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Pakistan's Courts: A Counterterrorism Challenge BY HUMA YUSUF

The third installment of the strategic dialogue between the Pakistani and US governments, which took place in Washington this October, was meant to strengthen the bilateral relationship. Instead, showdowns on counterterrorism strategy further strained relations. The United States repeated its demand that the Pakistani military pursue militants hiding in the northwestern tribal area of North Waziristan—an action the military is reluctant to take for political and strategic reasons.

To incentivize the Pakistani military, the United States offered a security assistance package worth US\$2 billion. But this overture, too, was tainted by an announcement during the dialogue that the United States would cut funding and training to six Pakistani military units accused of human rights violations, including torture and extrajudicial killings of suspected militants. Such a sharp rebuke of an ally is unusual and consequently is expected to heighten tensions in the runup to the US withdrawal from Afghanistan in 2011.

Concerns about the Pakistani military's transgressions have been brewing since last summer. In August 2009, the Human Rights Commission of Pakistan reported that troops had killed 282 suspected militants and their sympathizers in Swat, where the army had conducted operations to root out the militants. The following month, a video posted on Facebook allegedly showed soldiers abusing detainees. The US government was eventually compelled to invoke the Leahy Amendment, 1997 legislation that prohibits the United States from providing assistance to foreign armies suspected of committing atrocities, when a video captured on a mobile phone showing soldiers in uniform shooting six blindfolded men believed to be suspected militants surfaced in October.

Apologists have linked these instances of battlefield justice to the pressures that the Pakistani military is facing from the US government, which urges Pakistan to “do more” in the fight against terrorists along its border with Afghanistan. However, the practice has as much to do with the lack of an alternative, efficient, and just means by which to ensure that suspected militants are permanently removed from the fighting arena. By any standard, Pakistan's anti-terrorism courts (ATCs) are ill-equipped to deal with the recent influx of apprehended suspected terrorists.

Pakistan's ATCs comprise a parallel legal system established in 1997 under the Anti-Terrorism Act (ATA) to dispense quick justice for those charged with terrorist activities.

In the context of counterterrorism efforts, the efficacy of the ATC system is primarily compromised by the fact that the ATA does not apply to residents of the Federally Administered Tribal Areas (FATA), the area along the Afghan border from where most suspects hail. No matter where in Pakistan they are apprehended,

Huma Yusuf, Columnist for Pakistan's *Dawn* newspaper and Pakistan Scholar at the Woodrow Wilson International Center for Scholars in Washington, evaluates Pakistan's Anti-Terrorism Act and anti-terrorism court structure and concludes that current investigation practices and anti-terrorist legislation infringe on basic rights and deny terror suspects due process.



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residents of FATA must face justice under the Frontier Crimes Regulation (FCR), a set of laws drafted by the British in 1848, under which the doctrine of collective responsibility for a tribe applies. When suspected militants are repatriated to FATA, they often rejoin the insurgency.

Meanwhile, prosecuting residents of Pakistan’s settled areas in the ATCs is so convoluted that they too regularly go free without facing charges. For example, the decision to send a terror suspect to the ATCs is left to the discretion of the apprehending security official. In other words, there is no system in place to determine whether to free or charge a battlefield detainee.

Suspected terrorists who remain in detention are then transferred into the care of joint investigation teams, including officials from the police and intelligence agencies, who are tasked with gathering evidence and registering a case in the nearest ATC. This relocation of suspects means that investigating officials rarely have access to the site where the suspect was first apprehended, and have to rely on the eyewitness accounts of military personnel. Owing to a lack of evidence, suspected militants are frequently acquitted or serve mild sentences.

According to a recent report by the Punjab Public Prosecution Department, suspected terrorists are also freed when witnesses subjected to intimidation by accused terrorists’ networks refuse to testify. State prosecutors, too, are commonly harassed or threatened. Between January 1 and September 30 of this year, proceedings were initiated in 1,324 cases registered under the ATA in the Punjab province: in 306 cases, the accused were freed when witnesses rescinded their testimonies; in 372 other cases, the accused reached a compromise with the prosecutors.

ATCs also grapple with the problems that plague the Pakistani justice system as a whole. Corruption is rampant, state prosecutors have few resources (complaints of a shortage of stationary, let alone legal texts, are regularly heard); and there are significant delays in cases going to trial. Suspected militants apprehended as early as 2008 are only now beginning to face trial, and over 3,000 people remain in detention in makeshift prisons in areas where the army is conducting operations.

In the few circumstances where militants have been successfully convicted, the rulings have lacked credibility because human rights groups are quick to point out that the ATC system is vulnerable to rights violations. On the most basic level, the courts lack independence because judges are accountable to the executive. The system also denies suspects public trials, with a full defense, and the right to be presumed innocent until proven otherwise.

Indeed, owing to recent amendments, the ATA violates several basic rights. Per the Anti-Terrorism (Amendment) Bill of 2010, “extrajudicial confessions” recorded by security personnel are admissible as evidence, raising concerns about widespread detainee abuse. Suspected militants can also be kept in detention for up to ninety days without being charged. If suspects are charged with possessing explosive substances, the legal assumption is that the materials were meant for use in terrorist activities, and the burden of proof of innocence shifts to the accused.

As the Pakistani military’s battlefield tactics come under international scrutiny, the government should prioritize ensuring due process for suspected militants. This is necessary not only to prevent further detainee abuse and earn the respect of the international community, but also to bolster Pakistan’s democratic credentials. After all, the notion that all citizens are equal before the law is a fundamental premise of democracy, and a state that kills its own citizens cannot be seen as legitimate.