

# **Terrorist unless proven otherwise**

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**Human rights implications of  
anti-terror laws and practices  
in Pakistan**

**Najam U Din**



**Human Rights Commission of Pakistan**

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# CONTENTS

Foreword.....	i
<b>1. Terrorist unless proven otherwise: Human rights implications of anti-terror measures in Pakistan .....</b>	<b>i</b>
1.1 Scope.....	1
1.2 Constitutional and international rights guarantees.....	2
<b>2. Legal framework: historical context.....</b>	<b>5</b>
2.1 Anti-Terrorism Act, 1997 .....	8
2.1.1 Presumption of guilt .....	9
2.1.2 Justice in a hurry: speed and fairness .....	10
2.1.3 Redefining torture and admissibility of extrajudicial confessions .....	11
2.1.4 Juvenile rights .....	13
2.1.5 Trial in absentia.....	15
2.1.6 Effectiveness of speedy justice.....	16
2.2 Then vs. now: Progressive dilution of rights under ‘special’ laws .....	22
<b>3. Other legal provisions and practices with anti-terror component.....</b>	<b>27</b>
3.1 Detention under preventive laws .....	27
3.2 Global war on terror.....	32
3.3 Arrest, detention, ‘disappearances’ and due process .....	33
3.3.1 Sentence first – verdict afterwards .....	38
3.3.2 The scope for ‘unauthorized’ abuse .....	48
3.3.3 Beyond finding the ‘disappeared’ – a case for accountability .....	50
3.4 Extradition and unlawful surrender of individuals.....	53
3.4.1 When suspicion suffices.....	56
3.4.2 Complicity in torture and <i>refoulement</i> .....	60
<b>4. Conclusion.....</b>	<b>62</b>

## Foreword

The struggle to resist the Pakistan state's designs to deny the due process of law to anyone accused of offences put in the broad category of terrorism is more than three decades old, that is, if similar efforts by the colonial administration of the pre-independence period are not taken into account. The rationale all along has been that waves of terrorism can be checked only by awarding deterrent punishment to offenders through speedy trials by special courts. These assumptions have never been found valid and yet successive governments have persisted in their plans to curtail the guarantees of a fair trial no civilized jurisprudence can deny any accused. When the courts struck down the Suppression of Terrorist Activities (Special Courts) Act of 1975, the Terrorist-Affected Areas Ordinance was promulgated. It was soon replaced with Terrorist Activities (Special courts for speedy trial) Act of 1991, issued as an amendment to the constitution, as if constitutional cover to a flawed legislation could carry a greater guarantee of justice. Finally, the Anti-Terrorism Act of 1997 was conceived as a complete answer to terrorism.

In the resistance to encroachments on the people's right to the due protection of the law the judiciary has played a significant, and at times leading, role. It successfully foiled plans to set up military tribunals to hear cases of terrorism and other heinous offences as well as efforts to put special anti-terrorist courts outside the control of high courts. However, a spurt in sectarian violence and the derogation of human rights worldwide in the wake of 9/11 events have caused a perceptible weakening of commitment to the due process. Consequently more urgent have become the demands on jurists and all other defenders of basic rights to ensure that no-one's entitlement to a fair trial is suppressed.

Human Right Commission of Pakistan has never been at ease with theories of abridged justice. The present study by Mr. Najam U Din is offered as part of the Commission's contribution to the promotion of the ideal laid down by the Father of the Nation decades ago when he took his stand by the "fundamental principles that no man should lose his liberty, or be deprived of his liberty, without a judicial trial in accordance with the accepted rules of evidence and procedure"

HRCP hopes the study will be of some use to experts and laypersons alike. Comments and suggestions for further action are welcome.

-- HRCP

# **Terrorist unless proven otherwise: Human rights implications of anti-terror measures in Pakistan**

## **1.1 Scope**

Following the September 11, 2001 attacks on the World Trade Centre and the Pentagon, the “global war on terror” became a household term and led to international cooperation to counter a recurrence of such attacks. But long before terms like “war on terror” had gained currency, Pakistan was routinely dealing with “terrorist acts” through measures other than the regular criminal justice system. This study analyzes the specific anti-terror measures in the country – the legal framework and practices – and their impact on human rights.

The study compares the applicable law with domestic rights guarantees and the country’s obligations under international law, including international human rights law.

It also looks at practices in law enforcement, and the changes brought about in Pakistan following the country’s support for the US-led “war on terror”. These practices include arbitrary arrest and

detention, preventive or otherwise, “enforced disappearances”, restricting access of persons in unlawful detention to family members and lawyers, and transferring individuals to other countries without due legal process.

The study also considers the avenues available to those aggrieved by anti-terrorism laws and practices and peruses accounts of judicial proceedings in this regard to determine their effectiveness. The need for accurate and reliable data and information for any serious analysis is obvious. Accessing such information regarding many anti-terror practices, particularly relating to arrest and detention presents a difficulty since there seems to be a consistent effort to keep these practices under wraps. The section of the study regarding prevalent anti-terror practices relies principally on media reports, particularly of judicial proceedings reported by newspapers in 2006, as well as reports and data compiled by Pakistani and international human rights organizations during the year.

This study does not touch upon the on-going military operation to root out former Taliban, Al-Qaeda and their sympathisers in Pakistan’s tribal areas bordering Afghanistan. A brief glance suggests that the operation could do with attention to human rights and there may be a case of application of common Article 3 of the Geneva Conventions. Even though waged in the name of anti-terror efforts of the government, further discussion regarding the specific military operation in the tribal areas is beyond the scope of this report and merits a separate study in its own right.

## **1.2 Constitutional and international rights guarantees**

Security of life and liberty of person is the most basic of human rights and is guarded jealously by law, frequently by national constitutions. That any deprivation of life or liberty must occur in conformity with law and due legal process is a guarantee present in almost all major legal systems in the world.

The Constitution of Pakistan, 1973 also contains a distinct chapter on human rights.<sup>1</sup> Theoretically, every person present in Pakistan or subject to the country’s jurisdiction is guaranteed treatment in accordance with law. The Constitution bars arbitrary

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1 Part II, Chapter 1, Constitution of Pakistan, 1973.



arrest and detention<sup>2</sup> or any deprivation of life or liberty except in accordance with law.<sup>3</sup> It also enumerates many of the basic principles of due process provided by international human rights law.

The Constitution provides that “[n]o 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.”<sup>4</sup> Anyone arrested or detained is required to be produced before a magistrate within 24 hours of such arrest,<sup>5</sup> except in instances of preventive detention under law,<sup>6</sup> which will be discussed subsequently. The Constitution also prohibits torture and guarantees the inviolability of dignity of the person.<sup>7</sup>

Of the international human rights treaties relevant for the purposes of this study, Pakistan has ratified the Convention on the Rights of the Child (CRC). The country signed the International Covenant on Economic Social and Cultural Rights (ICESCR) in November 2004 but is yet to ratify it. Pakistan is not a party to the International Covenant on Civil and Political Rights (ICCPR) or to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). However, in December 2006, the country informed the United Nations of its intent to ratify the ICCPR and CAT.<sup>8</sup>

Pakistan has endorsed and continues to reaffirm the principles of the Universal Declaration for Human Rights (UDHR),<sup>9</sup> which also lays down guarantees regarding due process,<sup>10</sup> personal liberty<sup>11</sup> and prohibition of torture.<sup>12</sup>

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2 *Art. 10 (1), Constitution of Pakistan, 1973.*

3 *Art. 9, Constitution of Pakistan, 1973.*

4 *Art. 10 (1), Constitution of Pakistan, 1973.*

5 *Art. 10 (2), Constitution of Pakistan, 1973.*

6 *Art. 10 (3), Constitution of Pakistan, 1973.*

7 *Art. 14, Constitution of Pakistan, 1973.*

8 *Ratification of three human rights treaties, UN told, 11.12.2006, Dawn.*

9 *Statement by Ambassador Munir Akram, Permanent Representative of Pakistan to the United Nations, in the Informal Thematic Consultations on Cluster-III “Freedom to Live in Dignity” (19.4.05).*

10 *Art. 10, UDHR.*

11 *Arts. 3 & 9, UDHR.*

12 *Art. 5, UDHR.*

# **Legal framework: historical context**

In Pakistan, the use of “special” legal measures to fight what the government deems a terrorist act is neither unusual nor very recent. For over three decades now, the government has repeatedly introduced “special” legal provisions to deal with certain criminal offences outside the regular criminal justice regime. The government has proceeded to label certain criminal offences as acts of terrorism and sectarian violence, and created a parallel legal system to try them.

In the 1970s, the Pakistan government was facing a combination of violent opposition and nationalist movements and acts of random and general violence. The government deemed the regular criminal justice system incapable of trying these cases expeditiously. A fork in the road occurred in 1974, when the government decided that it needed improved, albeit separate, tools to deal with certain offences, with a view to addressing the violence and ensuring prompt justice.

In October 1974, the government established “special” courts for “suppression of acts of sabotage, subversion and terrorism”.<sup>13</sup> The stated objective of the 1974 ordinance was to provide “special provisions” for suppressing such acts and to establish “special” courts with exclusive jurisdiction for “speedy trials” of such acts.<sup>14</sup>

The 1974 law ushered in an era where “special” laws and courts dealing with “terrorism” or “terrorist acts” became the norm. The definition of “terrorist acts” has become broader and more general over time and the list of offences that can be tried by “special” courts has been continuously expanded.

The tale of special anti-terror measures in the country is an account of efforts by the government to depart from standard legal practice, and of some efforts by the judiciary to put in place limits on such “special” laws.

To go straight to the anti-terror legislation currently in force and skip a brief mention of the trend started by the 1974 law is to pass an opportunity to ascertain the rationale and devices of special laws and the intent of successive governments in introducing them.

The 1974 ordinance was approved by parliament a few months later and became the Suppression of Terrorist Activities (Special Courts) Act, 1975.<sup>15</sup>

The 1975 law went about expediting the slow legal process by barring adjournments in court proceedings unless “necessary in the interest of justice”.<sup>16</sup>

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13 *Preamble, Suppression of Terrorist Activities (Special Courts) Ordinance (XVIII), 1974.*

14 *Preamble, Suppression of Terrorist Activities (Special Courts) Ordinance, 1974.*

15 *PLD 1975 Central Statutes 89.*

16 *Sec. 5 (2), Suppression of Terrorist Activities (Special Courts) Act, 1975.*

It departed from the universal criminal law principle of presuming the accused innocent until proven guilty.<sup>17</sup> In further departure from the regular criminal law, the 1975 Act allowed for trial in absentia if the accused had initially joined the trial.<sup>18</sup>

The law remained in force until being repealed and replaced by the Anti-Terrorism Act (ATA), 1997,<sup>19</sup> which is the principle “special” anti-terror law currently in force.

Between the two laws, the government introduced a range of laws meant to cater to “special” needs, mainly directed at expeditious adjudication of cases concerning acts of terrorism. These laws included Special Courts for Speedy Trials Ordinance, 1987; Terrorist-Affected Areas (Special Courts) Ordinance, 1990; and Terrorist-Affected Areas (Special Courts) Act, 1992 among others. For the purpose of this study, however, the focus will be on the ATA 1997 because of its current applicability and the 1975 Act, because it started the trend, to gauge if the difference between the special and regular laws has increased or diminished over time.

The Anti-Terrorism Act 1997 was preceded by several years of sectarian violence and acts of terrorism in the country and aims at trying acts of “terrorism and sectarian violence”. By the legislature’s definition, these are mainly acts and omissions which are already culpable under the regular criminal law, and are “designed to coerce, intimidate, or overawe the government or the public or a section of the public or community or sect or create a sense of fear and insecurity in society”.<sup>20</sup> As in 1974, the criminal justice system in 1997 was deemed incapable of deciding the cases expeditiously. The ATA’s promise of speedy justice, even speedier than under previous special laws, must have sounded attractive in the circumstances. The ATA abandoned many safeguards to rights of the accused in the standard criminal law and even under the previous “special” law.

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17 *Sec. 8, Suppression of Terrorist Activities (Special Courts) Act (XV), 1975.*

18 *Sec. 5 (4), Suppression of Terrorist Activities (Special Courts) Act, 1975.*

19 *Sec. 39 (b), Anti-Terrorism Act (ATA), 1997.*

20 *Sec. 6 (1)(b), ATA, 1997.*

Before proceeding to analyze the prevailing ATA provisions and the rights at play, two things should be settled at the outset. Firstly, that Pakistan, like any other state, has a legitimate interest in pursuing anyone violating the law and taking reasonable legal measures to prevent crimes, including acts of terrorism.

Secondly, the slow pace of the legal process in the country, in civil and criminal courts alike, is well known and has been for decades. There is nothing wrong with improving laws in response to the situation on the ground so long as such laws are in conformity with human rights. In fact, a failure to address the reasons for the consistently slow adjudication of cases amounts to disregarding a constitutional goal. The Constitution of Pakistan mandates that the State shall “ensure inexpensive and expeditious justice”.<sup>21</sup> However, the Constitution requires such provision of justice in all civil and criminal cases, not just in the ones amounting to “acts of terrorism” according to the legislature.

The question is whether the “special” laws and practices are an improvement on the regular criminal justice system and more importantly whether they conform to Pakistan’s legal commitment to observe and ensure human rights by virtue of its constitutional requirements, and international treaty and customary law obligations.

## **2.1 Anti-Terrorism Act, 1997**

The 1997 Anti-Terrorism Act is the principal tool for trying those accused of acts of terrorism and sectarian violence. It takes those charged with such acts outside the ambit of the regular criminal justice system, and to a parallel legal system. The ATA goes considerably further than the 1975 law in providing “special” measures to expedite trials. It has the more expanded objective of preventing “terrorism and sectarian violence” and providing “speedy trial of heinous offences”.<sup>22</sup>

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21 *Art. 37 (d), Constitution of Pakistan, 1973.*

22 *Preamble, ATA, 1997.*

The Act deserves a closer inspection by virtue of that position and also to evaluate how human rights fare under the ATA, especially since many of its provisions are apparently contrary to domestic and international legal norms and standards.

### *2.1.1 Presumption of guilt*

The Pakistani legal system subscribes to the common law rule of evidence that the burden of proof lies on the party that asserts the affirmative of the issue in question. In standard criminal justice practice, the accused is presumed innocent and the prosecution must prove his guilt beyond reasonable doubt. The accused need not open his mouth. Any benefit of doubt must be given to the accused.

The 1975 "special" law departed from the universal criminal law principle of presuming the accused innocent until proven guilty.<sup>23</sup> That law presumed the accused guilty when he was found in possession of any article which could be used in the commission of the offence he was accused of committing, or when apprehended "in circumstances which tend to raise a reasonable suspicion that he has committed such an offence".<sup>24</sup> It was then for the accused to convince the court of his innocence. That has been the theme for all special laws since. Under the ATA 1997, there are instances of an accused having to prove his innocence rather than the prosecution proving his guilt. For instance, the onus of proof is on the accused when he is charged with failure to disclose to a police officer "his belief or suspicion"<sup>25</sup> that a person has committed an offence under the ATA.<sup>26</sup> Such onus is also on the accused in cases where he is charged with disclosing to another person "anything that is likely to prejudice an investigation" or "interferes with material which is likely to be relevant to an investigation."<sup>27</sup>

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23 *Sec. 8, Suppression of Terrorist Activities (Special Courts) Act (XV), 1975.*

24 *Sec. 8, Suppression of Terrorist Activities (Special Courts) Act, 1975.*

25 *Sec. 11-L (1), ATA, 1997.*

26 *Sec. 11-L (2), ATA, 1997.*

27 *Sec. 21-A (6) & (8), ATA, 1997.*

Against such a shift in the onus of proof, all that the most innocent of accused can do is present proof of past good behaviour or blanket pleas of innocence.

### **2.1.2 Justice in a hurry: speed and fairness**

Remedying the slow pace of adjudicating cases has always been the principal justification for anti-terror laws. The 1975 law ensured “speedy” trials by not granting adjournments unless “necessary in the interest of justice”.<sup>28</sup> It also provided that once the accused had appeared before the court, the remaining trial could proceed even if the accused subsequently absconds.<sup>29</sup>

The ATA aspires to meet its objective of ensuring speedy trials by setting a range of short and rigid deadlines. The law requires investigation of offences within seven days.<sup>30</sup> Once the case is submitted to court, the trial is to be conducted within seven days,<sup>31</sup> though as shown in Section 2.1.6 it almost always takes longer in practice. The trial judge is specifically barred from granting more than two consecutive adjournments.<sup>32</sup> Failure to keep to the timeframe might result in disciplinary action against the presiding judge.<sup>33</sup> An accused convicted by an ATC has only seven days to appeal the judgment, which must also be heard and decided within seven days.<sup>34</sup> Remarkably, only convicts have such a short deadline to appeal. The State allows itself 15 days<sup>35</sup> and any aggrieved victim or his heirs 30 days to challenge the anti-terrorism court (ATC) verdict in appeal.<sup>36</sup>

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28 *Sec. 5 (2), Suppression of Terrorist Activities (Special Courts) Act, 1975.*

29 *Sec. 5 (4), Suppression of Terrorist Activities (Special Courts) Act, 1975.*

30 *Sec. 19 (1), ATA, 1997.*

31 *Sec. 19 (7), ATA, 1997.*

32 *Sec. 19 (8), ATA, 1997.*

33 *Sec. 19 (8-a), ATA, 1997.*

34 *Sec. 25 (3), ATA, 1997.*

35 *Sec. 25 (4), ATA, 1997.*

36 *Sec. 25 (4A), ATA, 1997.*

Such short deadlines for a convict in the trial or appellate courts effectively exclude the provision of sufficient time to prepare a proper defence in trial or on appeal. The provisions on timeframe contravene due process rights of the accused/convict which are ensured by international human rights law, and the Pakistan Constitution. A combination of overly expeditious ATA trial and appeal procedure and shifting the onus of proof on the accused seriously compromises human rights guarantees for a fair trial.

### ***2.1.3 Redefining torture and admissibility of extra-judicial confessions***

The Pakistan Constitution prohibits torture and guarantees the inviolability of dignity of the person.<sup>37</sup> The country has also informed the United Nations of its intent to ratify the Convention against Torture and the ICCPR, which also has provisions prohibiting torture.<sup>38</sup>

The Constitution contains a general bar on torture for extracting confession, without splitting torture into the physical and mental elements. Unlike international human rights standards on torture,<sup>39</sup> inflicting mental pain or suffering on a person for obtaining information from him is apparently not deemed torture under the ATA. While giving police custody of a person for investigation, the court need only be satisfied that he will not be caused "bodily harm".<sup>40</sup>

On top of merely prohibiting "bodily harm", another ATA provision with potentially grave implications for the prohibition of torture is making confessions before police admissible in evidence.<sup>41</sup> Admitting such confession departs from the country's legal practice and the practice in much of the civilized world. Such

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37 *Art. 14, Constitution of Pakistan, 1973.*

38 *Ratification of three human rights treaties, UN told, 11 Dec 2006, Dawn.*

39 *Art. 1 (1), UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

40 *Sec. 21-E, (2), ATA, 1997.*

41 *Sec. 21-H, ATA, 1997.*



confessions are inadmissible for obvious reasons; they make the police judge, jury and executioner.

In fact, Pakistan's evidence law, the Qanoon-e-Shahadat Order, has a specific provision declaring confession of the accused made to a police officer inadmissible and ruling it out as the basis of conviction on its own.<sup>42</sup> Even the earlier "special" anti-terror laws did not permit extrajudicial confessions. Prior to the ATA, the only admissible confession was one made before a magistrate.<sup>43</sup>

In 2005, the Lahore High Court stressed that police torture was unconstitutional because it violated Articles 5 and 14 of the Constitution.<sup>44</sup>

Ill-treatment and torture during arrest and in detention is not rare in Pakistan. There were 1,250 cases of police torture in the country in the 16 months upto April 2006.<sup>45</sup> That was despite police reforms and the establishment of public safety commissions at district level. This figure compares with 1,100 cases of alleged police torture in 2004.<sup>46</sup> These cases of torture are of course the ones where people in police custody lodged complaints about torture. Since Pakistan joined the "war on terror", many of the people who "disappeared" and were subsequently released from government agencies' unlawful custody alleged physical abuse and threats. Statistics for allegations of torture in "enforced disappearances" are obviously not available since the government denies holding these persons in the first place.

In view of frequent instances of physical abuse in police custody, mental torture, collective punishment or duress on members of the accused's family, admissibility of confession before

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42 Art. 38, *Qanoon-e-Shahadat Order, 1984 (President's Order No. 10 of 1984)*.

43 Art. 39, *Qanoon-e-Shahadat Order, 1984 (President's Order No. 10 of 1984)*.

44 "Torture in custody a violation of Constitution," 27 Feb 2005, *Dawn*.

45 1,250 cases of police torture in 16 months, 25 May 2006, *Daily Times*.

46 "1,100 reported police torture during 2004," 08 Feb 2005, *Dawn*.

police has immense potential for abuse. It has not been rare for a conviction by an ATC to be set aside because the appellate court was not convinced that a confession by the accused was voluntary in nature.<sup>47</sup> Against the backdrop of law enforcement agencies' practice, and laws that compromise rights of the accused to speed up the adjudication process, the risk of forced confessions leading to conviction of the innocent is not unlikely by any stretch of imagination.

### **2.1.4 Juvenile rights**

In further controversial departures from regular criminal law, the treatment of juveniles accused of offences under the ATA is also contrary to previous practice.

Unlike the 1975 law, the 1997 Act specifically provides for children's trial before ATCs.<sup>48</sup> Children<sup>49</sup> accused of offences under the Act are treated in a manner similar to adults,<sup>50</sup> the concession they get, however, is that the maximum punishment for offences committed by children is half that for adults.<sup>51</sup> Under the ATA, children can also be sentenced to death. At times death sentence or life imprisonment is the mandatory sentence under the Act if the trial court convicts an accused, juvenile or otherwise.<sup>52</sup>

In July 2000, the government promulgated the Juvenile Justice System Ordinance (JJSO), which focused on the child in the criminal justice process. Under the JJSO, minors' trials are to be conducted separately from the adult accused. The Lahore High Court declared the JJSO unconstitutional in December 2004. However, the Supreme Court has since suspended the LHC decision, temporarily reinstating the JJSO. While JJSO remains in the field, Section 32 of the Anti-Terrorism Act gives the Act

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47 2006 PCrLJ 1400; 2006 PCrLJ 1671.

48 Sec. 21-C (4), (5) & (7) (e), (f), ATA, 1997.

49 Child means 'a person who at the time of the commission of the offence has not attained the age of eighteen years', Sec. 2 (d), ATA, 1997.

50 Sec. 21-C (4), (7) (e), ATA, 1997.

51 Sec. 21-C (5), (7), (f), ATA, 1997.

52 Sec. 7 (a), ATA, 1997.

overriding effect over all other laws, ruling out a trial for the juvenile accused under the JJSO. In more than one instance, high courts in Pakistan have insisted that juveniles charged under the ATA cannot have a separate trial. While overturning a trial court's decision to allow a separate trial under the JJSO of two juvenile accused, the Lahore High Court observed:

“An offender of terrorism can be tried only by an Anti-Terrorism Court constituted under the Anti-Terrorism Act, 1997 and the age of the offender has no relevance to the question of such jurisdiction. The express provisions of section 2(d), 21-C (5), 21-C (7) (e), 21-C (7) (f) and 21-F of the Anti-Terrorism Act, 1997 clearly postulate that a ‘child’ below the age of eighteen years can legitimately be tried by an Anti-Terrorism Court constituted under the Anti-Terrorism Act, 1997. We are fortified in our view in this impression by the provisions of section 32 of the Anti-Terrorism Act, 1997 which unambiguously provide that the provisions of the said Act are to have overriding effect over all other laws.”<sup>53</sup>

On other occasions the high courts have held that a court under the ATA has complete jurisdiction to try any offence irrespective of whether the offender is a minor or not.<sup>54</sup>

Trial and charging children under the ATA falls foul of Pakistan's commitment under the Convention on the Rights of the Child (CRC) on many counts.<sup>55</sup> Under the CRC, Pakistan is bound to ensure that “[e]very child alleged as or accused of having infringed the penal law ... [is] presumed innocent until proven guilty according to law”.<sup>56</sup>

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53 *PLD 2004 Lahore 779.*

54 *2006 PCrLJ 921.*

55 *Pakistan ratified the CRC on 12 December 1990.*

56 *Art. 40 (3),(a), CRC.*

The convention calls for measures “dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”<sup>57</sup>

As pointed out in the section concerning the onus of proof, the presumption of innocence is not available to many charged with offences under the ATA, children included. Incidents of juveniles being arrested under the ATA and their trial at the ATC are not rare. Children as young as 12 have been arrested and detained for alleged offences under the 1997 Act.<sup>58</sup>

In further disregard of Pakistan’s obligations under specific CRC provisions, the Anti-Terrorism Act does not establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.<sup>59</sup> The ATA instead casually defines a child as “a person who at the time of the commission of the offence has not attained the age of eighteen years”.<sup>60</sup>

Furthermore, under the CRC the state must also ensure that the child is not “compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality”.<sup>61</sup> Provisions regarding trial in absentia, which is discussed in the following section, and admissibility of confession before police expressly violate Pakistan’s obligations in this regard under the Convention on the Rights of the Child.

### ***2.1.5 Trial in absentia***

In almost all major criminal legal systems in the world, the accused is not tried in his absence, as that may prejudice his defence. The requirement for the accused to be present at his trial is aimed at allowing him to see and challenge the evidence and

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57 Art. 40, (3)(b), *Convention on the Rights of the Child (CRC)*.

58 *12-year-old jailed on terror charges, 05 Dec 2006, Daily Times.*

59 Art. 40 (2) (b), *CRC*.

60 Section 2 (d), *ATA, 1997*.

61 Art. 2 (b)(iv), *CRC*.

witness accounts that might incriminate him. There are similar provisions for a criminal trial in Pakistan. Under the regular criminal law in the country, the general rule is that all evidence is to be taken in presence of the accused.<sup>62</sup> The most that can be done in a charge against an accused who has absconded is to record deposition of witnesses. Such deposition can only be used against the accused after his arrest and even then only, "if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience, which, under the circumstances of the case, would be unreasonable."<sup>63</sup>

To ensure "speedy" trial, however, the ATA provides for trial of accused in absentia.<sup>64</sup> The Lahore High Court has recently observed that the ATC court is under a legal obligation to proceed with a case under the ATA even in the absence of an accused.<sup>65</sup> The Anti-Terrorism Act provisions in this regard compromises fair trial guarantees and the right of the accused to challenge the evidence against him.

### ***2.1.6 Effectiveness of speedy justice***

The stated objective and justification for the Anti-Terrorism Act, 1997 is the "speedy" justice that it was meant to administer. The instances of cutting corners at the expense of the accused have been narrated above. Now here is an effort to determine how effective and speedy justice really is under the ATA as it stands today.

An official report<sup>66</sup> on the performance of special courts in the country gives valuable insight into the speed of adjudication of cases by ATCs. The 2005 Annual Report on Administrative

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62 *Sec. 353, CrPC, 1898.*

63 *Sec. 512, CrPC, 1898.*

64 *Sec. 19 (10), ATA, 1997.*

65 *Terrorism accused can be tried in absentia, rules LHC, 23 Jan 2007, Daily Times.*

66 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee.*

Tribunals and Special Courts covers performance of ATCs during 2004,<sup>67</sup> the last year for which relatively detailed official statistics are available. The report gives brief statistics for 2005 as well.

However, an in-depth analysis of the ATC performance on the basis of this report is impossible because while it gives relatively elaborate details of ATC performance for the provinces of Sindh and the North West Frontier Province (NWFP), the figures about ATC performance elsewhere in the country are extremely abbreviated. The manner of providing details is not uniform or consistent and is at time selective. For instance, the performance of 11 ATCs in the Punjab province is covered in less than half a page — in a solitary six-column table containing a dozen odd rows.<sup>68</sup> Elsewhere, the report allocates 10 pages to detail cases before one of the many ATCs in a district in Sindh.<sup>69</sup> Such pattern of selective statistics in the report forces one to patch together the randomly provided information to try and form a broader picture.

But even this patchy information gives pointers to the speed of case adjudication by ATCs. One instance of that in the report are the details about the time between the registration of a case and the submission of challan detailing charges against the accused before the ATC in Mardan, a district in the NWFP.

The ATA requires challan submission to court within seven days of registration of a case.<sup>70</sup> In the only instance where information regarding the timeframe for submission of challan is provided in the government report, for Mardan district, that requirement is not met even in a single case. Of the 30 cases decided in Mardan during 2004, challans for only two cases were submitted in court within one month of the registration of cases.<sup>71</sup>

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67 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee, pp. 63-116.*

68 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee, p. 65*

69 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee, pp. 97-106.*

70 *Sec. 19 (1), ATA, 1997.*

71 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee. pp. 74-75.*

In one of the 30 cases the challan was submitted four years and eight months after a case was registered with the police. In another case it took three years and 11 months. In five cases, the submission of challan to the ATC took longer than two years. In nine cases the challan was submitted between one year to 23 months after the case registration. In five cases it took between six months to one year. In one case, it took five months and in six others it took longer than one but less than two months to submit the challan.<sup>72</sup>

One could perhaps look at the practice of submitting challans to ATCs across Pakistan but the annual report does not give similar data for any other district in the country.

Staying with NWFP, the report narrates the disposal of cases by the ATC in Dera Ismail Khan district during 2004.<sup>73</sup> During the year the court had a total of 43 anti-terrorism cases before it. By the year's end, seven of these cases were still pending; 17 had been transferred to regular criminal courts by the ATC; and three were returned to the prosecution branch. The Dera Ismail Khan ATC decided 15 cases during 2004. Fifteen cases decided out of 43 in a whole year when the ATA requires trials' conclusion within seven days<sup>74</sup> does not say much for the speed of case adjudication by ATCs. Furthermore, the annual report does not say how many of the 15 cases led to acquittals or conviction and how long the accused, irrespective of the eventual verdict regarding their guilt or innocence, were exposed to the ATA regime of restricted rights. It would also be interesting to find out how many of the convictions were affirmed or overturned on appeal.

Elsewhere in the country, the 11 ATCs in various districts of the Punjab province began 2005 with 545 cases pending. During 2005, 1,193 new anti-terrorism cases were instituted. The 11 ATCs

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72 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee. pp. 73-75.*

73 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee. pp. 69-71.*

74 *Sec. 19 (7), ATA, 1997.*

disposed off 1,013 cases during 2005, with the result that the year that began with 545 cases ended with 725 pending cases.<sup>75</sup>

The information about another NWFP district, Swat, states that 56 new cases were instituted in the district ATC during 2004. It does not say how many cases were with the court before the year began, only that at the end of the year 35 cases were pending with the court and 32 had been decided, eight ending in conviction and 24 in acquittal of the accused.<sup>76</sup> The report also does not say how long individual trials lasted or how long it took to submit challan after registration of the case in individual trials. That is important when one considers the diminished rights guarantees and special provisions under the ATA that the accused are exposed to.

The point is further illustrated by looking at the performance of ATC-I Karachi.<sup>77</sup> Of the 15 cases the court heard during 2005, 14 ended in acquittal and there was one conviction. Yet in 13 of the 15 cases, the acquittals came when the accused had been exposed to the ATA provisions — including diminished due process rights and guarantees and harsher requirements regarding bail — for around two years or more. In one case, it took almost five years before the accused were acquitted and in another over six years.

Paucity of across the board details notwithstanding, the report gives a damning verdict on the ATA ambition of expeditious justice. It emerges that it is frequent for the accused to be subjected to the ATA mechanisms for years devoid of guarantees taken for granted in a developed criminal legal system. Despite the trade-off between basic rights of the accused for the sake of expeditious case disposal, justice under the ATA is not expeditious by any definition of the word. There is also no consequence for the state, such as compensation or the like for the accused who is eventually

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75 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee, p. 65.*

76 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee. p. 76.*

77 *Administrative Tribunals and Special Courts, Annual Report 2005, National Judicial Policy Making Committee pp. 81-82.*



acquitted, for subjecting him to restricted rights and guarantees under the ATA.

Delay in submitting challans to courts or for the courts to decide cases falls short of the ATA requirement by a country mile. In fact, ending the delay in submitting cases to courts and the backlog of pending cases was sold as the main merit of ATA. If the same argument is followed and the ATA regime cannot ensure a timely submission of challans either, does that not negate the very *raison d'être* of the ATA? Why should this delay not lead to ATA being abandoned for a lack of speed in adjudicating cases – the precise reason why special anti-terror laws were deemed necessary to replace the regular criminal law in the first place?

So much for speedy justice. While there is not a similar official report for the outcome of appeals against ATC verdicts, it is tempting to test the waters on the trends on appeal, to gauge the effectiveness of justice administered by ATCs. To that end, I have decided to analyze the outcome of appeals against orders and judgements of the ATC that have been reported in a well known law journal in Pakistan during the calendar year 2006. My reason for choosing the Pakistan Criminal Law Journal (PCrLJ) is the journal's acknowledged status among lawyers as the premier law journal reporting criminal law cases in the country.

During 2006, PCrLJ published 16 decisions in appeal against ATC verdicts.<sup>78</sup> Some of these were against the final conviction of the accused and others against appealable orders passed while the case was pending with an ATC.

For perspective, it is added that the overall number of ATC appeals in the country during 2006 may be in hundreds. Also, some of the cases reported in 2006 may actually have been decided in calendar year 2005. Granted that an examination of the law based on a criterion such as this may be relatively random, but that is

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78 2006 PCrLJ 62; 2006 PCrLJ 78; 2006 PCrLJ 526; 2006 PCrLJ 589; 2006 PCrLJ 639; 2006 PCrLJ 728; 2006 PCrLJ 921; 2006 PCrLJ 1265; 2006 PCrLJ 1400; 2006 PCrLJ 1569; 2006 PCrLJ 1576; 2006 PCrLJ 1569; 2006 PCrLJ 1671; 2006 PCrLJ 1804; 2006 PCrLJ 1827; & 2006 PCrLJ 1907.

precisely why I have opted for it — a random sampling of appeals against ATC decisions to allow such an analysis. While it may not be a statistically precise reflection of the situation, it can give insight into the strengths and weaknesses introduced into the administration of justice under the ATA and under the trial system it has ushered in.

Of the 16 appeals reported in the high court against ATC decisions — both orders and final judgements — in the PCrLJ in 2006, only in one appeal against order<sup>79</sup> and in two against conviction<sup>80</sup> decisions were upheld by a high court unaltered.

Of the remaining 13, conviction was set aside in two appeals because the appellate court was dissatisfied with the voluntary nature of confession by the accused.<sup>81</sup> Another conviction by an ATC was set aside because the appeal court did not find any corroboration of a witness's statement.<sup>82</sup> In another appeal, the appellate court cited insufficient evidence as the reason for acquitting the accused convicted by an ATC.<sup>83</sup>

In three cases, the appellate court accepted appeals against ATC judgements or orders, finding the accused innocent or giving him benefit of doubt.<sup>84</sup>

In three appeals against conviction the court either partially set aside conviction<sup>85</sup> — for some of the charges or some of the accused — or reduced the sentence.<sup>86</sup>

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79 2006 PCrLJ 921.

80 2006 PCrLJ 1569; 2006 PCrLJ 62 (*The court upheld the conviction and sentence based on a judicial confession and said that the delay cited in recording such confession was a mere irregularity*).

81 2006 PCrLJ 1400; 2006 PCrLJ 1671.

82 2006 PCrLJ 639.

83 2006 PCrLJ 728.

84 2006 PCrLJ 1576; 2006 PCrLJ 1827; 2006 PCrLJ 1907.

85 2006 PCrLJ 526; 2006 PCrLJ 589 (*Conviction maintained for some accused, but set aside for accused found guilty in his absence*).

86 2006 PCrLJ 1265.

The remaining three cases included a revision petition to enhance sentence awarded to three respondents. The high court issued notices to the respondents asking why their prison sentences should not be enhanced to capital punishment.<sup>87</sup>

Another case challenged an ATC order on admissibility of evidence. The appellate court accepted the appeal, setting aside the ATC order and sending the case back to the ATC.<sup>88</sup> And in the final case the court allowed bail to an accused and for reasons of impropriety in recording of evidence in trial recommended that another ATC should hear the main trial case.<sup>89</sup>

Three ATC decisions out of 16 reported cases upheld on appeal is certainly not much. The point, however, is not to highlight the proportion of decisions overturned on appeal but to give a flavour and extent of the glaring shortcoming found in the ATC decisions. There is no guarantee that a less rigid timeframe, or not admitting confessions made before police will cure all of these flaws. But it goes to show that the justice administered by ATCs lacks effectiveness and any ambitions about “speedy” determination of cases become irrelevant if such decisions are frequently altered, overturned or sent back to trial courts on appeal.

## **2.2 Then vs. now: Progressive dilution of rights under ‘special’ laws**

It is easy to spot a marked decrease in rights of the accused under the Anti-Terrorism Act, 1997, even when compared with that other “special” law, the Suppression of Terrorist Activities Act, 1975. And such adverse effect on rights is not confined to shorter and rigid time limits for trial or deciding appeals.

Unlike the ATA,<sup>90</sup> the 1975 law did not specifically provide for trial of juveniles in ATCs or offer specific sentences for

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87 2006 PCrLJ 78.

88 2006 PCrLJ 1804.

89 2006 PCrLJ 710.

90 Sec. 21-C (4), (5) & (7) (e), (f), ATA, 1997.

them. Unlike the ATA,<sup>91</sup> the previous law did not allow for detention for up to one year on mere suspicion. The previous law did not provide specific time limits for conducting trial and deciding appeals or bar adjournments. With the ATA, the reference present in the previous law to granting adjournments “necessary in the interest of justice”<sup>92</sup> is gone. Now the ATC judge is specifically barred from granting more than two consecutive adjournments,<sup>93</sup> unless he wants to run the risk of disciplinary action.<sup>94</sup>

Under the 1975 law, if the accused before an anti-terrorism court was charged with offences some of which were not included in the schedule of the 1975 Act, the court could only proceed with the trial of the scheduled offences.<sup>95</sup> The rationale apparently was to save the accused from the abbreviated procedures under the “special” law meant to expedite the trial for scheduled offences. The ATA, however, ditched the distinction between scheduled and non-scheduled offences, even as it expanded and added to the previous “special” procedures. An ATC trying an accused for a scheduled offence today is specifically authorized to try him for any non-scheduled offence he is charged with,<sup>96</sup> even though such act may not have anything to do with terrorism by the legislature’s own definition.

Furthermore, under the ATA, law enforcement personnel may arrest suspects and enter and search houses without warrant.<sup>97</sup> The Act also increases police and other law enforcement personnel’s powers to use force for the purposes specified in the Act.<sup>98</sup> This may include the power to shoot to kill. The ATA also makes conditions for releasing the accused on bail more stringent.<sup>99</sup>

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91 *Sec. 11 (EEE), ATA, 1997.*

92 *Sec. 5 (2), Suppression of Terrorist Activities (Special Courts) Act, 1975.*

93 *Sec. 19 (8), ATA, 1997.*

94 *Sec. 19 (8-a), ATA, 1997.*

95 *Sec. 4 (2), Suppression of Terrorist Activities (Special Courts) Act, 1975.*

96 *Sec. 17, ATA, 1997.*

97 *Sec. 5(2)(ii) & (iii), ATA, 1997.*

98 *Sec. 5(1), ATA, 1997.*

99 *Sec. 5 (6), Suppression of Terrorist Activities (Special Courts) Act, 1975.*

The ATA also allows for an accused to be tried in absentia,<sup>100</sup> something which is prohibited under the country's criminal law. Even the 1975 law only permitted a trial in absence of an accused if the accused had at least initially joined the trial.<sup>101</sup>

Such provisions of the ATA make it clear that rights of terror suspects are not a priority under the Act which was brought about exclusively for "the prevention of terrorism, sectarian violence and for speedy trial".<sup>102</sup>

Indeed if setting short time limits alone was sufficient to fix the prevailing slow administration of justice in the country, nothing would have been easier than setting a seven-day trial limit for all cases in regular courts.

Instead of writing off the regular judicial system by citing a lack of speed and effectiveness, the government would have done well to examine the obstacles to the expeditious adjudication of criminal cases in the regular court system and developed solutions to remove those obstacles. Doing that would have been a lot less cumbersome, less expensive, and depending on the measures taken probably more in conformity with human rights law. Instead the government introduced a parallel legal system that denies due process and other safeguards to those charged under the ATA.

With the burden of proving his innocence largely on the accused, the legal requirement to decide trial and appeals within a short and rigid timeframe, a narrow definition of torture and admissibility of confessions made before police, the odds are stacked against the accused under the ATA. By abandoning many of the safeguards in the standard procedures, the Act denies the accused a level playing field.

The question is why constitute "special" laws to try acts or omissions which are already offences under existing criminal law?

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100 Sec. 19 (10), ATA, 1997.

101 Sec. 5 (4), *Suppression of Terrorist Activities (Special Courts) Act*, 1975.

102 Preamble, ATA, 1997.

The “special” law scales back rights of the accused to fix problems which are essentially caused by other factors, not least the general inefficiency in the judicial system, lack of judges and want of more capable investigation. The “speedy” trial has come about in response to slow or ineffective investigation and the state’s deemed failure to successfully prosecute alleged offenders. However, the onus for improper or incompetent investigation, or of the prosecution’s failure to come up with credible evidence cannot be shifted by asking the accused to prove his innocence.

It is in no one’s interest to convict an accused when there is even a shadow of doubt of his guilt. For one thing it may allow the guilty to roam free. Furthermore, there is absolutely nothing to be gained in terms of deterrence of crime either by denying the accused basic guarantees of a fair trial.

For over three decades, whenever the government has been unhappy with the pace of the legal process, it has brought in a “special” law, or added new offences to an existing list. That “special” anti-terror laws make a mess of human rights in general and due process rights in particular is obvious. Quite frankly “special” anti-terrorism legislation also implies an admission of failure on the government’s part to remedy whatever is afflicting the regular legal system. To that extent any special law that seeks to expedite specific offences, because the regular justice system is slow or ineffective concedes that the regular law is beyond repair. In such a scenario, not replacing or sufficiently amending the regular law amounts to admission of defeat in meeting a constitutional goal – to “ensure inexpensive and expeditious justice”<sup>103</sup> in all cases.

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103 Art. 37 (d), *Constitution of Pakistan, 1973*. The State shall “ensure inexpensive and expeditious justice.”

By ditching the safeguards inherent in the standard criminal law and procedure, the ATA creates a parallel legal system, which effectively hurries determination of cases at the expense of substantial rights of the accused. The logical inference apparently is that it is regard for rights of the accused that delays determination of cases in the regular criminal courts. Provisions of the ATA prejudice fair trial and due process rights of the accused and fly in the face of Pakistan's commitment under international human rights law and the country's Constitution.

# Other legal provisions and practices with anti-terror component

The following section looks at other legal provisions and practices — sometimes in relation to those provisions and at other times with no relation to law or due process — which have come to be seen as part of Islamabad’s anti-terror measures.

Such provisions relate to arrest, detention, extradition and the phenomenon Amnesty International calls “enforced disappearances”.<sup>104</sup>

## 3.1 Detention under preventive laws

The Constitution of Pakistan bars any law inconsistent with the human rights conferred by it.<sup>105</sup> However, it allows reservations

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<sup>104</sup> *Pakistan: Human rights ignored in the "war on terror", AI Index: ASA 33/036/2006, 29 September 2006.*



to some rights,<sup>106</sup> at times in such general terms as to render the constitutional guarantee meaningless. The constitutional provision prohibiting arbitrary arrest and detention specifically provides for preventive detention, i.e. arrest or detention of persons before they have actually committed a crime.<sup>107</sup>

Laws providing for preventive detention can be made “to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services...”<sup>108</sup> The general constitutional requirement regarding arrest — that a person shall be informed of the grounds for his arrest, and be produced before a magistrate within 24 hours — do not apply to persons held under preventive detention laws.<sup>109</sup>

Legal provisions for preventive detention are not a very recent phenomenon in Pakistan. The Code of Criminal Procedure, 1898, the principal tool governing the administration of criminal justice in the country also allows for such detention. It provides that a police officer may make such an arrest without orders of the magistrate and without warrants, if the offence likely to be committed is a cognizable offence and if it “appears to such an officer that the commission of the offence cannot be otherwise prevented.”<sup>110</sup> Detention under preventive laws has been a constant feature of legislation in the country, particularly under a range of security-related laws. For instance, preventive detention for up to one year is authorized under the ATA. All that is required is for the government to be satisfied that it is necessary to arrest or detain a person.<sup>111</sup> Inclusion of such a person’s name in a list under the Act would then justify his detention. Justifiable grounds for preventive detention under other laws such as the Security of Pakistan Act or Maintenance of Public Order include satisfaction of the government that arrest and detention is necessary “for preventing any person

105 Art. 8 (1) & (2), *Constitution of Pakistan, 1973.*

106 Art. 8 (5), *Constitution of Pakistan, 1973.*

107 Art. 10 (3), *Constitution of Pakistan, 1973.*

108 Art. 10 (4), *Constitution of Pakistan, 1973.*

109 Art. 10 (3), *Constitution of Pakistan, 1973.*

110 Art. 151, *CrPC, 1898.*

111 Art. 11-EEE, *ATA, 1997.*

from acting in a manner prejudicial to public safety or the maintenance of public order.”<sup>112</sup>

The use of such vague grounds without specifically elaborating them increases the likelihood of abuse of preventive detention laws. However, the practice goes even further than these expansive grounds provide, prompting courts to declare instances of detention under preventive laws illegal.<sup>113</sup>

However, a court’s pronouncement against preventive detention orders is no guarantee of such detention coming to an end. The government has not been averse to using consecutive preventive detention orders and detention under various laws in tandem. With the result that those under preventive detention under one law or one detention order have been released by courts and straight away detained by government agencies in pursuance of another law or a new detention order under the same law.

The preventive detention of Hafiz Muhammad Saeed, leader of the outlawed militant organization Lashkar-e-Taiba, in August 2006 is a case in point. Saeed was put under house arrest in Lahore for one month under preventive detention provisions of the Maintenance of Public Order.<sup>114</sup> While the Lahore High Court was hearing a petition filed by Saeed’s family against his detention, he was transferred from his house in Lahore to a rest-house in the nearby city of Sheikhpura.

The LHC ordered Saeed’s release observing that the government had not provided sufficient evidence to justify his detention. However, the government ordered that Saeed be put under house arrest again immediately after the highest court in the province had found his detention unjustified on the grounds cited by

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112 Sec. 3, *West Pakistan Maintenance of Public Order Ordinance, 1960.*

113 *Detention under preventive laws illegal, rules PHC, Nov. 22, 2006, Daily Times.*

114 *Hafiz Saeed put under house arrest, 11 Aug 2006, Dawn; Hafiz Saeed put under house arrest in Lahore, 11 Aug 2006, Daily Times; Petition against Hafiz detention adjourned, 24 Aug 2006, The News; Hafiz Saeed case: Home dept given two days to file reply, 26 Aug 2006, Dawn.*

the government.<sup>115</sup> Saeed's family said that he was not shown any warrant for detention as required by law and the police verbally informed him that he was being held under the preventive detention provisions of the MPO.<sup>116</sup>

In further hearings of the case, the high court maintained that the government must follow the criteria set by courts regarding preventive detention. The court said that the need for preventive detention must be substantiated by formidable material evidence suggesting that an individual's activities were detrimental to public order.<sup>117</sup>

The LHC was moved again following Saeed's second preventive detention.<sup>118</sup> During the hearing of that petition, the court was informed that Saeed was detained for the sake of better relations with a neighbouring country, India, since he was raising the issue of the country's involvement in Kashmir.<sup>119</sup> At least theoretically, preventive detention of "persons acting in a manner prejudicial to ... external affairs of Pakistan" is allowed by the Constitution.<sup>120</sup> Two days later the court ordered Saeed's release again and the state counsel later made it a point to mention how the government had released him "immediately" following the court's order.<sup>121</sup>

Other instances of preventive detention laws' use to prolong custody of individuals include the case of Waheed brothers. Akmal and Arshad Waheed were both doctors and were tried for treating, financing and harbouring militants and Al-Qaeda activists. They were convicted by an ATC but the sentence and conviction was set aside by the Sindh High Court (SHC) on appeal.<sup>122</sup> Ordering

115 *Hafiz Saeed re-arrested after release by court, 30 Aug 2006, The News; Again under house arrest, 29 Aug 2006, The Nation.*

116 *'Hafiz Saeed held without warrant', 31 Aug 2006, Dawn.*

117 *Preventive detention: criteria given by courts must be followed: LHC, 02 Sep 2006, Dawn.*

118 *Hafiz Saeed detention challenged again, 30 Sep 2006, The News.*

119 *Hafiz Saeed detained, 17 Oct 2006, Business Recorder.*

120 *Art. 10 (4), Constitution of Pakistan, 1973.*

121 *Authorities release Hafiz Saeed, 19 Oct 2006, The News.*

122 *SHC acquits doctor brothers, 11 Mar 2006, Dawn.*

their release the appellate court observed that the prosecution had “failed miserably” to prove the case against the appellants. However, the two brothers’ detention was extended under the MPO despite the court order for their release.<sup>123</sup> They were released a week later after the government withdrew the order for their preventive detention under the MPO.<sup>124</sup>

Besides its use in individual cases, preventive detention has been resorted to for mass arrests of activists of the proscribed religious and militant organizations during crackdowns in 2001 and 2005. They were detained for months for alleged membership of banned organizations under Section 11-EEE of the Anti-Terrorism Act, 1997.

Petitions against detention for alleged membership of such organizations were quite common during the middle of 2005. Judicial pronouncements have helped in such cases at times. Delivering judgement in one such petition, the Lahore High Court objected to the detention of the petitioner without meeting the ATA requirement — the inclusion of his name in a list under Section 11-EEE of the Act.<sup>125</sup>

In some cases the high courts added to the already extensive and vague grounds for preventive detention. For instance, in 2005 the Peshawar High Court ordered the release of seven petitioners who had been arrested under Section 11-EEE of the ATA because of their continued membership of the Tanzim Nifaz-e-Shariat Mohammadi (TNSM), a banned religious outfit.

However, in the same case, the court observed that a person charged in criminal cases could be detained under preventive laws.<sup>126</sup>

Such expansive and general pre-emptive grounds allowed under anti-terror and other security-related laws and under the

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123 *Waheed brothers detained after release in Qaeeda case, 11 Mar 2006, Daily Times.*

124 *Doctor brothers released, 19 Mar 2006, Dawn.*

125 *2006 PCrLJ 33.*

126 *Detention under preventive laws illegal, rules PHC, 06 Oct 2005, Daily Times.*

Constitution itself negate the constitutional guarantee regarding liberty of the person.

In view of Pakistan's intent to ratify the two international covenants, one can only start counting the number of laws the country will have to change to bring them in conformity with international human rights standards on personal liberty.

### 3.2 Global war on terror

Following the 9/11 attacks in the US, President Pervez Musharraf had pledged Pakistan's complete cooperation with the United States in the latter's "global war on terror". That cooperation included Pakistan "locating and shutting down terrorist training camps within its borders, cracking down on extremist groups and withdrawing support for the Taliban regime in Afghanistan".<sup>127</sup> That cooperation was also followed by practices such as "enforced disappearances" and surrender of individuals to the US without legal process.

Pakistan's cooperation with the US since includes capturing and surrendering more than 600 Al-Qaeda members.<sup>128</sup> In his recent book, President Musharraf states that Pakistan captured 689 Al-Qaeda members and handed over 369 to the United States since 2001.<sup>129</sup> There has been widespread commendation by western governments and other allies of Pakistan's efforts in the "war on terror". They have not, however, followed the human rights component of that war as closely. The measures taken after President Musharraf announced his backing for the "war" bring into focus a range of human rights and related civil liberty issues.

The impact on due process of law particularly regarding liberty, inviolability of personal dignity and freedom from torture

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127 US State Department, Bureau of South and Central Asian Affairs, October 2006, <http://www.state.gov/r/pa/ei/bgn/3453.htm>, last visited 31 Dec 2006.

128 US State Department, Bureau of South and Central Asian Affairs, October 2006, <http://www.state.gov/r/pa/ei/bgn/3453.htm>, last visited 31 Dec 2006.

129 *In the Line of Fire: A Memoir*, General Pervez Musharraf, p. 237.

merits a closer look. Pakistan's international human rights obligations, domestic guarantees, and relevant laws and practices are pertinent to this discussion.

### **3.3 Arrest, detention, 'disappearances' and due process**

The Pakistan Constitution provides that "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."<sup>130</sup>

Unlawful detention, whether related to anti-terror measures or not, is equally pervasive. Even though this study confines itself to a perusal of anti-terror laws and practices, the phenomenon of "enforced disappearance", i.e. incommunicado detention for long periods by civilian or military law enforcement or intelligence agencies, presents a peculiar problem in this regard. In absence of specific charges or trial or even acknowledgement of detention, it has been difficult to determine whether a person was detained in pursuance of the government's anti-terror action or not.

In the past year, arbitrary arrest and unlawful detention in the context of anti-terror measures in Pakistan were so intrinsically intertwined with "disappearances" that it is impossible to discuss one without the other. Suspects in the government's campaign against militant and extremist organizations, terrorism and nationalist movements, particularly in Sindh and Balochistan, frequently went missing, quite often following their apprehension by government agencies.

I am relying on the AI definition of "enforced disappearance" to describe the practice, which essentially implies any form of deprivation of liberty committed by agents of the State or by anyone acting with the State's authorization, support or acquiescence, followed by a refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the

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130 Art. 10 (1), *Constitution of Pakistan, 1973*.

person deprived of liberty, which places such a person outside the protection of the law.<sup>131</sup>

Under Pakistani law most arrests can only be in pursuance of a valid warrant but an overwhelming majority of terror suspects detained in the country since 2001 has not been arrested in that manner. Hundreds of people unlawfully taken into custody by the police or intelligence agencies were not charged with any offence. The standard procedure for recording their arrest and detaining them at recognized places of detention was also ignored. Many were detained incommunicado and without criminal charge. With dozens of “disappeared” persons being “found” and released after petitions to courts alleging unlawful detention by government agencies as 2006 ended, the dispute is no longer about the existence of the practice but about its extent.

According to the Human Rights Commission of Pakistan approximately 4,000 people have “disappeared” in Pakistan since the beginning of the US-led “war on terror” in 2001.<sup>132</sup>

The implications of being subjected to “disappearance” could be truly staggering. It means that a person in unlawful detention of a government agency cannot know the charge against him, cannot challenge his detention, cannot meet his family or lawyer, has no protection against torture, no due process guarantee against unlawful transfer to other countries, is not entitled to bail since he is not officially in custody, and there is no legal avenue to challenge judicial or administrative oversight in the form of any appeal or review.

A look at media reports of judicial proceedings regarding “disappearances” for 2006 is quite revealing. Cases of people from diverse economic, social and academic backgrounds going “missing” came to light during the year. An engineer, a rickshaw driver, a former navy personnel, scientists, businessmen and labourers – educated and illiterate, from cosmopolitan cities to

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*131 Pakistan: Human rights ignored in the “war on terror”, AI Index: ASA 33/036/2006, 29 September 2006.*

*132 4,000 people have simply disappeared: HRCP, 07 Nov 2006, The News.*

remote villages, from the very young to the very old – hundreds of people that have “disappeared” have had little in common other than the fact and the manner of their “disappearance”.

Reference to “enforced disappearances” was increasingly made in Pakistan as the year progressed. The Human Rights Commission of Pakistan (HRCP) was already drawing attention towards the high number of “disappearances” in the beginning of the year.<sup>133</sup> International human rights organizations also kept voicing their concern at the practice. Newspaper articles and editorials reflected the fact that the people were looking not at one or two random “disappearances” but at something of a trend.<sup>134</sup> The HRCP was able to verify that at least 242 people were “missing” in the county in December 2006. Of these, 170 were missing in Balochistan.<sup>135</sup> With families telling courts and newspapers about being contacted by intelligence agencies with assurances that their relatives will be returned, many people might have preferred and continue to prefer silence to coming out in the open about a “disappearance” and risk upsetting a government agency holding a missing relative.<sup>136</sup>

For all the dissimilarities in the background and circumstances of individuals subjected to “disappearance”, the practice is not as random as one might think. Go through a dozen or so cases of apprehension of individuals by government agencies and their subsequent “disappearance” and a pattern of compelling similarities starts to emerge. It goes like this: Someone is taken into custody by the police, military agencies or by civilian and military personnel acting in unison. One cannot even refer to the apprehended person as an accused at this stage since he is almost

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133 ‘Disappearance’ of people increasing in country: HRCP, 05 Feb 2006, *The News*.

134 *War on terror adds to human misery*, 24 Jan 2006, *Dawn*; *Numbers of ‘missing’ people alarmingly high*, 04 Apr 2006, *Dawn*; *ISI’s pervasive role*, 13 Jul 2006, *Dawn*; *These mysterious ‘disappearances’*, 05 Aug 2006, *Dawn*; *Where have they gone?* 11 Sep 2006, *The News*; *Still missing*, 20 Sep 2006, *The News*; *Another missing journalist*, 22 Nov 2006, *The Nation*; *The case of missing people*, 12 Dec 2006, *Dawn*.

135 242 people still missing: HRCP, 12 Dec 2006, *Daily Times*.

136 ‘We were silent out of fear’, 22 Jun 2006, *BBC URDU.com*.



never informed of any charge against him, nor produced in court for remand or to stand trial. After the apprehension everything goes quiet for a period, as the family tries to locate the person taken into custody. The search usually takes months and has frequently lasted longer than a year. The family privately tries to access a host of civilian and military law enforcement and intelligence agencies to find out, literally by way of elimination, if they have the missing person in custody. The efforts are invariably met with denials. In the face of official refusal to acknowledge the arrest or reveal the missing person's whereabouts, any protection afforded by law or the Constitution is nullified. It is usually around this time that a private search becomes so obviously fruitless that a habeas corpus petition is filed with any of the four provincial high courts in the country. Usually, the petitioner has to name a specific agency having custody of the person for the court to order information from that agency regarding the fate of the disappeared person. More often than not the family does not know the specific identity of the agency, because of the intentional ambiguity of the "arrest" and the subsequent official silence or denial. Following the petition, the court goes through the same routine as the family – seeking response from all government law enforcement and intelligence agencies. At this stage, the government agencies and the ministry responsible for them quite often submit before courts that they have nothing to do with a particular "disappearance" and do not know the missing person's whereabouts. The higher courts have taken the government to task for making stereotypical denials in some petitions.<sup>137</sup>

Since there is seldom a written record of such unlawful apprehensions by police, or intelligence agencies, the court has few options if the relevant government agency denies holding the missing person. The higher courts have at times asked those filing habeas corpus petitions to seek "a more appropriate remedy" — in effect a direction to the police to register a case for abduction of the missing person.<sup>138</sup>

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137 SHC tells govt to employ all means to produce detainee, 06 Jun 2006, Dawn.

138 Defence ministry denies Dr Sarki's detention by ISI, 17 May 2006, Dawn.

Occasionally, however, a government agency comes forward to own custody of the “disappeared”. The court then inquires into the reasons for detention. Though, at times, there has been reluctance to inform the court about specific charges against the detainee and efforts to keep him out of the regular judicial system.

Of course, there are minor variations to this plot – sometimes the family is approached by an intelligence agency and assured of the missing person’s eventual return – but the broad details remain eerily similar.

Throughout 2006, there have been hundreds of newspaper reports of “disappearances”, and dozens of accounts of nationalist leaders and activists going missing, especially in Sindh and Balochistan provinces. Relatives and leaders of nationalist parties have frequently held civilian and military intelligence agencies, including Military Intelligence (MI) and Inter-Services Intelligence (ISI) responsible for such “disappearances”.

Ascertaining the number of “disappearances” and official involvement in them is obviously not easy, particularly in the face of government assertions of not having anything to do with the missing persons. Yet, many of the “disappeared” persons went missing after being taken into custody by law enforcement agents. Many have returned from their “disappearance” to hold the government responsible for illegally arresting and detaining them.

To get a sense of the magnitude of the practice, I perused media reports for the calendar year 2006. I have particularly followed newspaper reports of proceedings in the habeas corpus petitions and otherwise before the provincial high courts and the Supreme Court.

In 2006, newspapers were reporting at least half a dozen new “disappearance” cases being heard by the higher courts every month on average. Many more might have gone unreported. But there were many more accounts coming to surface every week during the year — of families of the missing holding press conferences and demonstrations and making pleas for the release of

their loved ones to anyone in the government who would care to listen.

As families of the missing kept filing habeas corpus petitions in the provincial high courts, the Supreme Court of Pakistan saw enough similarity in various disappearances to ask the government for a report about the whereabouts of 41 missing men towards the end of 2006.

More than a few missing persons were “found” and returned to their families on or just before two deadlines in December 2006 set by the Supreme Court for the government to locate them.

### ***3.3.1 Sentence first – verdict afterwards***

I am recounting a few cases where the disappeared returned and either they or the circumstances of their arrest and return point to official agencies’ role in their illegal confinement.

Baloch nationalist Jamhuri Watan Party (JWP) leaders Salim Baloch, Abdul Rauf Sasoli and Saeed Brohi, were separately picked up in February-March 2006 by the ISI and MI, according to their families and JWP leaders. The Sindh High Court sought the defence secretary’s response a number of times after families of the “disappeared” moved habeas corpus petitions.<sup>139</sup>

Theoretically, the Defence Ministry has authority over military agencies including the ISI and MI. However, when the defence secretary finally submitted a reply to the court it was to the effect that the Defence Ministry did not have operational control over the ISI and MI.<sup>140</sup> The Defence Ministry submitted the same reply in three other habeas corpus petitions before the same court —

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*139 Govt told to submit remarks in detention case, 04 May 2006, Dawn; Govt given last chance over ‘missing’ activist, 14 Jun 2006, Dawn; Court seeks whereabouts of missing persons 30 Jun 2006, Dawn; SHC tells govt to employ all means to produce detainee: 06 Jun 2006 Dawn*

*140 No operational control over ISI and MI, defence ministry tells court, 12 Jul, 2006, Dawn*

for the recovery of Munir Mengal, director of Baloch Voice TV channel, missing since April 2006, Muhammad Alam Tariq, a prayer leader, missing since December 2005 and Affan Leghari, a former IBA student missing since October 2004.

Around three weeks later, the court put the MI director on notice in the case of detention of Baloch and Sasoli. The court asked the government counsel for the MI director's name. But the counsel declined to give the name, citing the hazards of identifying him because of the sensitive nature of his work. After the Defence Ministry's response, the court was effectively in the dark — not knowing which authority controlled the agencies accused of holding the JWP leaders and the other three missing men and also denied information on who to issue direct orders to.<sup>141</sup>

Almost a month later the government informed the court that the JWP officials and Affan were not in custody of the ISI or the MI. The counsel for the JWP leaders highlighted the contradiction of the Defence Ministry that on one hand it denied operational control over the intelligence agencies and on the other it was making statements and producing letters in court on their behalf.<sup>142</sup>

And then in December 2006, the JWP leaders including Salim Baloch were "recovered" almost simultaneously.<sup>143</sup> Sasoli returned home from 11 months of detention. He said he did not know who detained him or where. Baloch accused government agencies of torturing him while in unlawful detention and of submitting false affidavits denying his custody. The court disposed off the petitions regarding the recovery of the JWP leaders who were found.<sup>144</sup>

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141 *JWP leaders' detention case: MI director put on notice, 01 Aug 2006, Dawn; Whereabouts of activists: Agencies get further time for filing of comments, 17 Aug 2006 Dawn.*

142 *Unsigned 'confidential' letter submitted to court, 03 Aug 2006, Dawn.*

143 *Missing JWP leader returns home, 16 Dec 2006, The Nation; JWP leader freed, 15 Dec 2006, Dawn.*

144 *Writs disposed of as JWP men return home, 21 Dec 2006, Dawn.*

In another case, government officials allegedly stopped a train and offloaded Nawaz Khan Zounr, an activist of the Sindhi nationalist Jiay Sindh Muttahida Mahaz (JSMM), and his friend Zulfiqar Kolachi on 31 December 2005. Kolachi was released a month and a half later.<sup>145</sup> Zounr remained missing for 10 months until he was produced in an anti-terrorism court along with another JSMM activist, Sikandar Soomro, in late October 2006. They were both charged under the Explosive Substances Act. The two men were produced in court after Soomro's brother petitioned the SHC to order Soomro's recovery after his arrest 10 months earlier by a superintendent of police (SP).<sup>146</sup> Zounr had not been charged, produced in court, or allowed access to his family or lawyer since his arrest.

The list goes on. JSMM leaders Muzaffar Bhutto and Sattar Hucrru were arrested by the police from Karachi in October 2005, according to Bhutto's brother. Their whereabouts were not known after that. Relatives of the two men and the JSMM had been staging demonstrations against their "disappearance".<sup>147</sup> Despaired by his long absence, Bhutto's family had said that even if Muzaffar had been killed it was the family's right to get his body back.<sup>148</sup> Thirteen months after their "disappearance", Jamshoro police claimed the arrest of Muzaffar Bhutto and Sattar Hucrru in November 2006.<sup>149</sup> The police charged them with trying to blow up a gas pipeline. They were produced before an anti-terrorism court and remanded to police custody.<sup>150</sup>

Voluntary surrender to police when suspected of involvement in crimes is no guarantee to escape "disappearance" or that due process will follow. The arrest and subsequent disappearance of Abdul Basit from Faisalabad in January 2004

145 *Those who are missing ....*, 28 Jun 2006, BBC URDU.com.

146 *Two missing JSMM activists produced in court after 10 months*, 31 Oct 2006, Dawn.

147 *Protest against disappearance*, 19 Jul 2006, KD.

148 *Those who are missing ....*, 28 Jun 2006, BBC URDU.com.

149 *Two nationalist leaders missing for 13 months declared arrested*, 10 Nov 2006, Daily Pakistan.

150 *Two missing men found after 13 months*, 09 Nov 2006, BBC URDU.com.

testifies to that. Basit's uncle had handed him over to the police after they said that they wanted to question Basit in connection with an assassination attempt on General Pervez Musharraf. Later Basit went "missing" in police custody and his family was forced to petition the Lahore High Court (LHC) to seek his recovery. What followed was a perpetual passing of the buck. A deputy superintendent of police (DSP) from Faisalabad informed the LHC that an assistant sub-inspector (ASI) had handed Basit over to the district police officer (DPO), the most senior police officer in a district, and the DPO would know about Basit's whereabouts. The DPO in turn told the court that Basit was neither wanted by the police nor arrested by them. The DSP had told the court that he had given the missing man in custody of Iftikhar Ahmed, an ASI of the Faisalabad Anti-Terrorism Cell. The ASI said in his statement that Basit was wanted by the police with regard to an attack on President Musharraf and he had handed him over to army officers at the Pindi Bhattian Toll Plaza, near Faisalabad on orders from the Punjab Anti-Terrorism Cell. The Lahore High Court had ordered the Punjab police chief to investigate the matter.<sup>151</sup> Basit's whereabouts are still not known.

There are dozens of other cases of people disappearing following apprehension by government agencies. There is the case of two brothers separately arrested from Balochistan. Gowaram Saleh was arrested in August 2004 and Ibrahim Saleh in November 2005.<sup>152</sup> While Ibrahim was released later,<sup>153</sup> Gowaram remains missing. He has never been charged or produced in court.<sup>154</sup>

Then there was Akash Mallah alias Sikandar, a former activist of the nationalist Jiay Sindh Qaumi Mahaz (JSQM), who was arrested by police in Hyderabad in December 2005. He is still missing and the police have expressed ignorance about his

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<sup>151</sup> *Those who are missing (part II)*, 30 Jun 2006, *BBC URDU.com*.

<sup>152</sup> *Those who are missing ...*, 28 Jun 2006, *BBC URDU.com*.

<sup>153</sup> *Gowaram's relatives seek his release*, 14 Dec 2006, *Dawn*.

<sup>154</sup> *Missing man's family demands his recovery*, 18 Nov 2006, *Dawn*;  
*Where is Gohram Saleh?* 19 Nov 2006, *Dawn*;  
*Missing Baloch activist's family holds sit-in*, 15 Dec 2006, *Dawn*.

whereabouts.<sup>155</sup> However, residents of Sikandar's neighbourhood say that they had followed the police contingent that had Akash in its custody back to the police station and therefore knew for a fact that he was in police custody.<sup>156</sup>

Following 9/11, often the only semblance of wrongdoing needed against those "disappeared" was a suspicion of links to Al-Qaeda or any extremist or militant organization. At other times there was no hint of any such suspicion, just an arrest, the following disappearance and silence. Newspapers reported dozens of "disappearances" on suspicion of involvement in terrorism or links with Al-Qaeda throughout the year.

There was the illegal arrest of Attaur Rehman from his house by 30 men, 10 of whom were in police uniforms. Mr Rehman's family informed the court about the identity of one of those police officers as well. Not only has the missing man still not been found despite numerous court orders,<sup>157</sup> the police also deny his whereabouts or ever having arrested him.

There is the disappearance of Atiqur Rehman, a senior scientific officer with the Pakistan Atomic Energy Commission, on the day of his wedding in June 2004. His family alleges that Rehman was arrested by the ISI and has petitioned the Lahore High Court for his recovery.<sup>158</sup> The lawyer submitted affidavits in court to the effect that the ISI had assured the family to go ahead with

155 'Missing' JSQM workers: Court not satisfied with police report, 10 Dec 2006, Dawn; SHC orders police to find 'missing' activist, 23 Dec 2006, Dawn.

156 *Those who are missing ...*, 28 Jun 2006, BBC URDU.com.

157 *Detention of citizen: LHC asks petitioner to implead defence secretary*, 05 July 2006, *The Nation*; *Defence secy to report on detention*, 06 Jul 2006, *The News*; *'Federal agency is holding my father'*, 06 Jul 2006, *Daily Times*; *LHC seeks report from defence secy*, 07 Jul 2006, Dawn; *In the name of terrorism: Agencies can't be allowed to curtail citizen's liberties*, 25 Jul 2006, *The Nation*; *Body to locate man picked up by police*, 27 Jul 2006, Dawn; *LHC orders recovery of man in federal agencies custody*, 29 Jul 2006, *The News*; *LHC orders HS, IGP to recover detainee*, 08 Aug 2006, *The News*.

158 *Engineer in ISI custody*, 01 Jul, 2006, BBC URDU.com.

Rehman's wedding preparations as he would soon return home. However, his whereabouts still remain unknown.<sup>159</sup>

Expressing his dismay at the behaviour of government agencies while hearing the petition against Rehman's "disappearance", Justice Abdul Shakoor of the Lahore High Court said that citizens are not forcibly "disappeared" in civilized societies. The judge said that it seemed the courts were being stopped from functioning and added that the government agencies and the government counsel should act responsibly and help the courts decide cases. The LHC judge said if there is any legal charge against a person, a case should be registered and the person produced in court.<sup>160</sup>

From petitions to courts to international pressure, relatives of the missing have tried everything. In one case, Dr. Safdar Sarki, secretary general of the JSQM, was arrested by the police and the ISI from his sister's flat in Karachi on 24 March 2006.<sup>161</sup> The Sindh High Court was petitioned after he was neither charged with any crime nor produced in court. The court asked the government to answer allegations that Dr. Sarki was picked up by the ISI and detained.<sup>162</sup> The Defence Ministry denied Dr. Sarki's detention by the ISI in court. Despite the family's insistence that the police had taken away Dr. Sarki, the court observed that in view of the denial it could not issue a production order for Dr. Sarki. It asked his family to go to the appropriate forum, i.e. get a case of kidnapping

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159 *Bench asks ISI about scientist's detention, 30 May 2006 Dawn; LHC takes govt to task over detention of N-scientist, 31 May 2006, The News; Court seeks report on scientist's detention, 03 Jun 2006, Dawn; LHC notice on scientist's arrest, 06 Jul 2006, Dawn; No information on missing scientist: ISI, 08 Jul 2006, Dawn; Hearing in scientist case put off, 21 Jul 2006, Dawn.*

160 *Citizen are not 'disappeared' in civilized societies: Justice Abdul Shakoor, 3 Jun 2006, Daily Jang.*

161 *SHC seeks statement in detention case, 14 Apr 2006, Dawn; Those who are missing ..., 28 Jun 2006, BBC URDU.com.*

162 *SHC seeks govt. explanation in detention case, 10 May 2006, Dawn.*



registered with the police,<sup>163</sup> which the family accused in the first place of illegally arresting Sarki in collusion with the ISI.

Dr. Sarki also held US nationality, and his family sought Washington's intervention. The US asked Pakistan to find the doctor picked up in Karachi.<sup>164</sup> Many protest rallies later<sup>165</sup> Dr. Sarki's whereabouts were still not known until the end of 2006.<sup>166</sup>

Not aware if a missing person has actually been charged with anything specific, families of those disappeared are seldom certain about what to do to get them back or what they should defend the missing persons against. It was common throughout the year to read accounts of families holding press conferences after prolonged and unexplained disappearance of their relatives to issue blanket statements to the effect that their missing relatives had no links with militant organization, Al-Qaeda, or with terrorism.

The other common feature has been for the families to plead, literally beg, the president, prime minister, chief justices of high courts and the Supreme Court, and government ministers to help them get the "disappeared" persons back. Press conferences and sit-ins outside press clubs in Karachi, Lahore, Quetta and other cities were quiet often motivated by the hope that the higher judiciary might take notice of a "disappearance" if it was covered by newspapers.

Orders of the Supreme Court did seem to have some effect on the agencies holding the missing men. Quite a few "disappeared" persons were found ahead of the December deadlines set by the Supreme Court to locate the 41 missing persons. On December 01, 2006, the government informed the Supreme Court that 20 of the 41

*163 Defence ministry denies Dr Sarki's detention by ISI, 17 May 2006, Dawn.*

*164 US plea to locate Dr. Sarki, 26 Jun 2006, Dawn; Congressman asks Rice to obtain Sarki's release, 08 Aug 2006.*

*165 Rally demands release of Baladi, Sarki, 21 Jul 2006, Dawn; JSQM rally demands release of activists, 24 Sep 2006, Dawn; 'Enforced disappearances': Protest day on 14th, 12 Dec 2006, Dawn.*

*166 JSQM concerned over Sarki's 'disappearance', 08 Dec 2006, Dawn.*

“disappeared” persons had been located and 10 of them released and that the government did not know the whereabouts of the remaining 21. The Supreme Court sought a report regarding the remaining missing people by 15 December.<sup>167</sup> On that date the court was informed that three more missing people, Baloch nationalist leaders Salim Baloch, Abdul Rauf Sasoli and Saeed Brohi had been released and the number of missing people was 18.<sup>168</sup> The count has been called into question by the families of the “disappeared”.<sup>169</sup> They have also asked the court to take notice of statements of those recovered regarding their captors.<sup>170</sup>

On its own, the timing of the missing persons’ return following the Supreme Court order for report to the federal government would at best be circumstantial evidence of these people’s custody by government agencies. Except that the families of the missing told the Supreme Court through an application that 10 people who had returned from “disappearance” had given affidavits that intelligence agencies had detained them. The court was asked to provide them protection from intelligence agencies.<sup>171</sup>

That such protection is called for is manifested in the case of Abid Raza Zaidi, a PhD student at the Karachi University. Zaidi was arrested on 26 April 2006 and released after almost three months of “disappearance”.<sup>172</sup> He recounted details of his detention at a workshop<sup>173</sup> regarding “enforced disappearances” organized by the Human Rights Commission of Pakistan and Amnesty

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167 20 missing men traced, 02 Dec 2006, *The News*; Apex court raps govt over the missing, 02 Dec 2006, *Dawn*; Ten missing men released, 01 Dec 2006, *BBC URDU.com*.

168 Three more missing men released, 15 Dec 2006, *BBC URDU.com*.

169 Govt directed to recover missing persons, 09 Jan 2007, *Daily Times*.

170 Govt directed to recover missing persons, 09 Jan 2007, *Daily Times*.

171 Three more missing men released, 15 Dec 2006, *BBC URDU.com*.

172 4,000 people have simply disappeared: HRCF, 7 Nov 2006, *The News*.

173 Ex-inmates give horrifying details of ordeal behind bars, 01 Oct 2006, *The News*.

International. Zaidi went “missing” again on October 04 and was allegedly arrested by members of uniformed law enforcement agents.<sup>174</sup> He was released from his second “disappearance” on October 07.

Similarly, JWP leader Salim Baloch narrated his ordeal in official custody at a press conference organized by the HRCP on 20 December 2006. He was arrested by dozens of law enforcement agencies personnel on 31 December.<sup>175</sup> His whereabouts are not known.

And then on January 26, 2007, Khalid Khawaja, coordinator of the Defence of Human Rights Council (DHRC), which has been organizing efforts for the release of the disappeared persons, disappeared himself.<sup>176</sup>

The police produced Khawaja in court a day later and sought his custody for criminal charges under Pakistan Penal Code (PPC); for allegedly insulting religious beliefs of others.

Yet it is not the nature of charges against him but the manner of his apprehension that is alarming. Khawaja told reporters in court that unidentified persons in civilian clothes had abducted him. He said that he was blindfolded and questioned before being shifted to a police station at midnight. It is ironic that someone campaigning to end “disappearances” is subjected to the same illegal treatment.

Such systematic “disappearances” would be bad enough even without State involvement, reflecting a State’s inability or unwillingness to protect its own citizens, however, government agencies perpetrating the practice goes against the very concept of the State’s role in human rights protection.

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*174 Release of HR activist demanded, 06 Oct 2006, Dawn.*

*175 HRCP seeks release of Saleem Baloch, The News 04 Jan 2007; JWP condemns Salim’s arrest; Business Recorder, 05 Jan 2007; JWP leader goes missing again, Dawn, 04 Jan 2007.*

*176 Former ISI official produced in court, Dawn, 28 Jan 2007.*

There are far more questions than answers about the individual cases and about the overall phenomenon. Questions like, why would a State want to detain someone without charge or trial? Why would it pretend that it is not detaining a person when it is? And, in presence of government's preferred preventive detention laws and laws like the ATA, why resort to "disappearances" at all?

Laws such as the ATA, or even preventive detention laws are the least of the missing persons' worries, at least not until they are exposed to those laws. And however arbitrary such laws may be, families of the "disappeared" persons have repeatedly called for their trial in court if they are suspected of any crime rather than remain in the dark about their whereabouts and fate. Those formally charged with a crime, even under the ATA, are decidedly luckier compared to those subjected to "disappearance". The former at least get their day in court and have the possibility of their treatment or any hasty conviction evaluated by an appellate forum. "Disappearance" negates every single rights guarantee in law or the Constitution.

Other questions include the government's motives for avoiding charging a "disappeared" person or producing him in court. Could it mean that the government is not certain that any charge it might bring against a person would stick in a fair trial by an independent court? Or is it because people suspected of terrorism are not deemed worthy of a chance to disprove their presumed guilt?

It may well be that some of these people subjected to "disappearance" have been tortured, killed, or handed over to other countries without any legal process. Again that is not without precedent either, as the following section regarding extradition discusses.

That such practices are illegal is clear. That the state has systematically resorted to disappearance is obvious. That official agents consistently apprehend individuals in such a manner proves that resorting to disappearances is seen as an effective tool for restricting liberty of citizens with impunity. The government agencies have clearly developed a preference for apprehending

individuals outside the legal parameters. The surreptitious manner of apprehension is obviously meant to avoid legal scrutiny.

Even in fighting terrorism the government cannot be permitted to capture and indefinitely hold anyone it considers a terrorist in absence of evidence or of adjudication by an impartial court in a fair trial. Since no one can object to human rights abuses in custody if there is no evidence of custody, let alone of such abuse, the inherent check on arbitrary use of state authority present in the Constitution is rendered futile. Of course, the script is not terribly original — Latin American States have been there. Large-scale disappearances in Chile and Argentina in the 1970s spring to mind.

### 3.3.2 *The scope for ‘unauthorized’ abuse*

Once “disappearance” is regularly resorted to and seen as the done thing, as an acceptable tool, among law enforcement and intelligence agents there is always the potential for the practice to go beyond the anti-terrorism-specific cases and get a momentum of its own. There is the possibility, of which there have indeed been tangible signs, of extending the illegal exercise across the board and of using it to punish innocent persons or settle personal vendettas. Amnesty International has also noted that the practice of enforced disappearance in Pakistan “which was rare before 2001, has become more common in contexts besides the “war on terror”.”<sup>177</sup>

One example of extending the practice to non-terror related areas is that of a reporter for a private television channel who was arrested while filming near a Jacobabad military airbase in March 2006.<sup>178</sup> The reporter, Mukesh Rupeta, remained missing for more than three months. However, one day after national newspapers published the news of his disappearance, Rupeta was produced in court on charges under the Pakistan Penal Code and the Official

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<sup>177</sup> *Pakistan: Human rights ignored in the “war on terror”, AI Index: ASA 33/036/2006, 29 Sep 2006.*

<sup>178</sup> *Geo reporter missing since March 6, 22 Jun 2006, The News; Journalist ‘missing’ since March, 22 Jun 2006, Dawn; Missing journalist produced in court: 23 Jun 2006, Dawn.*

Secrets Act, for filming near the airbase, which was designated a sensitive area. While the journalist may well have been apprehended solely for filming the airbase, the fact remains that the agencies holding him chose not to produce him in court or bring any charges against him straight away. Furthermore, his detention for three months has not been explained nor probed by the court. Oversights such as this from courts dilute the constitutional guarantees on personal liberty.

There have also been instances of police and intelligence agencies involving “disappeared” citizens in false cases. Accounts of two separate cases show how “disappeared” individuals were falsely implicated, in these two instances, in assassination attempts on the president.<sup>179</sup>

In one of these cases, the Supreme Court ordered the Punjab police chief to personally investigate booking of a terrorism case against a disappeared person, Nazir Ahmed. Nazir had been in illegal police custody without any charge for two years.<sup>180</sup> A habeas corpus petition was submitted in court for his recovery. However, the police abused a high court bailiff appointed to recover Nazir from illegal police custody.

Expressing its displeasure with the police handling of the matter, the court noted that instead of producing Nazir — suspected according to the police account of allegedly supplying ammunition for an assassination plot against President Pervez Musharraf — in court, the police implicated him in a terrorism case. Nobody on earth would believe the police story, the judge observed.

“This person is being punished because he approached the court [to seek his release] when *prima facie* it seems there is no case

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179 *Branded a terrorist: Innocent man spends 42 days in jails: 21 Apr 2006, Dawn; SC orders Punjab IGP to investigate terror case, 22 Aug 2006, Dawn.*

180 *SC orders Punjab IGP to investigate terror case, August 22, 2006, Dawn*

against him,”<sup>181</sup> the chief justice observed. “This is not the way of arresting people.”

### ***3.3.3 Beyond finding the ‘disappeared’ – a case for accountability***

Other people who “disappeared” and were found include Mohammad Zaheer, a former serviceman of the Pakistan Air Force. He was allegedly arrested by the police in a robbery case in December 2004. Zaheer’s brother moved the Peshawar High Court (PHC) after Zaheer “disappeared” from the police lock-up. He told the court that police had informed him that soldiers had taken Zaheer away,<sup>182</sup> apparently for being a member of a militant organization. Around a month after the court issued notices to the ISI in the case,<sup>183</sup> Zaheer was handed over to the police and produced in an anti-terrorism court on charges related to the bank robbery he was arrested for in December 2004.<sup>184</sup>

The PHC apparently did not inquire into the 19-month-long “disappearance” of Zaheer and disposed off the petition.

Same was the case with two other persons “found” after two years of “disappearance” following the Supreme Court directions. They were Umer Rehman and Bin Yameen, mistakenly referred to in earlier media reports as Ibne Amin.<sup>185</sup>

Rehman told reporters after his release from official custody that during his detention he knew of 20 other men who were being detained like him in various cells across the country.<sup>186</sup>

*181 SC orders Punjab IGP to investigate terror case, 22 Aug 2006, Dawn.*

*182 Brother of militant moves PHC, 29 May 2006, Dawn.*

*183 Notice issued to ISI officer in detention petition, 2 Jun 2006, Dawn.*

*184 Man arrested by agency handed over to police, 21 Jul 2006, Dawn.*

*185 2 missing persons reach home after two years, 03 Dec 2006, The News.*

*186 7 ‘missing’ NWFP men freed, 04 Dec 2006, Daily Times.*

Media reports have also noted the existence of non-recognized and unofficial detention cells run by law enforcement officials.<sup>187</sup>

“The agencies took an undertaking from us (the six missing persons released along with Rehman) that we had been arrested for suspected links with Al-Qaeda and the Taliban, but are now being released because we have been found innocent,” Rehman said. Bin Yameen and Qari Mohammad Ishfaq, another person returning from “disappearance”, also confirmed that the security agencies had taken their signatures on such undertakings before releasing them.

Rehman said that he was interrogated for a month before being put in a cell where he spent more than two years. He said that the police charged him and Bin Yameen under Section 107 of the CrPC (requiring execution of a bond as security for keeping the peace) before releasing them on bail.<sup>188</sup>

Amina Janjua is one of the complainants before the Supreme Court in the petitions regarding the “disappearance” of 41 persons. She says her husband Masud Janjua was arrested by a government agency and has been missing since July 2005. She told the court that the government had “found” eight of the “disappeared” persons, out of a list of 16 which she had submitted in court. She said that of the eight Majid Khan and Saifullah Paracha were in US custody at Guantanamo Bay. Another missing man, Atif Idrees, had been produced in court, while five others had been released from agencies’ custody. She submitted in court that the released persons had said that other “disappeared” persons were also in custody of intelligence agencies. The court asked her to submit affidavits from the persons found in pursuance of the court orders.<sup>189</sup>

In January 2007, the government counsel informed the court that the government had “found” 25 out of a total of 41 missing people and many of them had returned home. Ms Janjua disputed the government figures and claimed that only 18 people

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187 LEA officials operating personal detention cells, 06 Nov 2006, Dawn.

188 7 ‘missing’ NWFP men freed, 04 Dec 2006, Daily Times.

189 Ten missing men released, 01 Dec 2006, BBC URDU.com.



had been freed while 23 were still missing. She told the court that many recovered people claimed to have seen other “disappeared” persons during their detention. She believed that the information gathered from the persons recovered so far could help find the remaining missing. She claimed that all the people who had been released were not talking for fear of the government. She asked the court to summon these persons to obtain their statements.<sup>190</sup>

This is where the matter rests in early January 2007. The superior courts’ intervention has won freedom for some of the “disappeared” and might do so for some more in the coming days. However, the courts’ role is as much about ensuring human rights and due process as about accountability for those violating those rights and preventing future violations.

It’s all very well for the Supreme Court to express disappointment over the government’s failure to find the “disappeared” men,<sup>191</sup> but the courts have to stand up for the principle of treatment in accordance with law. The Supreme Court told the state counsel in the petition regarding “enforced disappearances” to “take the matter seriously” and not to “act like a post office”.<sup>192</sup> While the post office may take exception to the SC comment, what needs to be done with regard to “enforced disappearances” must go beyond mere recovery of the missing people. There must be a measure of accountability for those responsible for illegal detention. The court must ascertain the identities of perpetrators of “disappearances” and ensure that they are held to account.

Compensation for those detained in such illegal manner is a neglected area. If the court finds the State or any of its agencies in the wrong, it should ensure that the government pays compensation to those subjected to “disappearance”. Any compensation for such detention must be an absolute minimum to gauge the government’s

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190 Govt directed to recover missing persons, 09 Jan 2007, *Daily Times*

191 SC ‘disappointed’ by failure to find missing people, 23 Jan 2007, *Daily Times*.

192 SC ‘disappointed’ by failure to find missing people, 23 Jan 2007, *Daily Times*.

sincerity to ensuring due process of law. Instead of waiting for the government to dilly dally on reports on the remaining missing, the court should ensure that the missing who have been released record evidence regarding the facts of their disappearance. Once the government owns up to illegal detention, there must be some consequence for such illegal action. Someone in the government agency held responsible must be answerable for such illegality. Prosecution of those responsible is the only way to stem the trend of "disappearances".

### **3.4 Extradition and unlawful surrender of individuals**

Extradition — the legal surrender by one State of an individual found on its territory to another State either to face criminal charges, or to serve a penal sentence already pronounced — is not a matter of the requested State's whim. Most states have laws regulating such surrender of individuals to other states. The Extradition Act, 1972 governs extradition procedures from Pakistan to any country — whether Pakistan has an extradition treaty with it or not. The Constitution which mandates that "[n]o person shall be deprived of life or liberty save in accordance with law", also requires that legal provisions are met before any extradition takes place.<sup>193</sup>

The 1972 extradition law provides that people can only be extradited if they have committed offences which would constitute an offence in Pakistan, are listed in the schedule of offences appended to the Act and are not political in character.<sup>194</sup> Following a country's request to Pakistan for the surrender of a fugitive offender, a magistrate's inquiry shall find if there is any substance to the allegation of the extradition offence. The inquiry looks at evidence submitted by the requesting country<sup>195</sup> and must allow the defence an opportunity to disprove the validity of the request.<sup>196</sup> If the magistrate deems that such a case is not made in view of the submitted evidence, the person sought can be discharged. If the

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193 Art. 9, *Constitution of Pakistan, 1973*.

194 Secs. 2 and 5 *Extradition Act, 1972*.

195 Sec. 6, *Extradition Act, 1972*.

196 Secs. 7-9, *Extradition Act, 1972*.

magistrate finds *prima facie* evidence for the requisition offence, the government has the discretion to extradite the suspect or refuse the request.<sup>197</sup>

However, the person to be extradited shall not be surrendered until after the expiry of 15 days from the date he was taken into custody under a warrant for the purpose.<sup>198</sup> The fugitive offender has the right to challenge the extradition order in appeal before the higher judiciary.<sup>199</sup>

All these legal provisions are in place to ensure that those being considered for extradition get a fair deal and basic due process guarantees.

But in practice transferring Pakistani or foreign nationals to other states without due process of law is not exactly an aberration in the country. The most famous of such surrenders prior to the “war on terror” was that of Mir Aimal Kasi.

The US authorities initially sought Kasi’s extradition for the murder of two CIA staff in 1993. However the legal procedure was dispensed with when Federal Bureau of Investigation (FBI) personnel abducted Kasi from a Dera Ghazi Khan hotel in Pakistan in June 1997. Two days later he was flown, hooded and shackled, in a military aircraft to the US, where he was charged with the two murders and sentenced to death.<sup>200</sup>

Pakistan and the USA do not have a bilateral extradition treaty. However, in 1973 Pakistan reaffirmed that the extradition treaty dating from the colonial period signed in 1931 between Great Britain and the US would be applicable. The procedure for such extradition is governed by the Extradition Act of 1972.

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197 Sec. 10, Extradition Act, 1972.

198 Sec. 11, Extradition Act, 1972.

199 C.f. Amnesty International (<http://web.amnesty.org/library/eng-pak/reports>) and Human Rights Watch (<http://www.hrw.org/doc?t=asia&c=pakist>) reports for 2006.

200 PAKISTAN: Imminent execution of Mir Aimal Kasi raises fears for others taken into US custody without human rights safeguards, *AI Index: ASA 33/034/2002*, 01 Nov 2002.

While in Kasi's case, the extradition process was at least initially resorted to before being bypassed, in numerous cases since no attempt was made to fulfil the extradition procedure requirements.

Since Pakistan joined the war on terror, many others have been surrendered to US custody including Yemeni national Ramzi bin al-Shaibah in September 2002; Abu Zubaydah in March 2002; Mullah Abdul Salam Zaeef, the former Taliban ambassador to Pakistan in January 2002; and Kenyan national Sheikh Ahmed Salim in July 2002 to name a few. It is symbolic of the ambiguity associated with this "war" that it's not clear if any formal extradition requests were made or the required legal procedures followed in any of those cases.

### ***3.4.1 When suspicion suffices***

By Washington's count, Pakistan has provided the US "extensive assistance in the war on terror by capturing more than 600 al-Qaida members and their allies".<sup>201</sup>

By President Pervez Musharraf's own admission Pakistan handed over at least 369 Al-Qaeda suspects to the US.<sup>202</sup>

"Many members of al-Qaeda fled Afghanistan and crossed the border into Pakistan. . . We have captured 689 and handed over 369 to the United States. We have earned bounties totalling millions of dollars. Those who habitually accuse us of 'not doing enough' in the war on terror should simply ask the CIA how much prize money it has paid to the government of Pakistan."<sup>203</sup>

Within two days of his book launch in New York President Musharraf was denying the impression that Pakistan had essentially acted as a bounty hunter for the US, and gained incentives for such

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201 US State Department, Bureau of South and Central Asian Affairs, Oct 2006, <http://www.state.gov/r/pa/ei/bgn/3453.htm>, last visited 31 Dec 2006.

202 *In the Line of Fire: A Memoir*, General Pervez Musharraf, p. 237.

203 *In the Line of Fire: A Memoir*, General Pervez Musharraf, p. 237.

illegal surrenders in exchange. "It [the money] doesn't come to [the] government of Pakistan. I should not have written that and I'm going to amend it in the future copy certainly."<sup>204</sup>

The president was apparently saying that the money had been paid to individuals and not to the government of Pakistan. If it was not the government, who else could have been capturing hundreds of Al-Qaeda members in Pakistan and what became of the 600 odd Al-Qaeda captured but not handed over to the US? Were they also captured and kept by private individuals? It defies belief that any private individuals can be acting in this manner, rounding up Al-Qaeda members without the government's knowledge and at least its tacit support. The president's version in the book and his subsequent statements fall right into the pattern of ambiguity Pakistan's role in the "war on terror".

Be that as it may. From all the information available it seems that such transfers were not accompanied by any apparent legal process.

Amnesty International has noted how individuals illegally transferred to the US by Pakistan in pursuance of the "war on terror" were practically sold for up to \$5,000 for every "terrorist" handed over to the US.<sup>205</sup>

All this while senior Pakistan government officials chose to talk to the press and publicly accused captured foreigners of "links with Al-Qaeda" and of committing a range of crimes, and at the same time never bringing formal charges against them. In view of such media trial and non-production in court, the accused obviously never had a chance to clear their names or even know the precise, if any, charge against them.

The 2005 arrest and subsequent surrender to the US of Abu Faraj Al Libbi, a Libyan national, is highly typical of such attitude and of contradictions and secrecy. Libbi, variously described as "top Al-Qaeda terrorist", "Al-Qaeda's number three" and the

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204 *Musharraf amends 'bounty' portion: Urdu translation of autobiography, 23 Oct 2006, Dawn.*

205 *Pakistan: Human rights ignored in the "war on terror", AI Index: ASA 33/036/2006, 29 Sep 2006.*

organization's "operational chief", was arrested from the NWFP on 02 May 2005.

The interior minister accused him of trying to assassinate President Pervez Musharraf and said that the Libyan national would be tried for that. Later the same month, however, Libbi was handed over to US custody. His precise whereabouts are not known. There was apparently no judicial process to establish whether those detained and illegally transferred in their hundreds to US custody had done anything illegal or criminal. The requirements for extradition under Pakistani law were apparently not met. That seems to be the story of all unlawful transfers by Pakistan to other countries in the name of the "war on terror".

Barring a sudden preference for transparency in government dealings, we will probably never know how many foreigners' capture and detention in pursuance of the "war on terror" was motivated by an actual suspicion of their involvement in terrorism or links with terrorists in Pakistan or in any wrongdoing anywhere. As things stand, it is hard to know if such individuals held and transferred to other countries were actually "foreigners" or not, and if there was any actual suspicion of involvement in terrorism.

Frankly, here is a case of a government with questionable human rights record at the best of times standing to gain for individual captured in the "war on terror" on the evidence of its own word. Add to that all the fuss and feathers about the need for secrecy in pursuance of the "war on terror" and the situation is a heaven-sent for governments known to have a preference for acting in a clandestine manner to escape accountability.

At a time when the government arbitrarily curbs even its own preferred and lopsided legal process for such detainees, it certainly is a dangerous thing to be a foreigner in Pakistan suspected of any wrongdoing.

While Islamabad maintains that no Pakistani has been handed over to US authorities, being a Pakistani national is hardly a guarantee of automatic observance of due process of law or protection against unlawful transfer to the United States or third countries.

And it does seem that Pakistanis have been handed over to the US. Majid Khan, arrested in Karachi by the police in March 2003 was one of them.<sup>206</sup>

Khan's family says that they heard from him for the first time since his arrest in November 2006, when he sent a card for Eid-ul-Fitr from the US military prison at Guantanamo Bay, Cuba, courtesy the International Committee of the Red Cross (ICRC). The family has challenged Khan's surrender to the US in the Sindh High Court.

Khan was allegedly suspected of having links with Khalid Sheikh Mohammed, the alleged mastermind of the September 11 attacks in the US. The SHC has ordered authorities to explain why he was handed over to foreign authorities.

Saifullah Paracha, a Pakistani businessman, was another of those who disappeared and were later found to be in US custody at Guantanamo Bay. His family had petitioned the court to know his whereabouts.<sup>207</sup>

The sketchy details of how Saifullah Paracha ended up in US custody at Guantanamo are consistent with the ambiguity associated with "enforced disappearances". Paracha's wife saw him off at the Karachi Airport on July 05, 2003, as he was planning to take a trip to Bangkok, Thailand. His business associate said that Paracha never got to Bangkok. CNN reported that Paracha had been arrested in Karachi on July 05, and that he remained in Pakistani custody at least for some time.<sup>208</sup> The Supreme Court was informed in 2004 on a petition by Paracha's family that he was arrested in Thailand and the Pakistani government had not handed him over to the US.<sup>209</sup>

206 SHC asks govt to explain why 'militant' handed over to US, 21 Dec 2006, *Daily Times*.

207 Detention of Pak businessman: Notice issued to FM, others in contempt plea: 06 Jul 2006, *Business Recorder*.

208 Lawyer: Detained Pakistani to face terrorism charges, August 6, 2003, *CNN.com*, <http://www.cnn.com/2003/LAW/08/04/alqaeda.suspect/>

209 Saifullah Paracha arrested in Thailand, government tells SC, October 15, 2004, *Daily Times*

If it was not for the ICRC delivering a card to Paracha's family about his whereabouts, his fate might never have been known.<sup>210</sup>

Pakistani nationals or not, the risk for people like Khan arrested in Pakistan and surrendered to the US without any legal process is all too apparent against the backdrop of the government's known preference for "enforced disappearances".

### ***3.4.2 Complicity in torture and refoulement***

Pakistan is bound by the customary international law principle of *non-refoulement*, which prohibits the handing over of anyone in any manner whatsoever to a country where they would be at risk of torture or serious human rights violations. The principle of *non-refoulement* is binding on all countries irrespective of their specific treaty obligations.

In view of President Pervez Musharraf's own admission of handing over hundreds to US custody without any apparent legal process and despite evidence of ill-treatment and torture of detainees at Guantanamo Bay, Pakistan is violating the customary law prohibition against *refoulement*. By illegally transferring individuals to countries where they are at risk of torture and other ill-treatment, Islamabad is actively complicit in torture on such individuals at places such as Guantanamo.

Amnesty International has also expressed concern over the risk of those subjected to "enforced disappearance" to torture and unlawful transfer to third countries and also mentioned a number of cases where such transfers and torture had occurred.<sup>211</sup>

Pakistan's consistent practice of arbitrarily and unlawfully transferring individuals to other countries by using administrative

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210 Notice issued to foreign office in detention case 06 Jul 2006, Dawn; Paracha has cardiac problems at Gitmo, 10 Nov 2006, The News.

211 Pakistan: Enforced disappearances in the 'war on terror', Amnesty International, Press Release, 29 Sep 2006, AI Index: ASA 33/038/2006.



discretion and bypassing the specific judicial determination points to a keenness on behalf of both the Pakistani government and the governments seeking extradition to avoid a judicial assessment of the substance of any extradition request and evidence, if any.

But what harm can possibly come of allowing judicial determination of an extradition request, or asking any requesting state to make a formal case for extradition before a judge or a magistrate.

After all, there is the conventional presumption of innocence principle to be satisfied and ensured as well. Or is there? Could the reason for avoiding the judicial process be an apprehension that the available evidence might not impress the court or that the court might not decide a case in the manner consistent with the government's wishes?

A preference for unlawfully transferring individuals to other States without due process leads to the presumption that either there is no convincing evidence against those whose extradition is sought or that Pakistan and the requesting state prefer "administrative assessment" of extradition requests, instead of risking the possibility of unfavourable results following a judicial assessment.

In such unlawful transfers of individuals to other countries, as in most other anti-terror measures Islamabad has taken, the government has been acting in violation of its own extradition law, the constitutional guarantee regarding due process and international human rights law. Furthermore, the country is facilitating torture in violation of its customary law obligation against *refoulement*.

It would be a fallacy to suggest that arbitrary arrest, illegal detention, or illegal transfer of individuals to other countries did not exist in Pakistan prior to the country joining the US-led "war on terror". But this "war" has certainly given a new justification for old practices, which have been tolerated if not actively overlooked by governments traditionally supporting human rights. It has sought to prioritize defeating terrorism as a cause above human rights.

# Conclusion

I conclude as I had begun, by acknowledging that governments have a legitimate interest in prosecuting those charged with any criminal act, including acts of terrorism and sectarian violence. They may go about that in a number of ways, changes in laws being one of them, as long as the rights of the accused are not compromised. However, creating parallel legal systems and using special circumstances to justify curbing rights is surely not the way to go.

A government committed to the rule of law would be the first to acknowledge that any action affecting the life or liberty of a person can only be taken in pursuance of law, and that due process must follow. It would also admit that everyone including the worst of convicted terrorists, let alone suspected terrorists never produced in court, have rights same as anyone else. However, amidst all the rhetoric regarding Pakistan's commitment to fight terrorism, any mention of rights of the accused has been conspicuous by its absence. One also fails to spot any urgency or intent in "special" laws to preserve or ensure rights of those on the wrong end of such legislation. That effectively implies that anyone suspected of acts of

terrorism, even when there is no credible evidence of any wrongdoing, is deemed less worthy of the rights taken for granted in the regular criminal justice system.

The slow pace of the conventional legal process has repeatedly been cited as the main justification for more expedited “special” procedures. The legal process in Pakistan has indeed moved slowly for a long time and still does. But time-challenged adjudication is not the answer to that. In fact, the “special” legal regime in place under the ATA has also slacked, with almost all trials taking a lot longer than the seven-day limit. More importantly, however, the effectiveness of justice delivered by ATCs remains highly questionable.

The case is far from made out for treating acts of terrorism and sectarian violence in Pakistan any different from other criminal offences. “Special” laws merely confuse the issue and cite ever new exceptional circumstances to justify a departure from the standard legal process. On the other hand, there is no conclusive evidence of the “special” legislation working, in curbing or deterring crime. And for the sake of argument, even if there was such a deterrent value, it would not justify the sort of arbitrary laws, devoid of fair trial guarantees, as are prevalent in Pakistan.

There is a genuine need to evaluate the reasons for delay in adjudication and sorting them out without stripping the system of the safeguards for the rights of the accused.

As things stand now, extensive violations of human rights exist both in laws and practice. A number of provisions in anti-terror laws violate constitutional rights and prejudge the accused – presuming him guilty, and putting the onus on him to prove his innocence. It is an impossible burden to discharge. As far as practice goes, human rights standards simply do not exist in practices such as “enforced disappearances” or illegal transfers of individuals to other countries.

But what possible harm can come of informing anyone what he is being arrested and detained for, allowing access to lawyers and giving a detainee a proper trial? Surely, any level-headed person

must realize that no good can come of punishing the innocent or disallowing anyone accused of an offence a fair opportunity to challenge the legality of charges against him.

Then why such a preference for “special” legal measures to counter “acts of terrorism” in Pakistan? For they surely have not been a passing fad. Irrespective of who has been in power, such laws have endured and, in fact, expanded. It has mattered little if the government running the country at the time was democratically elected or headed by a military dictator. When in opposition, political parties have criticized such laws as tools for oppressing and stifling dissent. But once in power, critics of “special” laws have suddenly become convinced of their utility.

At times one gets the feeling that anti-terror measures are a means to an end, an end that is not necessarily stated in preambles of laws like the ATA. That for any change in government, the mindset of those determining laws and practices stays the same decade after decade. The idea of “special” legislation has apparently appealed to consecutive governments because of its provisions, however draconian and arbitrary, that enable governments to proceed in ways prohibited by regular laws. On top of such laws, potential for exposure to arbitrary practices such as “enforced disappearances” acts as a deterrent to undesirable peaceful protests, legitimate political demands or general dissent.

If for no other reason, those in government should introduce basic rights and fair trial guarantees in these laws for purely selfish motives — to avoid the use of “special” laws against themselves once out of power. It was not so long ago that former prime minister Nawaz Sharif was deposed after a military coup by army chief General Pervez Musharraf in October 1999. Sharif was then tried under the Anti-Terrorism Act passed by his government in 1997 and convicted of conspiracy to hijack a commercial flight. He was sentenced to life imprisonment.

That Sharif never served his sentence because he and his family agreed to go into exile to Saudi Arabia while his appeal was pending with the Sindh High Court is besides the point. In view of the evidence against Nawaz Sharif before the ATC, the outcome of the case might have been different in a regular court.

Even a casual look at the special measures adopted by successive Pakistani governments seems to subscribe to the belief that terrorism cannot be countered without restricting citizens' rights. Governments in other parts of the world have cited collective security as a justification for compromising individual rights. But unlike many such governments, Islamabad is yet to see the sheer absurdity of assuming anti-terror measures and protecting individual rights to be a zero-sum game.

As things stand, a combination of the law and practice in Pakistan practically robs individuals of the security and certainty that is the justification for legislation and making all conduct subject to existing laws.

“Special” anti-terrorism legislation and practices in Pakistan have been a long and ill-conceived project signified by inferior trial process, questionable evidentiary standards and extensive human rights violations. It is time to revisit the whole plan and bring Pakistan’s anti-terror efforts in line with the national Constitution and international human rights standards.

However, a change in laws and ratifying international human rights treaties will only serve a purpose if human rights are observed without exception and in their true spirit. It’s all very well to have laws and constitutional human rights guarantees and express the intent to ratify principal international human rights treaties. But unless enforced, laws or even the Constitution mean nothing more than words. One is reminded of a famous statement by President Ziaul Haq, another military dictator who ruled Pakistan between 1977 and 1988. “What is a constitution?” president Zia is reported to have asked. “It is a booklet with ten to twelve pages. I can tear them up.”<sup>212</sup>

In a context unrelated to the country’s “special” laws, President General Pervez Musharraf said in 2006 that depriving people of basic human rights was the principal reason for

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212 *Pakistan - A Dream Gone Sour*, By Roedad Khan, Oxford University Press, 1997.

terrorism,<sup>213</sup> as the anti-terror tools employed by the government headed by the general deprived individuals of the very essence of human rights. Rights violations through state practices are no different and less reprehensible than those caused by individuals' actions. How ironic that in its bid to defeat terrorism, which is random and arbitrary by definition, Islamabad is routinely opting for measures which are equally random and arbitrary.

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*213 Depriving people of human rights the main reason for terrorism: President Musharraf, 18 Jun 2006, Daily Pakistan.*

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