable of misinterpretation and exploitations. Thus, the provisions of the PoPA require an extensive analysis to finally conclude whether indeed the PoPA is hindering the fundamental rights of citizens.

The PoPA's origins are easily traceable to the U.S. Patriot Act. Act. It is criticized to have exposed the citizens to more risks then the Act aims to avert. Opposition leaders, journalists, the legal fraternity, human rights Activist and members of civil society, all have expressed serious concerns over the "draconian" nature of the law and its implications on the society and their rights. The legislators concede to the harshness of the law and agree that it implicitly defies human rights but they also hurl justifications like, "*The Constitution of Pakistan allows for special measures and suspension of basic rights enshrined in the document when it comes to the 'safety and integrity of Pakistan"* and that desperate times call for desperate measures. One such example is Article 8(3) of the Constitution of Pakistan, 1973[6], which allows certain Acts of Parliament to override the fundamental rights of citizens enshrined in the Constitution of Pakistan. However, the PoPA is not a part of the Acts of Parliament which fall within the purview of Article 8 (3). Therefore, fundamental human rights cannot be violated during the PoPA's operation. "*The government has no concrete or long-term solutions; that our laws aren't good enough, nor is our legal system, nor are our law enforcers, and, indeed, nor are our legislators. It tells us that we are short on ideas and will. Terrorism and militancy is a problem that we have been facing for years — it is hardly a sudden phenomenon that could ostensibly justify expedience under the garb of haste*"[7], explains the editor of Tribune Pakistan.

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[6] Article 8(3) of the Constitution of Pakistan, 1973, Laws inconsistent with or in derogation of fundamental rights to be void.

(3) The provisions of this Article shall not apply to :-

(a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or

(b) any of the:-

(i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii)other laws specified in Part I of the First Schedule;

And no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

[7] (The Express Tribune, 2014)

The "rights" debate that this Act has stirred will be the main subject of the paper. We will further analyze the scope and extent to which this Act infringes fundamental rights. The paper will also focus on highlighting drafting flaws that are pertinent in contributing to the defiance that this Act is said to host.

Understanding Rights of Citizens

In order to understand how the Act adversely affects human rights, we first need to recognize the rights that may be suspended under this Act and their importance. The most basic and significant right that a human has is the "right to life' covered extensively in all legal jurisdictions. Pakistani citizens are accorded this fundamental right by Article 9 of the Constitution of Pakistan, 1973[8] and Article 3 of the UDHR[9] as Pakistan is signatory of the declaration. The right is integral, evidenced by the fact that human rights conventions and laws not just accord weightage to it but are premised on the idea of safeguarding and respecting life. Article 10 of the Constitution[10] further provides

[8] Article 9 of the Constitution of Pakistan, 1973, Security of person.
No person shall be deprived of life or liberty save in accordance with law.

[9] Article 3, Universal Declaration of Human Rights
Everyone has the right to life, liberty and security of person.

[10] Article 10 of the Constitution of Pakistan, 1973, Safeguards as to arrest and detention
(1)No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.
(2)Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
(3)Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention.
(4)No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorize the detention of a person for a period exceeding 17[three months] 17 unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of three months, unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.
Explanation-I: In this Article, "the appropriate Review Board" means:-
(i) in the case of a person detained under a Federal law, a Board appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court; and

protection of this right by providing safeguards against arbitrary arrest or detention. The PoPA envisages preventive detention as a legitimate means of combating terrorism.[11] However, in light

(ii) In the case of a Person detained under a Provincial law, a Board appointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons, each of whom is or has been a Judge of a High Court.
Explanation-II: The opinion of a Review Board shall be expressed in terms of the views of the majority of its members.
(5)When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, 19[within fifteen days] 19 from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:
Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.
(6)The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.
(7)Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:
Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy 20[or who is acting or attempting to act in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity] 20.
(8)The appropriate Review Board shall determine the place of detention of the person detained and fix a reasonable subsistence allowance for his family.
(9)Nothing in this Article shall apply to any person who for the time being is an enemy alien.

[11] S. 6, Protection of Pakistan Act, 2014, Preventive Detention.—(1) The Government may by an order in writing authorize the detention of a person for a period specified in the order shall not exceed ninety days if the Government has reasonable grounds to believe that such person is acting in a manner prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and service:---
Provided that detention of such person shall be in accordance with the provisions of Article 10 of the Constitution:
Provided further that without prejudice to the above, an enemy alien may be detained by the Government to prevent him from acting as aforesaid for such period as may be determined by it from time to time in accordance with Article 10 of the Constitution.
Explanation: A person connected or reasonably believed to be connected with the preparation, attempt or commission of a scheduled offence or a person acting in concert or under direction of an enemy alien, or a person falling under sub-section (5) of Section 5 shall be deemed to be a person acting in the manner stated above.
(2) In areas where the Federal Government or the Provincial Government has called Armed forces in aid of civil power under Article 245 of the Constitution or where any civil armed force has been called by the Federal Government or Provincial Government in aid of civil power under the Anti-terrorism Act. 1997 (XXVII of 1997), the said requisitioned force may detain any enemy alien or militant, in designated internment camps after a notification to that effect:---
Provided that detention of such person shall be in accordance with the provisions of Article 10 of the Constitution.

of the poorly worded provisions of PoPA which also do not provide for any concrete grounds for detention; one may argue that arrests can be made arbitrarily by law enforcement agencies under this Act. Accordingly, one can conclude that the PoPA's enforcement and its legislative loopholes are severely violating Pakistani citizens' fundamental right to life as envisioned under Article 9 and 10 of the Constitution.

An important aspect of a society is acknowledging boundaries and refraining from intruding into private spheres of life and property. This right is also undeniably fundamental as stated in Article 14[12] of the Constitution of Pakistan and is absolutely crucial for a liberated and democratic society. Article 12 of the UDHR explains;

"*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks*".

The right is premised upon respecting the ability of individuals to be solely entitled for to their private matters, regardless of whether they are tangible or intangible. Therefore one's house, office, domestic matters and personal decisions are only his/her business. In taking away a Pakistani citizen's right to privacy, the PoPA is not only violating their fundamental rights but is also violates of international law principles.

The right to a fair trial is crucial to any legal system. The entire premise of a law is to ensure that justice is ensured at all times, even when it is during conflict. Hence, a fair trial is imperative in reaching that outcome. Every individual is entitled to fair proceedings according to Article 10 of

(3) At any time during the said notification or upon its withdrawal, such interne may be handed over to Police or any other investigating agency for formal investigation and prosecution.
(4) The Federal Government shall make Regulations to regulate the internment orders, internment camps, mechanisms for representation against the internment orders and judicial oversight of such camps, subject to the provisions of sub-section (2) of section 9.
(5) Any person, arrested or detained by the armed forces or civil armed forces kept under arrest or detention before the coming into force of the Prevention of Pakistan (Amendment) Ordinance, 2014 (Ordinance I of 2014) shall be deemed to have been arrested or detained pursuant to the provisions of this Act if the offence in respect of which such arrest or detention was made also constitutes an offence under this Act.

[12] Article 14 of the Constitution of Pakistan, 1973, Inviolability of dignity of man, etc.
(1)The dignity of man and, subject to law, the privacy of home, shall be inviolable.
(2)No person shall be subjected to torture for the purpose of extracting evidence.

UDHR and Section 10A of the Constitution of Pakistan, 1973[13]. A person is to be tried by an impartial tribunal and in attunement to the Constitution. Another significant component of justice is ensuring that a person is convicted after a trial, this has been incorporated as a right in Art 11 of UDHR[14]. In allowing preventive detention, the PoPA is not only encouraging impunity but is also denying citizen's their right to due process.

Freedom of speech entitles individuals to divulge their opinions, expressions, ideologies and beliefs. It is placed as an edifice of a democratic society. This right has been granted by Art 19[15] of the Constitution. UDHR describes the right in Article 18[16] and Article 19. Other liberties that the PoPA threatens to infringe include right to property as per Article 24[17] of the Constitution

[13] Section 10A of the Constitution of Pakistan, 1973, Right to fair trial:
For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

[14] Article 11, Universal Declaration of Human Rights
1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. 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.

[15] Article 19, Universal Declaration of Human Rights
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[16] Article 18, , Universal Declaration of Human Rights:
"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"

[17] Section 24 of the Constitution of Pakistan, 1973, Protection of property rights
(1)No person shall be compulsorily deprived of his property save in accordance with law.
(2)No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.
(3)Nothing in this Article shall affect the validity of :-
(a)any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or
(b)any law permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or
(c)any law relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be evacuee property under any law); or

which allows a person to dispose and utilize their land according their personal will. Right to security is a qualified right that every individual is entitled to. The state is under a positive duty to ensure the safety of its citizens against all evil, emanating internally or externally. A person should not be tortured under any circumstances, no matter how grave the issue is. This insurance is provided in Article 14 of the Constitution and Article 22 of the UDHR. This right has been overtly discussed to be rigid and should not be suspended for issues of state security.

Provisions of the PoPA and their Impact on Human Rights

The Act encapsulates numerous provisions that threaten the fundamental rights that are enshrined in Pakistan's Constitution. We begin by examining Section 3 of PoPA, 2014[18], which excessively empowers the officials to exercise force against anyone they reasonably apprehend to be causing trouble. The force applied can be as grave as shooting on sight. The Act does mention that the force needs to be 'appropriate' and proportionate to the circumstances in which it is being used but, it is mostly construed subjectively by law enforcement bodies due to a lack of a concrete definition as to what is appropriate and due to the wide purport of the term, 'reasonable apprehension' . The official's power to apply force is largely absolute since it will be only in extraordinary circumstances that a legal proceeding is brought against an official for the use of excessive force. Consequently, innocent victim families are robbed of legal recourse and there is

(d)any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or

(e)any law providing for the acquisition of any class of property for the purpose of

(i)providing education and medical aid to all or any specified class of citizens or

(ii)providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or

(iii)providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves ; or

(f) any existing law or any law made in pursuance of Article 253.

(4) The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court.

[18] S. 3, Protection of Pakistan Act, 2014, Use of armed forces and civil armed forces to prevent scheduled offences.

(1) Any police officer not below BS-15 or member of the armed forces, or civil armed forces who is present or deployed in any area may, on reasonable apprehension of commission of a scheduled offence after giving sufficient warning, use the necessary force to prevent the commission of a scheduled offence, and in so doing shall, in the case of an officer of the armed forces or civil armed forces, exercise all the powers of a police officer under the Code.

no accountability for impunity. This immunity has been awarded by Section 20[19] of the law. It takes away the right of remedy and reparations from the innocent or those wrongly convicted, as according to the section, any action performed by the law enforcement agencies in 'good faith' won't be questioned by the judiciary. It is unclear as to what 'good faith' hopes to include and it is feared that the law enforcement agencies will use this to commit grave violations of fundamental rights with impunity.

The Act stands in omitting procedural technicalities in arrests, searches and detention. The requirement of issuing a warrant has been conveniently excluded. Providing reasons for arrest is not a requirement under this Act and neither is it a requirement to take consent of victims for searching their premises. A suspect can be detained for long extensive periods on mere suspicions and remand for a continuous of 60 days is available to them. However, many victims are not informed of their rights while being taken into detention and thus, many do not avail their right to a remand due to a lack of awareness. Section 15 of the Act[20] levies the burden of proof upon the accused and presumes the suspect to be guilty until he proves himself to be otherwise. This defies the legal maxim, "innocent until proven guilty" which is said to be the cornerstone of all legal systems. Furthermore, Section 9 of the PoPA[21] safeguards the State against being held accountable for withholding information regarding the whereabouts of the suspects under interrogation.

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[19] S. 20, Protection of Pakistan Act, 2014, Savings.--No member of the police, armed forces or civil armed forces acting in aid of civil authority, Prosecutor General, a prosecutor, Special Judicial Magistrates or the Judge of a Special Court shall be liable to any action for the acts done in good faith during the performance of their duties.

[20] S. 15, Protection of Pakistan Act, 2014, Burden of proof.—(1) An enemy alien or a militant financing the charge of a scheduled offence on existence of reasonable evidence against him, or a person arrested in preparation to commit or while attempting to commit such an offence shall be presumed to be engaged in waging war or insurrection against Pakistan unless establishes his non-involvement in the offence.

(2) Any person apprehended in course of preparation, attempts or commission of a scheduled offence and from whom any weapon, material, vehicle, article or instrument designed for or capable of being used to commit or to facilitate the commission of the offence of bombing, suicide bombing or target killing or grievous hurt shall be presumed to be guilty of preparation, attempt or commission, as the case may be, of a scheduled offence.

Explanation: A cell phone or other instrument that contains logs or evidence of calls or messages made or received that facilitates the preparation, attempt or commission of such an offence, shall be deemed to be such an instrument and any record thereon or therein shall be admissible in evidence.

[21] S. 9, Protection of Pakistan Act, 2014, Place of inquiries, investigations and trials etc.--(1) The Government, on the report of a prosecuting agency, may determine the place of custody, inquiry, investigation and trial of a scheduled offence anywhere in Pakistan.

The scheduled offences under the Act have an expansive nature and are too restrictive of human behavior. The Act inclines towards criminalizing certain standard actions. It imposes sanctions for acts as miniscule as damage to energy sources, such as damage to generators, transformers, etc. [22]

Drafting Flaws of PoPA and their Effects

The Preamble of the Act clearly states that this Act has been engineered for the protection of citizens against the prevalent terrorist Activities. It is odd that one only finds numbered provisions that directly address protection of citizens. In contrast, we find protection of the State, its machinery, its officials and armed forces exclusively dealt with in the Act. The security of the 'ordinary person' seems secondary to that of 'important personalities'. The question then raised is, does the Act only cater to a section of the population? How effective is it in according general protection?

PoPA's final draft displays an array of problems pertaining to its drafting. The most evident of these is the imprecise definitions leading to ambiguity in understanding and consequentially in application too. They are expansive in nature and are open to varied interpretations. S. (2)(d) of the PoPA[23] describes the phrase "enemy alien" as any person with an unascertainable identity as a

(2) Subject to the Constitution, (a) the Government, Joint Investigation Team, armed forces or civil armed forces may, in the interest of the security of its personnel or for the safety of the detainee or accused or intern, as the case may be, or for any other reasonable cause withhold the information except from a High Court or the Supreme Court regarding the location of the detainee or accused or intern or internment center established or information with respect to any detainee or accused or interne or his whereabouts:---

Provided that the judge or judges to whom disclosure is made may decide to treat it as privileged information in the public interest; and

(b) the Government may not in the interest of the security of Pakistan disclose the grounds for detention or divulge any information relating to a detainee, accused or interne who is an enemy alien or a militant.

(3) A person convicted of a scheduled offence subject to direction of the Government may be confined at any place in Pakistan including the prisons established by the Provincial and Federal Governments.

[22] Scheduled Offence No. ix of the Protection of Pakistan Act, 2014

(ix) destruction of or attack on energy facilities including dams, power generating and distributing systems including stations, lines and poles;

[23] S (2)(d) of the Protection of Pakistan Act, 2014, Definitions

In this Act, unless there is anything repugnant in the subject or context,---

(d) "enemy alien" means a militant

(a)whose identity is unascertainable as a Pakistani, in the locality where he has been arrested or in the locality where he claims to be residing, whether by documentary or oral evidence; or

(b)who has been deprived of his citizenship, under the Pakistan Citizenship Act, 1951 (II of 1951), acquired by naturalization;

Pakistani, established either by documentation or oral evidence. The definition would also presumably include within its purview those who have been denied citizenship under the Pakistan Citizenship Act. Prima facie, the legislative intent of the definition may be to accommodate foreign insurgents presumably the extremist groups. TTP, ISIS and Daish etc. However, due to the unclear wording of the provision, the definition simultaneously also leaves Afghani refugees, trafficked Philippine nationals, Bangladeshi and Burmese laborers brought in through illegal means vulnerable to the Act. The ambit of who qualifies as an "alien' is so expansive that in circumstances it may also enlist internally displaced citizens who commonly do not possess written documentation and at times neither oral evidence to establish their citizenship. Obviously women and children will also be subjected to this Act if they fall within the definition of who is an 'alien'. This probable circular effect may strip many innocent of the minimalistic protection that they are guarded by.

The nebulous scripture of the Act comprises of inaccurate use of words contributing to the ambiguity. The phrase 'enemy alien' is also suggestive of PoPA's defiance to rights. The use of the word "enemy' implies that a person is deemed to be a convict on mere apprehension and prior to a proper trial. It is in contravention with the legal maxim that "no one should be condemned unheard". The provisions are undeniably in derogation to the fundamental rights of citizens, but the language only worsens the already existing problems.

The obfuscation ensues to the definition of 'military' laid down in S. (2) (f) of PoPA[24]. The definition is simplistic yet imprecise. It states that insurrection by a person against Pakistan will make him a militant for the purposes of this Act. A general definition of the word insurrection is

[24] S. (2) (f) of Protection of Pakistan Act, 2014, Definitions
(f) "militant" means any person who:
(a) wages war or insurrection against Pakistan, or
(b) raises arms against Pakistan, its citizens, the armed forces or civil armed forces: or
(c) takes up, advocates or encourages or aids or abets the raising of arms or waging of war or a violent struggle against Pakistan; or
(d) threatens or acts or attempts to act in a manner prejudicial to the security, integrity or defence of Pakistan; or
(e) commits or threatens to commit any scheduled offence;
(i) a person who commits any act outside the territory of Pakistan for which he has used the soil of Pakistan for preparing to commit such act that constitutes scheduled offence under this Act and the laws of the State where such offence has been committed, including an act of aiding or abetting such offence; or
(ii) any person against whom there are reasonable grounds that he acts under the directions or in concert or conspiracy with or in furtherance of the designs of an enemy alien;

"an act of revolt, rebellion or resistance against the civil authority or the government"[25].By this general definition, people who went on a movement of civil disobedience on the call of Imran Khan (a prominent political leader of the opposition) by refusing to pay taxes and bills could also have been termed to be insurrected for the purposes of this Act Expression of dissent over the actions of the government is an inherent right and an integral facet of democracy. The PoPA tends to criminalize freedom of expression, which will only damage the modicum of democratic atmosphere found in the State.

The definition of militant also includes someone who "*raises arms against Pakistan, its citizens, the armed forces or civil armed forces...*" The first question that begs attention is how is 'raises arm' to be construed? What Actus Reus does it encapsulate? The term 'raises arms' is metaphorical to starting a fight/war but the Act in S (2) (f) (i) has already, specifically talked of "waging war". The phrase is vague and warrants explanation. Further when we talk of raising arms against citizen and "killing kidnapping, extortion, assault or attack on citizens' we suspect an overlap with criminal law. The similarity in the Actus Reus only differs at mens rea, established late in the trial. We find no precedence explaining its meaning and we are exclusively relying on the interpretation of an official. Is it then fair to predict that a militant might be misconstrued to be may be a convict under CPC and vice versa. Are target killers of Karachi militants or murderers or both? The ambiguity that will flow in the application of provisions is eminent and daunting. The Act lacks specificity; its expansive approach towards Actus Reus is susceptible to exploitation.

Numerous provisions of PoPA herald reasonable assumptions to be sufficient rather than establishing standardized testing methods. We also come across a dichotomy in the characteristics of reasonableness. In places it is entirely subjective as seen in provisions that empower officials and in others, as in S (2) (f) (e) (ii) of the Act, it is left unspecified. Further carving discretion for officials in respect to what is reasonable is troublesome, this will give them an absolute power to Act. The Act does not emphasize on how checks and balances will be maintained. Such extensive discretion has never been lucrative. Human rights activists fear that such powers coupled with no system for effective accountability will further persecute the already oppressed minorities of Pakistan. Proponents of this Act boast a defense that only those who are engaged in mischief will be worried and those innocent have nothing to fear. What the executive and the supporters of PPA

[25] (Merriam-Webster Dictionary)

fail to understand is that the application of law is neither smooth nor free of political agendas and will obviously be misused and its boundaries will be infringed**.**

The definition of 'terrorist activities' has no defined bounds, an act as remotely controversial as a protest against the government or any form of criticism may qualify as hurting the integrity or security of the state. The offensive acts mentioned are so obscure that they include damage to infrastructure, devices, cybercrimes and adverse intrusion in information technologies. The act further becomes unreasonable when it mentions collection of literature pertaining to terrorist activities or war to also be deemed criminal- does this mean that the media, journalists and all other proponents of the freedom of expression are vulnerable to the Act? We fail to locate any precise definition of cybercrimes. Secondly, the degree and magnitude which will be deemed offensive under this Act is open for interpretation. Mr. Mazhar Illahi explains "*The terms are so ambiguous that a non-violent online political protest might be considered 'threatening the security of Pakistan*".[26] "The United Nations Special Rapporteur on Human Rights and Counter Terrorism has criticized legal definitions of terrorism that include property crimes, saying they should be limited to Acts "*committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages*". [27]

Another point of bewilderment is the "Removal of difficulty" clause under Section 25 of the PoPA, 2014.[28]

Sub-section 1, is in obvious contradiction with the inherent character of the judiciary that is to interpret laws in attunement with the intention of the parliament. Furthermore, sub-section 2 is incomplete as it does not specify the procedure that has to be undertaken in order to present the 'difficulty' to the parliament and how the outcome regarding the same is to be reached. The perplexity that arises from this drafting flaw is pertinent and raises question like *"…whether, in view of subsection (2), the Order of President shall be treated as a Bill in both the Houses of*

[26] (Illahi, 2014)

[27] (Human Rights Watch, 2014)

[28] S. 25 of the Protection of Pakistan Act, 2014, Removal of difficulties

(1) If any difficulty arises in giving effect to any provision of this Act, the President may make such order, not inconsistent with the provisions of this Act, as may appear to him to be necessary for the purpose of removing such difficulty.

(2) An Order under sub-section (1) shall be laid before each House of the Parliament in its first sitting after the Order is made."

Parliament? If yes, whether this is possible in the absence of any constitutional provision to this effect?"[29]. Moreover, another question also arises. Are there distinct parameters of "difficulty" and "ambiguity", and is the President vested with recourse to pass an order over the crucial point of legislative difficulty/ambiguity which is pending adjudication before the superior courts? In view of these important questions, one must also consider whether any such legislative authority can be delegated to the President in view of the constitutional scheme of parliamentary democracy? These questions must be answered by lawmakers first in order to fully assess the validity of the PoPA.

Appropriate security to judges and witnesses is nebulous and inadequate in the legislation drafted previously. The term "appropriate" needs to be defined by the judiciary in order to assess the level of protection judges and witnesses require. Hurling those who aid the reformers into more risk will deter witnesses from taking the rostrum and will leave judges left more subjected to harm than ever,

Conclusion

The Human Rights Commission of Pakistan (HRCP) says the Ordinance gives absolute power to the security forces and legitimizes 'safe houses' operated by the law enforcement agencies for interrogations[30]. What the security agencies had been doing covertly will now be done under the legal umbrella. The Act defies the concept of rule of law; it empowers the state officials and robs legal recourse consequentially decreasing the importance of courts and judiciary.

Laws have previously also been used for political manifestation i.e. blasphemy laws being an evident example. This Act is capable of being utilized as an instrument to persecute minorities.

The Center for Research and Security Studies (CRSS), Islamabad, also opposes a practically 'carte blanche' to the security forces.[31] The lack of accountability will render this law to be an effective tool of oppression and impunity rather than one of relief and guardianship.

Anti-Terrorism Act 2013 provides protection of judges and witnessing in terrorism cases. Inadequacy of security provided has been witnessed time and again, with attacks on judges at various instances such as in Karachi. With increased impunity, there is a chance that judges and

[29] (Dawn News, 2014)

[30] (Human Rights Commission of Pakistan, 2014)

[31] (Center for Research and Security Studies, 2014)

witnesses will be more vulnerable than usual, The Act does not accommodate the surged threat in the protection accorded in PoPA and one can only hope that the governments makes amendments like ensuring masked proceedings.

Although ruling party MPs tried to justify some PoPA provisions by drawing on anti-terror laws in TADA (India) and the Patriot Act (USA), yet most speakers expressed serious reservations, saying the establishment of special courts under PoPA and also authorizing establishment of military courts in a democratic system under the Pakistan Army Act, 1952[32] amounted to encroaching upon the independence of the judicial system and also restricted the powers and functions of the same. Such parallel systems will cause severe violations of human rights and will contravene all principles of human rights law, especially the right to a fair trial.

One cannot deny the need for affective retooling and empowerment of forces to combat the insurgents and a fair point raised by analysts is that it will facilitate the army to obliterate the miscreants as it removes many legal impediments that hindered their purpose[33]; but this will all be at the expense of exposing the rights of masses to risks and violations.

These rights are integral to every society and are the most basic of rights that the state and its institutions are to accord and safeguard. Respecting rights is not just a dominating character of a democratic state but should also be adhered to in times of dictatorship.

[32] (The Nation, 2015)

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