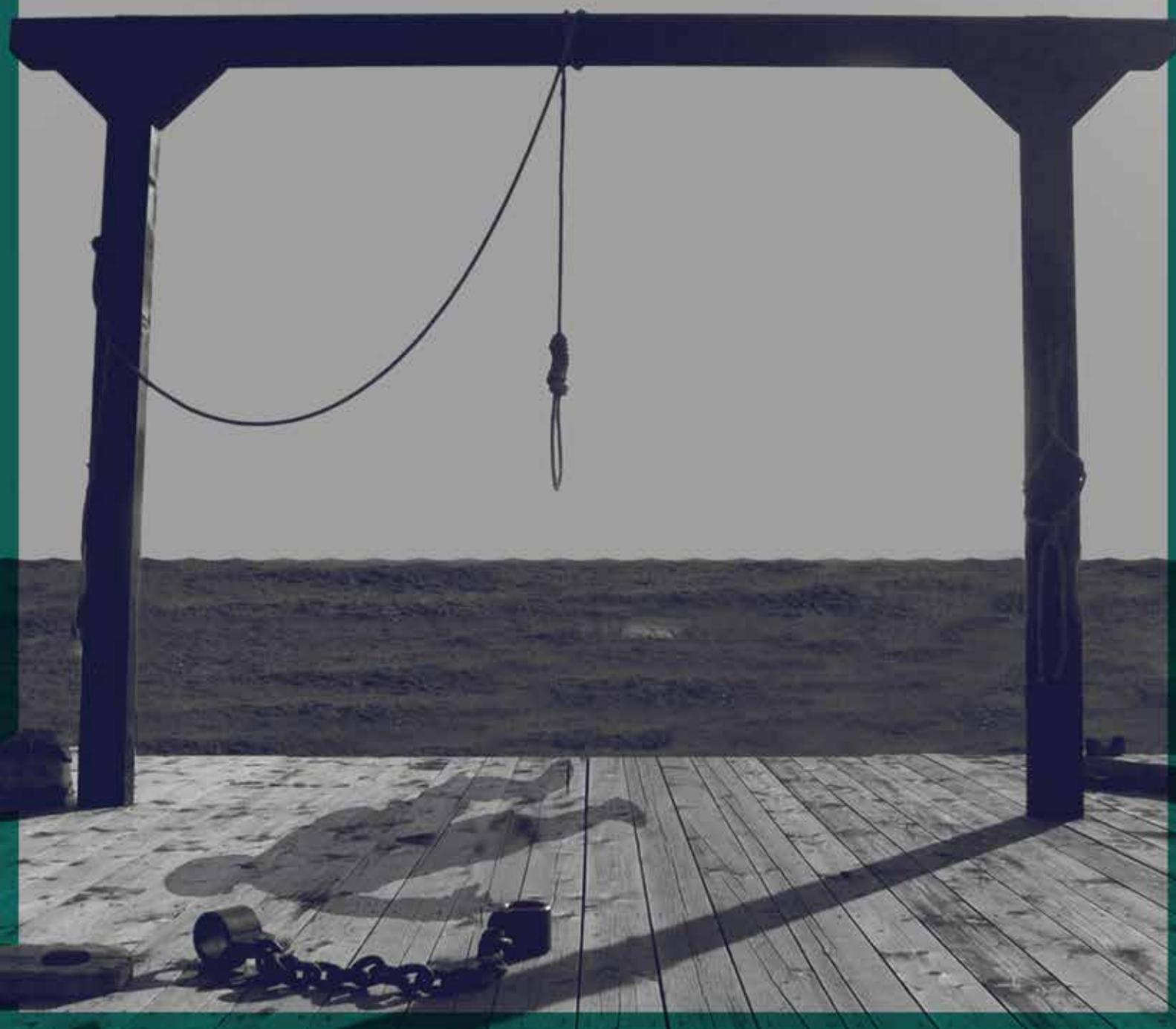


TRIAL AND TERROR

THE OVERREACH OF PAKISTAN'S
ANTI TERRORISM ACT



DEDICATED TO

The lawyers and investigators who combed through countless records to unearth the cases highlighted in this report.

JUSTICE PROJECT PAKISTAN

JPP is a legal action non-profit organization based in Lahore, Pakistan. We provide direct pro bono legal and investigative services to the most vulnerable Pakistani prisoners facing the harshest punishments, particularly those facing the death penalty, the mentally ill, victims of police torture, and detainees in the War on Terror.

JPP's vision is to employ strategic litigation to set legal precedents that reform the criminal justice system in Pakistan. We litigate and advocate innovatively, pursuing cases on behalf of individuals that hold the potential to set precedents that allow those in similar conditions to better enforce their legal and human rights.

Our strategic litigation is coupled with a fierce public and policy advocacy campaign to educate and inform public and policy-makers to reform the criminal justice system in Pakistan.

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INTRODUCTION

The Anti-Terrorism Act (ATA), Pakistan's primary anti-terrorism legislation, was promulgated in 1997. The legislative intent underpinning the ATA was to increase the power of law enforcement agencies to prevent and investigate terrorism and create special courts to expedite trials of terrorist suspects¹. However, since its inception, the ability of the law to effectively convict terrorists and fulfil its mandate of reducing terrorism in the country has come under considerable criticism from various stakeholders.

The limited ability of the law to fulfil its mandate gained renewed relevance, and as a result, increased scrutiny, in the wake of Pakistan lifting the de-facto six-year moratorium on the death penalty on December 17, 2014. The original objective of the reinstatement of the death penalty was to execute those convicted of terrorist offences² following the tragic terrorist attack on the Army Public School in Peshawar that resulted in the deaths of over 145 civilians, including 135 children.

However, in March 2015, without any public justification, the moratorium was lifted for all those awarded the death penalty under Pakistan's criminal laws, including for non-terrorism related offences.

Since the moratorium was lifted, the Government of Pakistan has executed more than 480³ individuals, making it the fifth most prolific executioner in the world. Despite the government's predominant narrative claiming that the death penalty is a necessary measure to curb terrorism, only 30 percent of those executed were convicted for crimes of terrorism.⁴ This statistic is greatly problematic in light of the original aim for which the moratorium was lifted - it clearly establishes that the majority of those being executed are not terrorists. There are currently more than 27 crimes that are punishable by death, a vast majority of which fail to meet the "most serious crimes" standard under international law⁵.

In order to determine the efficacy of the ATA in combating terrorism, it is crucial to examine the ways in which it has essentially created a separate legal realm for terrorist offences. It stipulates a parallel set of procedures for the custody, detention, prosecution, and sentencing of terrorism suspects in the country, establishing special Anti-Terrorism Courts (ATCs) for the "speedy trial"⁶ of offences triable under the ATA and authorising policies such as the denial of bail to terrorist suspects, enhanced police powers, extended remand of suspects, preventive detention, and death penalty for certain offences. Additionally, the ATA's broad, vague definition of terrorism has created regressive effects for those who may lawfully be

¹ Anti-Terrorism Act, 1997[ATA], Preamble

² See The Washington Post. "Pakistan Announces A National Action Plan To Fight Terrorism Says Terrorists' Days Are Numbered". 2014. Web. 13 June 2017. Available at https://www.washingtonpost.com/news/worldviews/wp/2014/12/24/pakistan-announces-a-national-plan-to-fight-terrorism-says-terrorists-days-are-numbered/?utm_term=.8a9367080ba6

³ Till September 30, 2017

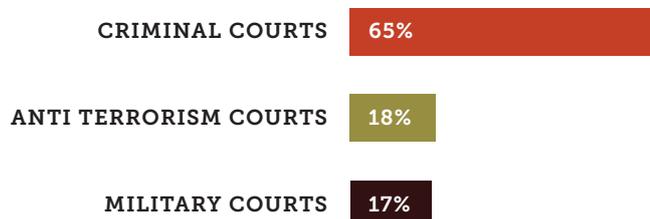
⁴ See Exhibit A

⁵ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art 6(2)[ICCPR]

⁶ ATA, S 13(1)

EXECUTIONS IN PAKISTAN

The 480 prisoners that have been executed since December 2014 were tried under the following courts.



charged for offences other than terrorism, known as “scheduled offences.” In such scenarios, they are deprived of the key procedural safeguards, such as pertaining to custody and detention, that they would be entitled to under Pakistan’s ordinary criminal justice system.

A study by Justice Project Pakistan and Reprieve ‘Terror on Death Row’ discovered that due to the broad scope of the law, almost 86 percent of those sentenced to death under the ATA were convicted for offences that bore little connection to terrorism as it is traditionally defined⁷. This number highlights the great discrepancy between the government’s aim of countering terrorism, that propelled the resumption of executions in December 2014, and the subsequent impact it has had in practice.

In effect, the anti-terrorism regime created by the ATA is being employed by the police and law enforcement as a means to subvert the fundamental rights during arrest, investigation and trial of non-terrorism suspects, as opposed to effectively countering terrorist offences in Pakistan.

This is made worse still by the fact that the ATA provides the death penalty for a broad range of offences including kidnapping for ransom, murder and hijacking. Moreover, those convicted under the ATA are more likely to be awarded the death penalty than those tried under the criminal justice system. Since the lifting of the moratorium over 76⁸ executions were carried out for suspects charged under the ATA. According to Amnesty International’s 2016 Death Penalty report, in 2016 out of a total of 277 death sentences, 31 death sentences were handed out by the ATCs⁹.

OFFENCES OF THE 76 EXECUTED PRISONERS SINCE DECEMBER 2014 CHARGED BY ATCs	TERRORISM	MURDER OVER PERSONAL ENMITY	MURDER DURING ROBBERY	OTHER
	2017	02	01	03
2016	01	01	03	00
2015	24	18	09	14

⁷ Justice Project Pakistan and Reprieve. “Terror on Death Row”. December 2014. [Terror on Death Row] Available on http://www.jpp.org.pk/wp-content/uploads/2017/01/2014_12_15_PUB-WEP-Terror-on-Death-Row.pdf

⁸ Till September 30, 2017

⁹ Amnesty International. “Death Sentences and Executions 2016”. 2017. p.24

The ATA has come under considerable criticism from various stakeholders regarding its inability to effectively try, convict and punish terrorists. In August, 2017, Justice Dost Muhammad Khan authored a Supreme Court judgment¹⁰ criticising the broad application of the ATA in ordinary crimes. In his judgement, he noted that the ATA was a “harsh law” and should not be extended liberally to include the crime of murder or attempted murder for any reason or motive that has no connection with terrorism or militancy.

The international human rights community has repeatedly highlighted the lack of conformity of the ATA with Pakistan’s international legal commitments. The United Nations Human Rights treaty bodies have expressed serious concerns regarding the failure of trials under the ATCs to abide by international human rights standards and urged the Government of Pakistan to introduce significant legal and policy reforms in successive state reviews.

One of the ATA’s most problematic aspects is that juvenile offenders charged under the ATA are deprived of the special procedural safeguards accorded to them under Pakistan’s special regime for trying juvenile offenders (the Juvenile Justice Systems Ordinance, 2000) and guaranteed for all juvenile offenders under international law. ATCs continue sentencing juvenile offenders to death despite the existence of credible evidence in favour of their juvenility.

This was evidenced in the case of Muhammad Iqbal, who was sentenced to death by an ATC in Gujranwala on 5 July, 1999 under the provisions of the ATA. His death sentence was upheld by a Division Bench of the Lahore High Court on 20 March, 2002 and a subsequent appeal was dismissed by the Supreme Court on 11 September, 2002, despite his birth certificate confirming that he had been a juvenile at the time of committing the offence. This had been confirmed by the results of an ossification test, upheld by the trial court.

Following the 2001 Notification, the Government of Punjab issued a letter to the Registrar of the Lahore High Court setting out the eligibility criterion for the special remission for juveniles under the Notification on 18 August, 2003¹¹. Stating that all juvenile offenders were automatically entitled to remission if their death sentences were confirmed by the High Court before 17 December, 2001, the letter included a list of juveniles whose claims the Home Department was directed to forward to “the concerned District and Sessions Judge/Juvenile Court through the concerned Superintendent Jail.”

Despite the existence of the Notification and the letter by the Government of Punjab, juveniles sentenced prior to the enactment of the JJSO continue to be denied its protections¹². Requests by prisoners and/or family members for an inquiry regarding their juvenility under the Presidential Notification, including those identified by the provincial government, continue to be denied by the provincial Home Departments and the Courts.

¹⁰ See, for example, Dawn, SC warns against use of Anti-Terrorism Act over ‘non-terrorist actions’, 15 August 2017, Accessed at: <https://www.dawn.com/news/1351635>

¹¹ Government of the Punjab, Home Department, Grant of Special Remission Under Article 45 of the Constitution to Condemned Prisoners, (Aug 19,2003)

¹² See Death Row’s Children, 19.

Out of the 28 juvenile offenders in Punjab whose names were on the aforementioned list, 10 prisoners were tried by Anti-Terrorism Courts. To date, 4 have been executed, while 3 have been released and 1 is currently awaiting execution. There is a lack of information available regarding the remaining juveniles.

Similarly, on 9 August, 2004, the Government of Sindh issued a letter to an Anti-Terrorism Court, Karachi for the determination of age of 6 juvenile offenders under the Presidential Notification. The ATC, however, dismissed the request alleging that it had become *functus officio* following the conclusion of appeals - its mandate or authority in the case had come to an end.

This report attempts to delineate the plethora of flaws and procedural inadequacies in the ATA that have rendered it ineffective in the context of Pakistan's counter-terrorism efforts. It has been derived from a comprehensive review of 27 cases, as well as interviews of law practitioners and those convicted under the ATA. It is cognizant of the institutional flaws deeply entrenched in the judiciary and law enforcement agencies. Ultimately, it delineates the egregious violations of fundamental rights inherent in the summary and unlawful executions of some of Pakistan's most vulnerable prisoners, whose crimes bear no nexus to terrorism.

INTERNATIONAL HUMAN RIGHTS STANDARDS AND TREATY BODY REVIEWS

The provisions of the ATA, particularly with respect to the death penalty have come under criticism from various United Nations treaty bodies that have reviewed Pakistan's state reports within the past two years. The following standards and recommendations highlight the violations of the Government of Pakistan's international human standards inherent in the application of the ATA.

(i) UNITED NATIONS HUMAN RIGHTS COMMITTEE

The UN Human Rights Committee is the monitoring body of the International Covenant on Civil and Political Rights (ICCPR). Pakistan became a party to the ICCPR in 2010. Following ratification of the UN Treaty, the Government of Pakistan submitted its Initial Report following a four-year delay in 2015.

In its Concluding Observations on Pakistan's Initial report, issued on 23 August, 2017, the Human Rights Committee expressed concern regarding the broad definition of terrorism laid down in the ATA as well as its supremacy over other laws. The Committee particularly noted with concern the trying of juveniles under the ATCs and thereby out of the purview of the Juvenile Justice System Ordinance 2000 (JJSO). The Committee also highlighted the admissibility of confessions made in police custody as evidence in court under the ATA as a matter of concern and additionally highlighted the lack of conformity of the courts' extensive jurisdiction and lack of procedural safeguards with the provisions of the ICCPR.

THE COMMITTEE RECOMMENDED THAT:

"22. The State party should review the Anti-Terrorism Act with a view to aligning the definition of terrorism provided in Article 6 of the Act in accordance with international standards; removing the jurisdiction of the Anti-Terrorism Courts over juvenile offenders; repealing Section 21-H of the Act; and establishing procedural safeguards in the Act and bringing the court proceedings in line with Articles 14 and 15 of the Covenant to ensure fair trials. It should also take the measures necessary and in line with the Covenant to reduce the existing backlog of cases."

(ii) COMMITTEE ON THE RIGHTS OF THE CHILD (CRC)

Pakistan ratified the UN Convention on the Rights of the Child (UNCRC) in 1990. In its Concluding Observations on Pakistan's fifth periodic report issued in July 2016¹³, the Committee on the Rights of the Child (CRC), the monitoring body of the UNCRC, noted with alarm the application of the death penalty on juvenile offenders under the ATA, terming it a human rights violation inherent under the ATA. The Committee additionally observed the juvenile offenders sentenced to death had limited access to procedures for challenging their sentence on the basis of their age. Thereby, the CRC directed the government to ensure that all stages of cases involving juveniles are overseen by juvenile courts, even those concerning terrorism.

(iii) COMMITTEE AGAINST TORTURE (CAT)

Pakistan ratified the UN Convention against Torture (UNCAT) in 2008. The Committee Against Torture, the monitoring body of the UNCAT, in its concluding observations on Pakistan's initial report stated with concern that Pakistan's counter terrorism legislation, chiefly the Anti-Terrorism Act, eliminated legal safeguards against torture that were otherwise provided to persons deprived of their liberty. The Committee noted that the legislation allows security agencies to detain any person suspected of committing an offence under the ATA for up to three months in clear violation of the provision of the Convention. The Committee recommended that the ATA should be repealed or amended to ensure that persons deprived of their liberty had access to legal safeguards against torture and arbitrary arrest and detention.

¹³ Committee on the Rights of the Child, Concluding observations on the fifth periodic report of Pakistan, 11 July 2016, Accessed at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgtfJm%2bHg0lSmJyv0jaC3TzAJeutm6yrgXJIVjuF22ng8BZ7wV1kAzb7NUPDGkasYZmwEAkxcWxJLHQpl07R4Vt5Zh2ids2P%2bUSoPSydL0LF>

¹⁴ Committee against Torture, Concluding observations on the initial report of Pakistan, 1 June 2017, Accessed at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgtfJm%2bHg0lSmJyv0jaC3TzAJeutm6yrgXJIVjuF22ng8BZ7wV1kAzb7NUPDGkasYZmwEAkxcWxJLHQpl07R4Vt5Zh2ids2P%2bUSoPSydL0LF>

ANTI-TERRORISM ACT: A FLAWED LEGAL FRAMEWORK

The ATA, promulgated in 1997 with the stated purpose of “prevention of terrorism, sectarian violence and for speedy trial of heinous offences”¹⁵ is the primary counter-terrorism legislation in Pakistan. It has been supplanted overtime by special laws including the Investigation for Fair Trial Act, 2013 and the Protection of Pakistan Act, 2014. However, it remains the primary law under which all terrorism suspects are tried.

The ATA created special mechanisms for investigation and prosecution of offences that fell within its ambit previously absent in the normal legal system. Key amongst these mechanisms were Anti-Terrorism Courts (ATCs). Such courts are to be established by the government in its discretion and are to be presided over by a judge of the Sessions Court, or an Additional Sessions Judge, or a District Magistrate, or a Deputy District Magistrate, or an advocate with 10 or more years of experience appointed by the government¹⁶. The procedures of the special courts are subject to strict time constraints – the prosecution is provided with 7 days to complete the investigation¹⁷ and the court is provided with 7 days to try the case¹⁸. The recalling of witnesses is forbidden¹⁹ and no adjournments beyond 2 days are countenanced²⁰. Those accused of crimes may be tried in absentia as long as adequate notice concerning the dates of the trial is published²¹. In addition, special ATA Tribunals were established - appeals against the conviction and acquittal of ATCs lies exclusively with such Tribunals, whose decisions were final and no further appeal could be filed.

In addition, the ATA gave the police and armed forces broad discretionary powers to pre-empt and prevent suspected terrorist activity. They may “arrest, without warrant” not only any person who has committed an act of terrorism or a scheduled offence, but also one who is “about to commit” any such act²². They may also “enter and search, without warrant any premises” to arrest or take possession of any “fire-arm” or “weapon” used or “likely to be used.”²³

¹⁵ The Anti-Terrorism Act (Act No. XXVII of 1997) [ATA], Preamble. Available at <http://www.ppra.org.pk/doc/anti-t-act.pdf>

¹⁶ ATA, S. 14

¹⁷ ATA, S.19(1)

¹⁸ ATA, S. 19(4)

¹⁹ ATA, S. 12(3)

²⁰ ATA, S. 19(8)

²¹ ATA, S. 19(10)

²² ATA, S 5(2)(ii)

²³ ATA, S 5(2)(iii)

MEHRAM ALI CASE

Almost immediately after its enactment the ATA was challenged before the Supreme Court in the landmark case *Mehram Ali v The Federation of Pakistan*²⁴. Mehram Ali, member of a Shia organization, was charged with detonating a remote-controlled bomb in the vicinity of the Lahore courts, where two Sunni leaders of an anti-Shia group had been brought for a hearing on 18 January, 1997. The explosion resulted in the deaths of 23 people and injured more than 50. Following the enactment of the ATA, Mehram Ali's case was sent from a Sessions Court judge to a newly established ATC which convicted and awarded 23 death sentences and 550 years of imprisonment. Thereafter, he appealed to the Anti-Terror Appellate Tribunal which upheld its conviction. Following the dismissal, Mehram Ali filed a writ petition under Article 199 of the Constitution of Pakistan before the Lahore High Court which assumed jurisdiction despite the provisions of the ATA which granted exclusive jurisdiction over all appeals from decisions of the ATCs to Special Appellate Tribunals.

The High Court upheld the decision of the ATC leading to an appeal to the Supreme Court. Though the Supreme Court upheld the original decision it also declared the bulk of the ATA, as it existed, to be unconstitutional²⁵. It stressed that no parallel legal system could be constructed that completely bypassed the rules and oversight of the regular legal system, ordering that these special courts would also be subject to the same procedural rules as regular courts, including most importantly, rules of evidence. The decisions of these courts would be subject to appeal before the constitutionally mandated higher courts. These changes were incorporated into the ATA through the Anti-Terrorism (Amendment) Ordinance of 1998. The Mehram Ali decision did much to rectify some of the fair trial issues posited by the promulgation of the ATA and brought the courts within the judicial oversight of constitutional courts. However, many pressing issues that result in potential miscarriages of justice remained part of the ATC system.

²⁴ PLD 1998 SC 1445

²⁵ Charles H. Kennedy, "The Creation and Development of Pakistan's Anti-terrorism Regime, 1997-2002," in *RELIGIOUS RADICALISM AND SECURITY IN SOUTH ASIA*, ed. Satu P. LIMAYE, Mohan Malik, and Robert G. Wirsing (Honolulu: ASIA PACIFIC CENTER FOR SECURITY STUDIES, 2004), 391

Each subsequent amendment to the ATA, between 1998 and 2002, broadened its scope, increasing the offences that could be tried under it. For example, in 2000 during the regime of General Musharraf, the offence of hijacking was included in the ATA, and the Act was prominently used to try the case of “hijacking” against former Prime Minister Nawaz Sharif. This case exemplified the contrast the ATCs provided to the regular legal system by convicting Nawaz Sharif of the offence on evidence that was tenuous at best and would not have been so easily proven, and resulted in such a speedy conviction in a regular court²⁶. Following the 9/11 attacks, General Musharraf’s government was put under international scrutiny and pressure to respond to the menace of terrorism in the country. Pursuant to a UN Security Council resolution, which “obligated all states to amend their anti-terrorism legal regimes to include measures prohibiting and punishing financing to terrorists,” the ATA was amended again²⁷. The ATA was later amended in 2004, 2005, 2010 and twice in 2013, the last three under the new democratically elected government.

In 2004, two new sub-sections were included in the ATA, which gave “right of the appeal” to “the victims or the legal heirs of the victim” against the judgment of the ATC, to be filed in the High Court within thirty days of the ATC decision²⁸. In 2005, there were “further modifications” in the ATA 1997- the word ‘14-years’ was replaced by ‘imprisonment for life’ as far as the maximum jail term for the convicted militants was concerned²⁹. ‘Special Benches’ of High Courts were also established, to hear the appeals of the victims or heirs of the victim³⁰. Terrorism-related cases could also be “transferred from one province to another.”³¹ ATCs could now try offences related to the “abduction or kidnapping for ransom” as well as “use of fire-arms or explosives by any device, including bomb blast, in a place of worship or court premises.”³² In 2009, the government promulgated the Anti-Terrorism Amendment Ordinance (2009) which contained new provisions for new terrorism-related offences to facilitate placing charges against the hundreds of suspected militants in detention³³. The Ordinance also extended the detention period from 30 days to 90 days while the onus of proof was shifted to the suspect³⁴. Moreover, it made “extra-judicial confessions” recorded by security personnel admissible as evidence in ATCs.³⁵

²⁶ *Id* at 14

²⁷ Kamran Adil, “Amendments to Anti-Terrorism Law of Pakistan: An Overview”, *Pakistan Journal of Criminology*; Peshawar 5.2 (Jul-Dec 2013): 140

²⁸ Naeem Ahmed, “Combating Terrorism: Pakistan’s Anti-Terrorism Legislation in the Post-9/11 Scenario”, *JRSP*, Vol. 52, No. 2, July-December, 2015: 121

²⁹ Naeem Ahmed, “Combating Terrorism: Pakistan’s Anti-Terrorism Legislation in the Post-9/11 Scenario”, *JRSP*, Vol. 52, No. 2, July-December, 2015: 122

³⁰ *Ibid*

³¹ *Ibid*

³² *Ibid*

³³ Sitwat Waqar Bokhari, “Pakistan’s Challenges in Anti-Terror Legislation”, *Centre for Research & Security Studies*: 15

³⁴ *Ibid*

³⁵ *Ibid*

The Anti-Terrorism (Amendment) Act 2013 authorized government agencies with "extended powers to seize, freeze and detain property or money of anyone suspected to be using it for financing terrorism."³⁶ It also amended the definition of terrorism to include "foreign government or population or an international organization" under the threat of terrorism³⁷. In addition, it substituted "proscribed organizations" with the phrase, "an organization concerned in terrorism or a terrorist."³⁸ Later in 2013, the Anti-Terrorism (Second Amendment) Act 2013 was passed. It included keeping the "pre-charged detention period" for suspected terrorists at "90 days"; "denying passports and arms licenses to members of banned outfits"; considering "the carrying of explosives without a lawful reason" to be a "terrorist act"; "running illegal FM radio stations and many other violent and suspicious activities as acts of terrorism."³⁹ In addition, the detainees were prohibited to ask for release on bail or to file a petition for habeas corpus in any court of law⁴⁰. The accused were to be presented in court in-camera within 24 hours of their detention⁴¹. The amendment also expanded the definition of the threat of terrorism to include "intimidating and terrorizing the public, social sectors, business community, security forces, government installations, officials and law enforcement agencies" as well.⁴²

However, despite these successive and far-reaching amendments, the ATA remains ineffective in addressing Pakistan's terrorism challenges. This is evidenced by the decision of the Parliament in January 2015 to establish military court trials for terrorism suspects for a period of 2 years despite the existence of the Anti-Terrorism Courts. In March, 2017, the Parliament voted to pass the 23rd Constitutional Amendment renewing the mandate of the military courts for an additional two years.⁴³ It is important to recognize that this extension was not accepted by Parliament without opposition - many argued that no effort had been made to reform the ATA, which manifested in the failure of the Anti-Terrorism Courts. Even the most "vehemently anti-military justice lawmakers and parliamentarians" had no alternative but to support the proposal for another two-year extension.⁴⁴

³⁶ Sitwat Waqar Bokhari, "Pakistan's Challenges in Anti-Terror Legislation", Centre for Research & Security Studies: 19

³⁷ Ibid

³⁸ Ibid

³⁹ Sitwat Waqar Bokhari, "Pakistan's Challenges in Anti-Terror Legislation", Centre for Research & Security Studies: 21

⁴⁰ Sitwat Waqar Bokhari, "Pakistan's Challenges in Anti-Terror Legislation", Centre for Research & Security Studies: 21

⁴¹ Ibid

⁴² Ibid

⁴³ Maria Kari " No sunset for Pakistan's Secret Military Courts" THE DIPLOMAT. 24 April 2017. Available at <<https://thediplomat.com/2017/04/no-sunset-for-pakistans-secret-military-courts/>>

⁴⁴ Ibid

SHABBIR HUSSAIN

Arbitrarily sentenced to death as a terrorist

Shabbir Hussain was arrested on 21 February, 2009 and convicted for kidnapping and murdering the brother of a business partner for ransom by an Anti-Terrorism Court, Lahore on 29 August, 2009. The alleged murder had taken place in Shabbir's house where the business partner's brother Faisal Rasheed was staying on his visit to Lahore. Shabbir claimed that two dacoits had forcibly entered the house at night resulting in the violence that had led to the deceased being killed. It is clear from both the defence and prosecution's version of the story that Faisal Rasheed was voluntarily in Shabbir's house and was killed there later on the same day. Despite the nature of the alleged offence bearing no connection to traditional definitions of terrorism, the ATC accepted jurisdiction in the case, without any discussion.

Shabbir claims that the ATA charge was included by the Police following his inability to pay a hefty bribe. He claims that following arrest he was unlawfully detained at various places for 5 days before he was presented before a Magistrate who granted a police remand for 14 days. During this time, he was tortured severely by strappado (hanging by the wrists), severe beating and rula (damaging veins and nerves in the thighs and calves through use of a bamboo stick). The police asked him repeatedly to ask his business associate for money.

The High Court rejected his appeal and confirmed his death sentence on 1 June, 2011. The Supreme Court subsequently accepted his appeal and converted his death sentence to seven years.

TIMELINE

26 APR 2006

The murder is committed and an FIR is registered

24 MAY 2006

Shabbir is arrested

11 NOV 2007

Shabbir is handed down the death sentence by Session Court, Rawalpindi

10 NOV 2010

Lahore High Court confirm his sentence

22 APR 2011

Supreme Court uphold the sentence

(i) THE VAGUE AND OVERLY BROAD DEFINITION OF TERRORISM

A fundamental flaw within the ATA is the vague and overly broad definition of “terrorism” under its provisions. This allows offences bearing no nexus to militancy and proscribed terrorist networks to be tried under its provisions. A study by Justice Project Pakistan and Reprieve in December, 2014 discovered that as many as 80 percent of those convicted of terrorism related offences under the ATA were accused of offences that had nothing to do with terrorism as it is commonly understood. Furthermore, 86.3 percent of those sentenced to death by the ATCs were convicted for offences bearing little or no connection to terrorism.⁴⁵ Not only does this fundamental weakness lead to serious miscarriages of justice, it also serves to overburden police, prosecution services and courts and so, results in delays in the administration of ‘real’ cases of terrorism.

Based on interviews of lawyers conducted by JPP, it was observed that political and economic influence serves as a primary determinant for whether an offence is tried under the ATA or under the ordinary criminal justice system. According to a lawyer with over 17 years of experience representing clients under the ATC, police often book suspects under the ATA in the First Information Report (FIR) in response to the influence exerted by the complainant, even for offences that would not otherwise be defined as terrorism.⁴⁶ The same was reiterated by Mr. Imran Asmat Chaudhry, another senior Advocate of the High Courts with over 7 years of experience in the ATCs, who stated that:

“I have personally taken around 11 cases, which were sent to ATCs for trial. [The] motive behind all cases was personal enmity, political rivalry, or any other malignant intentions of the police themselves - even though the crime had no nexus to the ATA.”⁴⁷

It was additionally noted that police routinely book suspects under the ATA as the law provides them with broad powers of arrest and investigation along with fewer safeguards for suspects.⁴⁸ The broad definition under the law has often allowed it to be used as a tool of political victimisation by ruling parties against opponents.⁴⁹

According to data provided by the Prosecutor General of Punjab, in a study conducted in 2014, out of a total of 1,195 cases heard by the province’s 14 ATCs, 178 (15 percent) were transferred to regular courts due to the police incorrectly applying the ATA to the alleged offences. Similarly, in 2013, in Karachi 391 of 565 cases (69.2 percent) heard by the city’s 5 ATCs were transferred to the regular courts for not falling within the ATCs’ ambit.⁵⁰

⁴⁵ Terror on Death Row, at p. 10

⁴⁶ Interview with Anonymous. 20 March 2017. Available on file.

⁴⁷ Interview with Imran Asmat Chaudhry. 20 March 2017. Available on file

⁴⁸ Id

⁴⁹ Id

⁵⁰ Tariq Parvez & Mehwish Rani. “An Appraisal of Pakistan’s Anti-Terrorism Act” United States Institute of Peace. (August 2015), p 5. Available at <https://www.usip.org/sites/default/files/SR377-An-Appraisal-of-Pakistan%E2%80%99s-Anti-Terrorism-Act.pdf>

“The Anti-Terrorism Act, 1997 (ATA) has empowered police in a way that with the insertion of a single line, “Aur Ilaqa main khof aur hiraas phail gaiya” (the act created fear and chaos in the area) they can transfer any crime from the normal courts to the terrorism courts.”

Syed Farhad Ali Shah, a senior lawyer with experience representing 100 cases before the ATCs since 2010

(ii) STATUTORY LANGUAGE UNDER SECTION 6

The preamble of the ATA lays out the intent of the law in the following words: “the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected there with and incidental there to.” The inclusion of heinous offences, which are not defined within the law, widens its scope beyond crimes of terrorism and sectarian violence to almost all acts of violence. In addition to the preamble, Section 6 lays out the definition of terrorism. The original definition, at the time of the enactment of the law was limited to two paragraphs. However, successive amendments have broadened it to an unwieldy 28 paragraphs that extends to all violent crimes and not just those pertaining to terrorism.

SECTION 6(1) DEFINES TERRORISM AS

“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.

Section 6(2) lays out 17 acts (or threat of actions) that are to be combined with the mens rea requirements under Section 6(1) in order to qualify as an offence under the Act. These include virtually all forms of violent crimes including murder, kidnapping, robbery, banditry, intimidation, extortion, grievous violence, damage to property, barring public servants from their duties and inciting hatred and contempt through religion.

Section 6 (3) further broadens the scope of the law by providing that any types of actions that involve the use of firearms, explosives, or any other weapons are acts of terrorism regardless of whether they satisfy the requirements under section 6(1)(c). This effectively categorizes all acts of violence involving any form of weapons as acts of terrorism regardless of whether they were committed in furtherance of a political or ideological motivation that is central to all acts of terrorism.⁵¹

⁵¹ See Umair Javed “Ideology and Terrorism”. Inter Press Service. 18 July 2016. Available at <http://www.ipsnews.net/2016/07/ideology-and-terrorism/>

This provision relegates the intent underpinning an act to secondary importance - its sole focus is that the actus reus i.e the use of fire-arms, explosives or any other weapon in any action falling within section 6(2), which consists of a vast list of acts, should be established. As a result, all acts of violence committed with a firearm, even those resulting from personal enmity or disputes, are classified as acts of terrorism.

The effect of section 6(3) is to expand the ATA’s jurisdiction from a more general, public domain, to potentially regulating private acts occurring between individuals, that have traditionally been prosecuted under Pakistan’s general criminal law. It is necessary to critically analyze whether the legislative intent underpinning the law envisaged for it to encompass such a broad range of acts.

ORDINARY CRIMES TRIED BY THE ATCs DUE TO VAGUE & OVER-BROAD DEFINITION OF TERRORISM	
Section 6 In this Act, ‘terrorism’ means the use or threat of action where an action:	
ATA SECTION	ORDINARY CRIME THAT MAY FALL UNDER IT
2(a) Involves the doing or anything that causes death	Accidental death during armed robbery
2(c) Involves grievous damage to property including government premises, security installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson, by any other means	Damaging a car during protests by throwing stones
2(e) Involves in kidnapping for ransom, hostage taking or hijacking	Kidnapping someone to raise money, not to fund terrorist organisation
2(p) Involves in dissemination, preaching ideas, teachings & beliefs as per own interpretation... without explicit approval of the government	Friday sermons/ general discussions on TV etc

Additionally, under section 34 of the ATA, the government holds the authority to add even more offences punishable under the law as “scheduled offences” to the Third Schedule through a simple notification. In 2004, the following three offences were added to the Third Schedule as exclusively to be tried by the ATC regardless of overlapping jurisdiction with other laws including the Pakistan Penal Code:

- (i) **Abduction or kidnapping for ransom;**
- (ii) **Use of fire-arms or explosives by any device, including bomb blast in a mosque, imam-bar-gah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; and**
- (iii) **Firing or use of explosives by any device, including bomb blast in the Court premises. All offences included in the Third Schedule are interpreted as exclusively triable by the ATCs “even if an offence is committed for absolutely private motives and having no nexus with terrorism.”**

All offences included in the Third Schedule are interpreted as exclusively triable by the ATCs “even if an offence is committed for absolutely private motives and having no nexus with terrorism.”⁵²

“ If someone comes into conflict with the ata he is harassed perpetually. Accused are booked under the law primarily for the satisfaction of the aggrieved party and the people in the locality, as the case will be concluded in a speedy manner. Otherwise, the same remedies are available under the ordinary criminal law.

IMRAN ASMAT CHAUDHRY
LAWYER WITH OVER 17 YEARS OF EXPERIENCE
REPRESENTING ATC CLIENTS.

This was evidenced in the case of Mushtaq Ahmed, who was detained by police in 2010 for the murder of three police officers.

In 2002, Mushtaq Ahmed’s nephew was involved in a fight with a group of men who had abducted his 11-year-old sister. As an outcome of the fight, one of the abductors was murdered. Thereafter, the family of the deceased named Mushtaq and a number of his male relatives as suspects in the FIR. He has since then been acquitted of the charge. One night, policemen tried to illegally enter his house in order to take him into their custody without any warrant. Once the police broke into the house, a gun-fight ensued. The neighbors assumed that a robbery was taking place and thus began firing at the armed police men. This resulted in the deaths of 3 policemen.

The only evidence tying Mushtaq to the crime is the ocular evidence given by the accompanying policemen themselves and a gun which was later recovered from the house. No forensic testing was done to

⁵² National Public Safety Commission. “Manual on Anti-Terrorism Act, 1997”. National Police Bureau Islamabad. October 2008. Available at https://www.unodc.org/tldb/pdf/Pakistan_Anti-terrorism_Manual_2008.pdf

show Mushtaq's fingerprints on the gun, nor was his presence corroborated by any other witnesses despite the arrival of his neighbors at the scene of the incident. The mere fact that a gun was recovered from the house was taken to mean that he, the owner of the house, had employed the gun to shoot at the policemen in the dead of the night.

According to Mushtaq, the police asked his mother to pay them a bribe of PKR 800,000 (\$8,000) which she refused. As a result of her refusal the police, tortured him severely and eventually settled on a bribe of PKR 7000 (\$70). The police also took his wife, mother, four children and brother in law into unlawful custody only to release them following the payment of a bribe of PKR 400,000 (\$4,000).

Mushtaq was convicted and sentenced to death by the Anti-Terrorism Court on 6 September, 2011. The Lahore High Court dismissed his appeal and confirmed his death sentence on 2 February, 2015. Finally, the Supreme Court accepted his leave to appeal on 3 March, 2017 and the case is currently pending.

(iii) JUDICIAL INTERPRETATION OF TERRORISM BY SUPERIOR COURTS

Judicial interpretation of the definition of terrorism has served to contribute to its vagueness and disparity of nexus to terrorism and sectarianism. In the case of *Kashif Ali v. The Judge*, Anti-Terrorism Court, No. II, Lahore (PLD 2016 Supreme Court 951) the Supreme Court stated that the insertion of the term "design" in Section 6 has "widened the scope of the Act and the terms "intention" and "motive" previously used have been substituted with the sole object that if the Act is designed to create a sense of fear or insecurity in society then the Anti-Terrorism Act will have the jurisdiction." The Court went on to state that the motivation and intent were no longer relevant for cases falling under Section 6(2) and what mattered was the object for which the alleged act was designed. In the words of the Court it was "only required to see whether the terrorist act was such that it would have the tendency to create a sense of fear or insecurity in the minds of the people or any section of the society, as well as the psychological impact created on the mind of the society."

While adjudicating upon the facts presented before it, the Supreme Court ruled that even though a single murder had been committed as a consequence of personal enmity or vendetta it fell within the definition of terrorism under Section 6 by virtue of the fact that it was committed in a public place and on election day when it was busy with voters. The precise location and time was, in the opinion of the court, sufficient evidence that the act was designed to create a feeling of fear in the society.⁵³ In order to establish its interpretation as determinative of all future cases the court unequivocally stated that "we have attempted to generalise the principles which need to be applied by the Courts while deciding the jurisdiction of an Anti-Terrorism Court. We expect that from now onwards the Anti-Terrorism Courts as well as the High Courts would apply the principles set forth herewith."

As stated above, this inordinately wide definition of terrorism has resulted in a large number of conventional criminal offenses to be tried before ATCs. The jurisprudence of the Court continues to develop in a way where all offences that can incite fear in a person are brought within the ambit of terrorism for spreading a "sense of fear and insecurity." There are several salient examples of this.

⁵³ Para 17

Shafqat Hussain was sentenced to death by an Anti-Terrorism Court in November 2004 for alleged kidnapping and murder, on the basis of a confession extracted after 9 days of torture in police custody. Shafqat also described that one of his co-workers, a guard at the building where Shafqat worked as a caretaker, was also arrested alongside him and was tortured by the police, but was eventually released after his family bribed the police officers. Since Shafqat was a juvenile and his family was based in another province, he was more susceptible to abuse.

Recognizing that the case against Shafqat could not stand, the Sindh High Court threw out his murder conviction and held that the most it could show was guilt of a botched kidnapping in which death was accidental. Yet, the Court did not strike down the associated 'terrorism' charge of kidnapping, which had been tenuously justified on the basis that the crime "created a sense of terror in the wider community". Shafqat was executed in August, 2015 despite a report by the Sindh Human Rights Commission (SHRC), a statutory body, requesting the Supreme Court of Pakistan to initiate an inquiry into evidence pertaining to his juvenility and torture.

"I was forced to strip in front of my detained sons and on the next day my feet were beaten with bamboo cane till they were swollen and after that I was forced to do push-ups and when I lost consciousness, I was thrown into the cell.

On same night I was brought out of the cell and beaten till my hips bled. Marks of those wounds still exists. During the remaining days of remand the police applied rullas⁵⁴ over my thighs due to which I can't walk properly till today."

– Sharif Baksh, 70-year-old prisoner on death row for the last 12 years

(iv) EXTRAORDINARY POLICE POWERS AND SUSPENSION OF FUNDAMENTAL SAFEGUARDS

The Anti-Terrorism Act, 1997 provides law-enforcement agencies, including police, with enhanced powers and extended discretion that pose a direct threat to long-standing rights to privacy, security, due process, fair trial and protection from torture enshrined under the Constitution of Pakistan and international human rights law under the International Covenant on Civil and Political Rights and the UN Convention Against Torture. In a country where the police faces widespread allegations regarding arbitrary and discriminatory abuse of power, the existence of the counter-terrorism regime under the ATA has led to grave violations of key safeguards.

⁵⁴ While the victim lies down, a roola or thick bamboo stick is placed on top of him. The perpetrators stand on both ends of the stick to weigh it down and roll it over the victim's body. The pressure from the bamboo stick causes extreme pain and crushes the victim.

A vague and broad definition of terrorism additionally allows the police to use its exceptional powers in relation to all offences rather than just terrorism crimes. As a result, accused charged under the ATA essentially waive key procedural safeguards to which they are otherwise entitled, regardless of the nature of their crimes. These include being subject to:

- (i) enhanced powers with respect to the collection of evidence (S. 19A);
- (ii) use of necessary force by police (Section 5(1));
- (iii) the arrest of suspects without warrant (S. 5(2)(ii));
- (iv) recording of evidence in police custody (S. 21-H);
- (v) police remand of 30 days at a time (S. 21-E);
- (vi) preventive detention of up to 3 months without review (Section 6).

Additionally, the ATA grants indemnity to police with respect to all acts done or intended to be done in good faith. Such indemnity essentially provides impunity to police for acts of brutality, custodial torture, false encounters, and unlawful detention.⁵⁵ Interviews with legal practitioners revealed that the discretion to exercise enhanced powers of arrest, investigation and detention is critical to the determination of the police regarding whether to charge an accused under the ATA or the PPC.⁵⁶

(v) HEIGHTENED RISK OF TORTURE & COERCED CONFESSIONS

Shahzad was arrested by 5 police officers from his village and taken to a nearby police station. He was subsequently informed that he had been arrested for the murder and kidnapping of a person whom he had never heard of. The police then took him to a private house where they tortured him for a week. He was kicked in the face, beaten with sticks and deprived of food for four days. Finally, when Shahzad refused to confess despite the heinous torture, the police brought his wife and mother to the police station and threatened to tear their clothes off. Shahzad was kept in the police station for over a month in total, during which time the police took him to a private house three times. The police then took him before a Magistrate where he confessed to the crime as he was afraid that his wife and mother would be arrested again. Shahzad was convicted and sentenced to death under S. 7 (a) ATA by Anti-Terrorism Court, Hazara Division on 9 July, 2012.

Torture by police is endemic and systemic in Pakistan. A study by Justice Project Pakistan in collaboration with the Yale Law School, Allard K Lowenstein International Human Rights Clinic, discovered 1,424 cases

⁵⁵ See Oves Anwar, Human Right and the Anti-Terrorism Act, 1997 in HUMAN RIGHTS AND PAKISTAN'S COUNTER-TERRORISM LEGISLATIVE LANDSCAPE (Research Society of International Law; January 2017), 64. Available at <http://rsilpak.org/wp-content/uploads/2017/05/2.-2017-Human-Rights-and-Pakistan%E2%80%99s-Counter-Terrorism-Legislative-Landscape-Final.pdf>

⁵⁶ See Interview with Syed Abbas Haider. 20 March 2017. Available on file⁵⁷ Committee Against Torture. Concluding Observation on the Initial Report of Pakistan. Para 12, 60th Session, 4 May 2017 U.N. Doc.CAT/C/PAK/CO/1

of torture confirmed by a government appointed District Standing Medical Board (DSMB) out of a sample of 1,867 Medico-Legal Certificates in the district of Faisalabad during the period 2006-2012. 134 of the victims were women and 58 were children.

Despite being a party to the UN Convention Against Torture (UNCAT) and the International Covenant on Civil and Political Rights (ICCPR), Pakistan has failed to enact a comprehensive legislative framework that criminalises torture and establishes an independent investigation mechanism to investigate allegations of torture against the police. As a result, police in Pakistan enjoy virtual impunity to torture suspects. In May, 2017, the UN Committee Against Torture, the monitoring body for the UNCAT, expressed serious concern at “consistent reports that police engage in the widespread practice of torture throughout the territory of the state party with a view to obtaining confessions from persons in custody”.⁵⁷

As a result of the suspension of fundamental guarantees and safeguards under the counter-terrorism regime, there is a heightened risk of torture for suspects under the ATA. The Committee Against Torture accordingly noted that the Anti-Terrorism Act, 1997 “eliminates legal safeguards against torture that are otherwise provided to persons deprived of their liberty.”⁵⁸

The ATA allows police to detain a person for up to thirty days without review or the possibility of a habeas petition.⁵⁹ During this time, investigation is meant to be concluded by a joint investigative team. However, Section 21-E of the ATA allows the remand to be extended by another 90 days on application to the courts “if further evidence may be available.” These provisions are relied upon extensively by police to extract confessions and statements from accused persons through resorting to heinous forms of torture.⁶⁰

The risk of torture is increasingly heightened by the 30-day maximum period for the completion of investigation mandated upon the police through the ATA. Compelled to produce suspects within the stipulated deadline, the police resort to rounding up several suspects and torturing them into confessing. Interviews of convicted persons under the ATA revealed that police often arrest and detain several suspects and ask them for exorbitant bribes. Those able to pay are released, while the rest are tortured by police into confessing.

This is evidenced in the case of Amjad Ali, who was arrested in 2006 on charges of abduction for ransom, creating a sense of fear in society and for impersonating a police officer. Following his arrest, Amjad was kept in an undisclosed place for over a fortnight where the police subjected him to severe torture to coerce him into providing evidence. He was subsequently taken to People’s Colony Police Station and presented to the Magistrate the next day. The Special Anti-Terrorism Court, Gujranwala convicted Amjad on 31 January, 2007 on the basis of a recovery of PKR 30,000 (\$300) and some jewellery ornaments that the police claim to have made from his place of residence. The evidence was not presented under proper

⁵⁷ Committee Against Torture. Concluding Observation on the Initial Report of Pakistan. Para 12, 60th Session, 4 May 2017 U.N. Doc.CAT/C/PAK/CO/1⁵⁸ Id.

⁵⁸ Id.

⁵⁹ ATA, S. 21

⁶⁰ Terror on Death Row. 17

procedures and no other forensic evidence proving Amjad's possession of the money and personal effects was presented. The sole witnesses to identify Amjad as part of the kidnapping gang were the complainants and reliance was almost entirely placed upon their identification of Amjad in an identification parade. According to Amjad, the complainants were his acquaintances and had personal enmity against him due to a dispute on a piece of land which Amjad had purchased from the complainant and he refused to hand over the possession.

The Lahore High Court rejected his appeal and confirmed his death sentence on 2 June, 2009. The Supreme Court of Pakistan finally accepted his leave to appeal on 25 October, 2016 and his death penalty was converted to life imprisonment after spending over 9 years on death row.

Under Section 21-H of the ATA, confessions made under the custody of police are admissible in court. This is contrary to the Qanun-e-Shahadat Order, 1984 which renders any confessional statements made under police custody inadmissible as proof. Therefore, confessions and statements extracted by police through heinous torture and abuse often form the basis of convictions and death sentences under the ATA. In its Concluding Observations, the Human Rights Committee, termed Section 21-H as a violation of Pakistan's international obligation under the International Covenant on Civil and Political Rights (ICCPR) and issued recommendations to the Government to repeal it.

Out of the 17 cases reviewed for this report almost all alleged experiencing some form of torture, whereas more than half claimed that they had been kept under illegal detention and tortured before being formally charged.

(vi) LACK OF EFFECTIVE LEGAL REPRESENTATION

International law provides all defendants with the right to effective legal counsel.⁶¹ The UN Human Rights Committee has stated that this right is particularly important in cases of death penalty.⁶² Accordingly in Pakistan, the High Court Rules provide access to a lawyer at state expense for cases where the punishment is death or imprisonment for life.⁶³ However, these lawyers are often only engaged once the trial is underway. As a result, the accused remains unrepresented during all stages of arrest, police remand and investigation, where as described above, he is vulnerable to many forms of intimidation and abuse particularly due to the relaxed procedural safeguards under the ATA. This inevitably means that the accused is also without counsel to challenge the jurisdiction of the Anti-Terrorism Courts over his offence.

Additionally, the lawyers appointed at state expense are selected off a list of volunteers, maintained by High Court Judges and appointed by the Advocate General's office. These volunteers inevitably comprise of

⁶¹ International Covenant on Civil and Political Rights, art. 14(3)(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.")

⁶² General Comment No. 32, para 38

⁶³ Lahore High Court: Rules and Orders of the Lahore High Court, Lahore: Vol. V: Relating to Proceedings in the High Court (2005), Part E. Available at <http://www.lhc.gov.pk/system/files/volume5.pdf>

young and inexperienced lawyers or those who are unable to find work on their own. In the absence of minimum quality standards, the quality of legal representation provided by these lawyers is poor, with most never appearing for hearings and/or meeting with the clients.

Shafqat Hussain was convicted for alleged murder and kidnapping on the basis of a single piece of evidence; a confession extracted after nine days of torture in November, 2004. Shafqat was a juvenile offender. His lawyer failed to raise a single shred of evidence regarding the torture he had endured at the hands of the police or his juvenility that could have prevented him from being convicted or sentenced to death. The lawyer told Shafqat that “no one leaves the anti-terrorism courts without a death sentence” thereby deeming it to be pointless to raise a defence for his client.

Similarly, Tariq Mukhtar was arrested along with 11 male members of his family for the death of four persons that occurred as a consequence of a fight that broke out between two families over a property feud. The police looted their house under the guise of “search and seizure” and stole many valuable possessions. The loss of material possessions and arrest of all adult male members prevented them from hiring a lawyer throughout their trial. Additionally, Tariq and his co-accused were never informed of the date of their appeal at the High Court and were unable arrange any representation. The appeal was thus dismissed without their knowledge.

As a result, accused persons prefer to engage their own counsel, often at a heavy cost which they are unable to bear. Interviews with accused revealed that the quality of private counsel is extremely poor. More than half the interviewees suffered from inadequate representation particularly in the early stages of their cases and in almost all cases the lawyers failed to challenge the jurisdiction of the Anti-Terrorism Courts over the alleged offences, even if the offence clearly did not fall within the definition of terrorism.

Lawyers tend to take advantage of indigent prisoners and their family through extracting exorbitant fees and failing to raise an adequate defence. In certain cases, egregious errors by lawyers directly resulted in convictions based on false testimony, and in the executions of juvenile offenders and other vulnerable groups that are owed special protections under international law. The consequences of poor representation are worsened by the fact that the law provides no remedy, such as post-conviction reviews, on grounds of incompetent or ineffective counsel.⁶⁴

For example, Amjad Ali was convicted of kidnapping for ransom and sentenced to death by Anti-Terrorism Court, Gujranwala on 31 January, 2007. Amjad’s family was too poor to hire a lawyer and he had to be represented by the counsel of his co-accused who he never met outside the courtroom. The counsel did not raise a single piece of evidence in Amjad’s defence, nor was he provided a chance to record his statement.

“Lawyers appointed at state expense are mostly new and inexperienced and often have limited experience with trials under the ATC”

Syed Abbas Haider, lawyer with 10 years’ experience handling ATC cases.

⁶⁴ A Most Serious Crime. P. 16

ANSAR ABBAS

Sentenced to death on the basis of insufficient evidence

Ansar was convicted and sentenced to death by an Anti-Terrorism Court III, Lahore of shooting and killing a policeman and injuring another at a checkpoint on 20 March, 2007. Ansar's death sentence was confirmed by the High Court, an appeal to which is currently pending before the Supreme Court.

The convictions at both the Trial and High Court level relied heavily on the eyewitness account of one policeman who was injured in the incident which took place at night. According to Ansar, he remained in extra judicial custody for 25 days and was subjected to torture for a confession statement. Of the two accused in custody, only Ansar was made to go through the "identification parade" used to identify the perpetrator, ten months after he was arrested. The entire prosecution case hinged on this positive identification.

The weapon recovered from Ansar at the time of arrest did not match the bullets found at the scene of the crime but that was overlooked by the court on the basis that Ansar "might have thrown away the actual weapon and might have gotten this new one" [emphasis added] before arrest.

Moreover, reliance was also placed on the alleged admission of guilt by the third co-accused to the owner of the motorcycle they were riding. This was a gross laxity of procedures, as the third partner had been killed as a result of a police encounter and could no longer confirm or deny the admission to which only one person, the motorbike owner, was a witness.

Based on this evidence that in no way satisfactorily proved that Ansar was present at the scene or the one who shot at the police, and would not have held up in a regular court, Ansar was awarded the harshest available penalty. To date Ansar has already spent 11 years on death row.

TIMELINE

- 16 FEB 2006**
the murder of a policeman is committed
- NOV 2006**
Ansar alleged that he was kept in extra-judicial custody of the police for 25 days and subjected to severe torture for a confession statement
- 30 NOV 2006**
Ansar is officially arrested
- 01 DEC 2006**
Identification parade is held and Ansar is identified 11 months after the incident
- 20 MAR 2007**
Anti Terrorism Court Lahore sentence Ansar to death
- 29 JUL 2009**
Lahore High Court confirm his sentence
- 30 MAY 2012**
Supreme Court grant leave of appeal
- PRESENT DAY**
His case is currently pending in the Supreme Court

JUVENILE OFFENDERS ARE DENIED SAFEGUARDS IN TRIALS UNDER THE ANTI-TERRORISM ACT.

As a party to the UN Convention on the Rights of the Child (UNCRC) and the ICCPR, Pakistan is under an obligation to provide special protections to juvenile offenders throughout the legal process, particularly at sentencing.

Additionally, international law categorically condemns the use of the death penalty for juvenile offenders. The UN Committee on the Rights of the Child (UNCRC) dictates that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

In order to bring its criminal justice system in conformity with its international legal obligations, the Government of Pakistan enacted the Juvenile Justice System Ordinance, 2000 (JJSO). The JJSO prohibits executions of juveniles below the age of 18 years and makes provisions for separate juvenile courts, trial and detention centres from adults. However, over 17 years following its enactment the JJSO is woefully under implemented. Given the dismal rates of birth registration (less than 32 percent⁶⁵) in the country, juvenile offenders who are arrested often lack any identification documents in the rare cases in which the police records the age of a suspect, it is primarily on the basis of arbitrary visual age assessments.⁶⁶ The police are almost always inclined to record the age of the accused as above 18, in order to deliberately deny them the benefits accorded under the JJSO.

Courts, in violation of international law, fail to accord the benefit of doubt to the accused person in age determination proceedings. Research by JPP of over 140 cases pertaining to age determination has demonstrated that courts remain divided on the evidentiary value of conflicting records, including identity documents issued by the government.⁶⁷ In the absence of age determination protocols, courts are free to choose any evidence that favours the verdict of their choice. Birth certificates are often rejected outright as forgeries, despite the fact that they are government-issued documents. As a result, juvenile defendants are in a virtually impossible situation to prove their juvenility. Due to the limitations of age determination mechanism, Pakistan has unlawfully executed at least 6 juvenile offenders despite the existence of credible evidence in favour of their juvenility.

THE FOLLOWING PRISONERS WERE UNLAWFULLY EXECUTED DESPITE CREDIBLE EVIDENCE IN FAVOR OF THEIR JUVENILITY

AFTAB BAHADUR

AGE CONVICTED: 15 YEARS
EXECUTED: 10 JUNE 2015

SHAFQAT HUSSAIN

AGE CONVICTED: 17 YEARS
EXECUTED: 04 AUG 2015

ANSAR IQBAL

AGE CONVICTED: 17 YEARS
EXECUTED: 29 SEPT 2015

MUHAMMAD SARFARAZ

AGE CONVICTED: 17 YEARS
EXECUTED: 10 MAY 2016

MOHAMMAD AMIN

AGE CONVICTED: 17 YEARS
EXECUTED: 31 MAR 2015

FAISAL MEHMOOD

AGE CONVICTED: 17 YEARS
EXECUTED: 27 MAR 2015

⁶⁵ UNICEF, Birth Registration Progress Report 2012-2015, pg 7, Accessed at: https://www.unicef.org/pakistan/Birthregistration_LR.pdf

⁶⁶ Id

⁶⁷

Muhammad Amin was 17 when he was arrested in 1998 for allegedly killing a man during a botched burglary. He was convicted for murder and given two death sentences by a Special Anti-Terrorism Court. Amin claimed that he was subjected to severe torture to confess to the shootings. Muhammad's age was raised on appeal, but the documentary evidence of juvenility was deemed to "be of no avail so belatedly" and a medical assessment conducted after Muhammad had reached adulthood was relied upon instead. The Supreme Court also upheld his conviction and sentence on 19 March, 2002. In 2004, he was pardoned for the murder conviction on behalf of the family of the victim. However, since Section 21-F of the ATA bars the remission of any sentence unless granted by the Government, Muhammad was executed on 21 March, 2015 after spending over 17 years on death row.

CONDEMNED JUVENILES:

THE FOLLOWING DEFENDANTS WERE SENTENCED TO DEATH BY ANTI-TERRORISM COURTS DESPITE CREDIBLE EVIDENCE THAT THEY WERE JUVENILES AT THE TIME OF COMMITTING THE OFFENCE:

MUHAMMAD AZAM

Mohammad was sentenced to death by ATC Gujranwala in 1999. According to his birth certificate, he was less than 18 years old when he committed the offence. The ossification test conducted on orders of the prosecution determined his age to be 16. The Trial Court admitted to his juvenility but still sentenced him to death. The Lahore High Court upheld the sentence and Supreme Court dismissed his appeal in 2002.

MOHAMMAD IQBAL

Arrested in 1998 and sentenced to death in July 1999, several documents confirmed Muhammad Azam to be 17 years old at the time of commission of offence. He was even initially incarcerated at a borstal institute for juveniles in Karachi. In 2004, jail authorities sent Trial Court a request to conclusively determine his age so his sentence could be commuted under the JJSO. The Court rejected the request on the basis that the plea should have been raised during the trial.

MOHAMMAD DIN

Mohammad Din was sentenced to death and given life imprisonment by an ATC in Bahawalpur when he was between 16 and 17 years of age according to medical examinations ordered by the court. His 13 year old brother was also handed down life imprisonment before he was acquitted a year later due to his young age. Since Mohammad was not charged under any ATA offence, his compromise with the victim's family was accepted by the Trial court and he was finally released after spending a decade on death row.

MUHAMMAD IQBAL |

Juvenile offender facing imminent execution

Muhammad Iqbal, along with 4 other co-accused, was tried for murder and robbery offences by an Anti-Terrorism Court in 1999. The primary evidence connecting Iqbal to the offence was being identified in an identification parade that was held 2 months after the alleged incident. Iqbal was kept in unlawful custody by the police for over a month before he was formally arrested.

An ossification test, conducted on the request of the prosecution, determined Iqbal's age as 17 at the time of committing the offence. His juvenility was also confirmed through a school-leaving certificate produced before the trial court. However, despite the trial's court acknowledgment of his juvenility, Muhammad Iqbal was convicted of murder and sentenced to death.

Following Iqbal's death sentence, the Government of Pakistan enacted the Juvenile Justice System Ordinance, 2000 which prohibited the death penalty for all juvenile offenders. A Presidential Notification granted all juveniles, like Iqbal, who had been sentenced to death prior to the JJSO automatic remission of their sentences on the basis of an age determination inquiry. Iqbal's name was included by the Government of Punjab in a letter to the Registrar as a juvenile entitled to benefit of the Notification but no inquiry was held.

Iqbal's death sentence was upheld by the High Court in 20 March, 2002 and on 11 September, 2002 the Supreme Court **denied** his leave to appeal. A request for the issuance of an execution warrant was sent by the Government of Punjab to the ATC, Gujranwala in June, 2017.

Following a complaint filed by Iqbal's lawyer, the National Commission on Human Rights (NCHR), Pakistan's National Human Rights Institution, took notice of the matter. Through its order dated 3 July, 2017, the NCHR observed that Iqbal had been unlawfully denied his right to an age determination under the Presidential Notification dated 2001 and directed the Home Department, Government of Punjab to initiate an inquiry into Iqbal's age and to restrain the ATC from the issuance of an execution warrant until the conclusion of such inquiry.

Even though the Government of Punjab withdrew its request for the issuance of a warrant, no age determination inquiry has taken place and, despite being a juvenile, Iqbal remains on death row.

TIMELINE

10 JUL 1998

The murder and robbery are committed

05 OCT 1999

Iqbal is convicted of murder and sentenced to death by Anti-Terrorism Court

20 MAR 2002

The High Court uphold his death sentence

11 SEP 2002

The Supreme Court confirm his death sentence

16 JULY 2005

ATC Gujranwala dismiss application for acquittal on the grounds of compromise as the offences are non-compoundable

16 MAR 2016

Mercy petition rejected by the President

26 MAR 2016

Black warrant issued with execution date set for 30th March 2016

28 MAR 2016

Review petition filed on the basis of compromise, juvenility and double punishment. Dismissed.

PRESENT DAY

Iqbal continues to be on death row and his warrant can be issued any day

(i) JUVENILE OFFENDERS ARE TRIED AS TERRORISTS AND SENTENCED TO DEATH UNDER THE ATA

According to Section 14 of the JJSO, the law does not repeal other laws but applies “in addition” to them. However, the ordinance also provides juvenile courts “exclusive jurisdictions to try cases in which a child is accused of commission of any offence.” Since the enactment of the JJSO, jurisprudence by superior courts has been unable to uniformly address the jurisdiction of juvenile courts over crimes for which special courts have been enacted, particularly terrorism. As a result, juveniles continue to be tried as adults and are sentenced to death by special courts whose procedures fail to comply with internationally agreed fair trial standards.

Under Section 32, the ATA is granted overriding effect over all laws currently in force. Upon reading Section 32 of the ATA in juxtaposition with Section 14 of the JJSO, courts often interpret the provisions of the ATA as meaning that for terrorism offences under the ATA, the Anti-Terrorism Courts possess exclusive jurisdictions even for juvenile offenders.

In the case of *Asadullah v. the State*, the Sindh High Court recognised that the ATA held that “Section 14 of the JJSO strengthened the view that the court constituted under the ATA had jurisdiction over the scheduled offence, irrespective of any limit of age or any other class of offenders.” It was held that no

(ii) DENIAL OF AGE DETERMINATION INQUIRIES UNDER THE PRESIDENTIAL NOTIFICATION

Since the Juvenile Justice Systems Ordinance 2000 was not enacted retrospectively, the President of Pakistan on 13 December, 2001 issued a Notification stating that any prisoner who had their death sentences confirmed prior to the introduction of the JJSO, but in whose cases there existed evidence that they were juveniles at the time of committing the alleged offences, should be granted a "special remission" and have their death sentences commuted. Such remission was to accrue on the basis of an inquiry into their age by provincial-level executive committees constituted specifically for this purpose.

However, the operation of the Notification subsequently became the subject of proceedings before the Supreme Court in the case titled *Ziaullah v. Najeebullah* (PLD 2003 SC 656). The Court opined that questions pertaining to determination of age could only be decided by relevant Sessions courts under the JJSO. Thereafter, the executive committees were dissolved.

In 2003, the Punjab Government declared in a circulated letter that all juvenile offenders were entitled to remission if their death sentences were confirmed by the High Court before 17 December, 2001. Attached with the letter was a list of juveniles incarcerated in Punjab who were entitled to this remission.

Despite the existence of the Notification and the letter by the Government of Punjab, juveniles sentenced prior to the enactment of the JJSO continue to be denied its protections.⁶⁸ Requests by prisoners and/or family members for an inquiry regarding their juvenility under the Presidential Notification continue to be denied by the provincial Home Departments and the Courts. An analysis of case studies reveals that there is simply a lack of awareness regarding the effect of the Notification amongst the provincial home departments and the Sessions judges who are responsible for its implementation.

The list of condemned juveniles attached with the Government of Punjab, Home Department's letter included details of 28 prisoners from Punjab, 10 of whom had been tried by Anti-Terrorism Courts. According to information acquired by Justice Project Pakistan at least 4 of the prisoners have been executed, three have been released and at least one is still serving his sentence.

Similarly following the issuance of the Presidential Notification, the Office of the Superintendent of Central Jail Karachi, Sindh sent a letter on 9 August, 2004 to the Anti-Terrorism Court, Karachi seeking age determination inquiries for 6 prisoners under the Notification. The letter stated that "this office has received the instructions of the Home Department, Government of Sindh through Inspector General of Prisons Sindh to refer the matter to the Honourable Juvenile Court concerned for the determination of the ages of the condemned prisoners in accordance with section 7 of the Juveniles Justice System Ordinance 2000." However, the Anti-Terrorism Court, Karachi on 2 September, 2004 dismissed the request of the Government of Sindh on the reasoning that as the accused had not raised their juvenility before any trial and/or appellate court they had lost the right to agitate the plea at this stage. This was despite the fact that during the time of their conviction the JJSO had not been promulgated and no such plea was available at their disposal.

As a result, none of the 6 juvenile offenders identified by Government of Sindh have been granted an age determination inquiry to which they are entitled under the Presidential Notification 2001.

⁶⁸ See *Death Row's Children*, 19.

MOINUDDIN AND AZAM

Juvenile Offenders tried as terrorists

According to the accused, Azam (aka Abdur Rehman) and Moinuddin went to a house to collect an unpaid debt but the homeowner refused to pay, resulting in a fight. Moinuddin had a pistol on his person, and in the scuffle the owner of the house was killed. The investigating officer filed the case under the Anti-Terrorist Act (ATA), which meant the duo would face a harsher punishment and be tried without judicial safeguards. Confessions were extracted from the accused by severe torture, and the brutality of torture was such that Azam admitted to be someone else in order to stop the police from inflicting pain.

At the time of their arrest, both Azam and Moinuddin were 17 years of age. There was an initial recognition of their adolescence as Azam, despite being tried as an adult was kept in a juvenile facility until he was awarded the death penalty. Despite assurances from jail officials and a government doctor that both Azam and Moinuddin were 17 at the time of the crime, the court refused to take it into consideration.

While Moinuddin and Azam were sentenced before the introduction of the JJSO, they were entitled to the special remission granted to all condemned prisoners who were juveniles at the time of offence as a result of the presidential notification. The request sent to Trial Court by jail authorities to determine Azam's age was rejected on the basis that the plea had not been raised earlier.

Despite reaching a compromise with the complainant and being pardoned by them, they remain on death row.

TIMELINE

11 OCT 1998

the murder and robbery are committed

08 JUL 1999

Moinuddin and Azam are convicted of murder and sentenced to death by Anti-Terrorism Court

28 OCT 1999

The High Court uphold their death sentence

12 SEP 2001

The Supreme Court confirm their death sentence

02 SEP 2004

Anti-Terrorism court Karachi reject appeal filed by jail authorities to have both the prisoners' sentenced reduced because of their juvenility

10 MAY 2008

Moinuddin and Azam submitted request to ATC Karachi to accept the compromise between them and complainants. Since the ATA does not acknowledge compromises, the application is rejected

09 APR 2015

First execution date. Stayed a day before the hanging.

23 APR 2015

Second execution date. Later stayed.

Present Day

Their case is currently pending in the Supreme Court

CONCLUSION

This report has attempted to delineate, through a comprehensive examination of statute as well as case law, the multiple flaws, both procedural and substantive, inherent in the framework created by the Anti-Terrorism Act, 1997. It has demonstrated the discrepancy between the Pakistani government's objective of countering terrorism and the practical impact of the ATA, coupled with the lifting of the moratorium on death penalty for all offences, including non-terrorism related offences- almost 86 percent of those sentenced to death under the ATA were convicted for offences that bore little connection to terrorism as it is traditionally defined. In practice, the anti-terrorism regime created by the ATA is being employed by the police and law enforcement to subvert the fundamental rights during arrest, investigation and trial of non-terrorism suspects, as opposed to effectively countering terrorist offences in Pakistan.

The report has also highlighted the salient criticisms advanced against the ATA by various United Nations Treaty Bodies that demonstrate the ways in which this legislation contravenes international human rights standards. One of its most egregious violations is its impact on juvenile offenders; those charged under the ATA are deprived of the essential procedural safeguards accorded to them under international law as well as under Pakistan's domestic law, the Juvenile Justice System Ordinance, 2000. ATCs continue sentencing juvenile offenders to death despite the existence of credible evidence in favour of their juvenility.

In light of the aforementioned, there are several recommendations that can be made to reform the existing legislation.

- (a) **Reduce the scope of the definition of "terrorism" under the Anti-Terrorism Act and ensure that only those crimes that pertain to terrorism or to militancy or organized terrorist outfits are tried by the Anti-Terrorism Courts.**
- (b) **Introduce an amendment explicitly barring the jurisdiction of Anti-Terrorism Courts over juvenile offenders regardless of the nature of their offences. Ensure that for cases where the evidence of juvenility is discovered after the trial is already underway, the cases are remanded to an appropriate juvenile court and retried.**
- (c) **Repeal provisions awarding powers of search and seizure to police without warrants and ensure that procedural safeguards in line with the ICCPR are introduced.**
- (d) **Repeal Section 21-H of the Act, and introduce provisions barring the admissibility of confessions/statements recording in the custody of police.**
- (e) **Initiate an inquiry into all cases wherein the accused has been sentenced to death under the ATA with a view to commuting the sentences in the event that a violation is discovered. During the course of such an inquiry the moratorium on the death penalty should be reinstated.**

GLOSSARY

Anti-Terrorism Act (ATA), 1997 – explicitly enacted in response to a bomb attack earlier that year, the Act broadened the previous definition of ‘terrorism’ and created special anti-terrorism courts.

Anti-Terrorism Courts – special courts created by the Anti-Terrorism Act 1997 for the hearing of terrorism cases.

Compromise – a Sharia Law principle, as introduced into Pakistani law in 1990. The victim of a crime against the human body or their legal heirs, may agree to expunge the perpetrator’s criminal sentence, either in exchange for monetary or without this.

First Information Report (FIR) – the initial written document prepared by police when they first receive information about the commission of an offence.

Qisas and Diyat – two forms of punishment under Islamic penal law, as introduced into Pakistan’s criminal law in 1990, under which crimes against the human body are seen as offences against an individual, not society or the state. Diyat (blood money) allows the legal heirs of a murder victim to agree to a compromise with the perpetrator, wither in exchange for monetary compensation or without this. Qisas (retribution) entails the right of the victimor their legal heirs to inflict comparable injuries to the perpetrator as he or she inflicted on the victim, including – in the case of murder – causing his or her death. The permission of a court is required in all cases.

Roola/Rooler – Perpetrators make the victim lie down, facing up, and place a roola – a long, thick, bamboo or wooden rod-on top of him. A perpetrator sits or stands on either side of the rod to weigh it down. Two other perpetrators pull or push the rod over the victim’s body, crushing him. The heavy pressure caused by men sitting on the rod causes extreme pain. It is particularly painful on the thighs. The method can cause lasting harm, including limiting victim’s ability to walk for years after the torture and limiting a man’s ability to have sexual intercourse.

Strappado – Perpetrators tie the hands of the victim behind his back. They tie a rope around his wrists and suspend him, hanging him above the floor. Strappado can cause both arms to dislocate. Perpetrators sometimes add weights to the victim’s body to intensify the effect and increase the pain.

