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CHARLES H. KENNEDY

The Creation and Development of Pakistan's Anti-terrorism Regime, 1997–2002

The purpose of this paper is to examine the policies of Pakistan relevant to its goal of combating terrorism during the past five years. Regardless of how one defines “terrorism,” Pakistan is a particularly appropriate case study when one approaches policies of “anti-terrorism.” First, the political history of Pakistan is rife with policies designed to combat terrorism in its various guises. Clearly, the Ayub Khan regime was no stranger to the use of policies to justify the suppression of domestic opposition as it PRODA’ed and EBDO’ed its way through periods of guided democracy. One should also not forget Z.A. Bhutto’s contribution to the craft. His Suppression of Terrorist Activities Ordinance, 1975 held the field in the Sindh and Punjab until its repeal in 1997 and remained the law in the North West Frontier Province (NWFP) and Baluchistan until August 2001. Zia ul-Haq was not averse to the use of the extra-judicial device to counter “threats to the state,” and the democratic tag team of Benazir Bhutto and Nawaz Sharif transformed the use of the ad hoc special court into an art form to combat each other and each other’s political supporters from 1989–97.

Second, Pakistan has had its share—perhaps more than its share—of domestic violence. The ethnonational violence that eventually occasioned the horrors of the Bangladesh civil war is a case in point. But, one should not forget the Baloch nationalist movement (*really* “civil war”), nor the Movement for the Restoration of Democracy (MRD) disturbances, nor the bloody Muhajir Qaumi Mahaz (MQM)-Sindhi riots. Each of these conflicts raised issues similar to those raised during the past five years—the state was challenged by violent opposition; civil order was threatened; the state needed latitude to respond; departures from “normal” legal practice were justifiable, if not required.

Despite these earlier events, however, the post-1997 policies of Nawaz Sharif mark a qualitative departure in the nature of Pakistan’s policies. Nawaz Sharif was the first Pakistani decision maker to craft an “anti-terrorism” strategy.¹ Heretofore, successive Pakistani decision makers had adopted policies designed to target political opponents or to address ethnonational conflict. Such policies, at times, departed from the norm—they were justified as “necessary” or as meeting “emergencies”—and, at times, the targets of such policies were labeled “terrorists.” But, such decision makers did not create an ideology that justified such departures from the norm, they did not create permanent institutions that dealt with “terrorism,” and they did not construct an “anti-terrorism regime.”

Constructing the Regime: Nawaz Sharif as “Anti-terrorist”

ON 18 JANUARY 1997 Mehram Ali, a foot soldier of the Shia militant organization Tehrik Nifaz Fiqh-i-Jafaria (TNFJ), planted a remote-controlled pipe bomb in the grounds of the district court complex in Lahore. He detonated the bomb. When the debris settled the bodies of twenty-three victims were found, including those of Maulana

1. It is important to note that Nawaz Sharif had earlier introduced an anti-terrorism strategy, through the vehicle of the Twelfth Amendment to the Constitution, which added Article 212-B to the document. The latter amendment allowed for the “establishment of Special Courts for the trial of heinous offenses.” Constitution (Twelfth Amendment) Act, 28 July 1991. This device was designed as a temporary expedient that would stand repealed, if not confirmed by the parliament, three years after its enactment. Accordingly, the Twelfth Amendment and Article 212B expired on 28 July 1994.

Zia-ur-Rehman Farooqi and Maulana Azam Tariq, both members, the latter the chairman, of the Sipah-i-Sahaba Pakistan (SSP), a militant Sunni organization. The latter victims had been brought to the Additional Sessions judge's office from the Kot Lakhpat jail where they were serving sentences related to their earlier anti-Shia crimes. Fifty-five others were also injured in the blast. Mehram Ali was caught at the scene but his trial before the Sessions court dragged on. The case generated considerable press coverage and provided the context, perhaps pretext, for the government's introduction of the Anti-Terrorism Act of 1997, which came into effect on 20 August. The Mehram Ali case was transferred to the newly constituted special Anti-Terrorism Court (ATC) in late August, where Ali was awarded a death sentence, convicted for twenty-three counts of murder, and various other sentences related to the bombing. He filed an appeal before the newly constituted Anti-Terrorism Appellate (ATA) Tribunal, also in Lahore. The ATA upheld his conviction. The petitioner then filed a writ petition before the Lahore High Court claiming, among other things, that the formation of the special courts violated provisions of the constitution. The Lahore High Court claimed jurisdiction to hear the appeal, but held that the conviction should still stand. Mehram Ali then filed an appeal to the Supreme Court of Pakistan.²

The Anti-Terrorism Act of 1997 was the brainchild of the Nawaz Sharif administration, which had been returned to power in February 1997 following a landslide victory that left Sharif's party, the Pakistan Muslim League, with an overwhelming majority in the national assembly. The motives for the introduction of the Anti-Terrorism Act were mixed. Clearly, Pakistan had suffered from very significant communal and sectarian violence for the past several years, and the regular criminal justice system had not been able to curb such violence. In this context, the ATCs, with their "promise" of speedy justice, unencumbered by the procedural niceties of the regular court system, would serve as a deterrent to would-be terrorists. Also, Nawaz Sharif and his political allies may have seen merit in establishing a parallel judicial

2. This account is drawn from *Mehram Ali versus Federation of Pakistan* PLD 1998 SC 1445 and S. M. Zafar, "Constitutional Developments in Pakistan, 1997–99," in Charles H. Kennedy and Craig Baxter, eds., *Pakistan: 2000* (Karachi: Oxford University Press, 2001), 14–15.

system in which the numerous ongoing trials of his political enemies (especially prominent officials of the Pakistan People's Party [PPP]) could be transferred for speedy disposal. In any case, the Anti-Terrorism Act was a bold departure from the normal legal system.³

First, the 1997 act broadly defined "terrorism" to include:

Whoever, to strike terror in the people, or any section of the people, or to alienate any section of the people or to adversely affect harmony among different sections of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, or firearms, or other lethal weapons or poisons or noxious gases or chemicals or other substances of a hazardous nature in such a manner as to cause, or to be likely to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or displays firearms, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act.⁴

Crimes included within the purview of the act were: a) murder; b) the malicious insult of the religious beliefs of any class; c) the use of derogatory remarks in respect of the holy personages; d) kidnapping; e) and various statutes relating to "robbery and dacoity."⁵ Clearly, terrorism as defined by the act was in the "eyes of the prosecutor," that is, the terms of the act could be interpreted to include virtually any violent act, or encouragement of the commission of a violent act.

Second, the act created special "anti-terrorism" courts. Such courts would be established by the government in their discretion and would be headed by a judge of a Sessions court, or an additional Sessions judge, or a district magistrate, or a deputy district magistrate, or an advocate with ten or more years of experience appointed by the government. Such judges would have no specific tenure of office, serving at the discretion of the government. Strict time constraints would

3. Anti-Terrorism Act, 1997 (20 August 1997). *PLD* 1997 Central Statutes (unreported) 535.

4. Section 6, 537.

5. Schedule, 547-48.

govern the procedures of such special courts—the prosecution would be given seven days to complete the investigation and the court would be given seven days to try the case. The recalling of witnesses would be prohibited and no adjournments, beyond two days, would be countenanced. Those accused of crimes could be tried in absentia if adequate notice concerning the dates of the trial were published in the press. Appeals against conviction and acquittal of such courts would lie *only* with special ATA Tribunals, also constituted at the discretion of the government. Such tribunals would have seven days from receipt of the appeal, which would have to be filed within three days of conviction to render a decision. The decision of the Appellate Tribunal would be final; no further appeal could be entertained. Such special courts would also have the power to have cases pending before other courts (regular courts—Sessions courts, magistrate courts) transferred to its jurisdiction, without the necessity of recalling witnesses.⁶

As stated above, Mehram Ali's case was transferred from a Sessions judge to a special Anti-Terrorism court wherein he was convicted and awarded a death sentence; he appealed to the relevant ATA Tribunal where his conviction was upheld; he then appealed to the Lahore High Court, which claimed standing to hear the appeal despite the terms of the Anti-Terrorism Act, but still upheld the conviction; and then finally he filed an appeal before the Supreme Court. In its decision, *Mehram Ali versus Federation of Pakistan*,⁷ the court upheld Mehram Ali's conviction and he was later executed, but the court declared the bulk of the 1997 Anti-Terrorism Act to be unconstitutional.

Although the court found nothing inherently unconstitutional in the establishment of special courts for specific and pressing needs of the government, such courts would nonetheless be subject to the rules and procedures of the existing constitutionally established judicial system. That is, (1) judges of such courts would have a fixed and established tenure of service; (2) such special courts would be subject to the same or similar procedural rules as regular courts, including rules of evidence, etc.; and (3) the decisions of such special courts would be subject to appeal before the relevant constitutionally mandated regular courts. Namely, appeal against the decisions of the special courts

6. Sections 12, 14, 19, 24–5, 29, and 31.

7. *Mehram Ali versus Federation of Pakistan*.

would lie with the respective High Courts and ultimately with the Supreme Court. As Ajmal Mian, then Chief Justice of the Supreme Court found, the supervision and control over the subordinate judiciary (including the special courts) vests with the High Courts. Moreover, no parallel legal system can be constructed that bypasses the operation of the existing regular courts. Despite this finding the Supreme Court evinced sympathy for the government's avowed intent to speed justice. In a concurring opinion Justice Irshad Hasan Khan stated:

[The] speedy resolution of civil and criminal cases is an important constitutional goal, as envisaged by the principles of policy enshrined in the constitution. It is therefore, not undesirable to create Special Courts for operation with speed but expeditious disposition of cases of terrorist activities/heinous offenses have to be subject to constitution and law.⁸

In light of this finding, the Nawaz Sharif government had no recourse but to amend the Anti-Terrorism Act and incorporate the changes ordered by the Supreme Court. Accordingly, on 24 October 1998 the Anti-Terrorism (Amendment) Ordinance, 1998 was issued.⁹ The new act met all of the objections raised in the *Mehram Ali* case. Therefore, Special Anti-Terrorism courts remained in place but the judges of such courts were granted tenure of office (two years, later extended to two and one-half years); the special Appellate Tribunals were disbanded, appeals against the decisions of the Anti-Terrorism courts would henceforth be to the respective High Courts; and restrictions were placed on the earlier act's provisions regarding trial in absentia to accord with regular legal procedures.

Unfortunately, civil order in Pakistan, particularly in Sindh province, continued to unravel. On 17 October 1998, Hakim Muhammad Said, one of Karachi's most well-known citizens, a former governor of Sindh and founder of the Hamdard Foundation (*Hamdard Islamicus*) and Hamdard University, was murdered. Under increasing pressure

8. *Ibid.*, 1497–98.

9. Anti-Terrorism (Amendment) Ordinance, 1998 (24 October 1998). *PLD* 1999 Central Statutes 143.

from within his own political circle—and most likely from the military—to do something to curb such lawlessness and violence, Nawaz Sharif chose to impose Article 232 and declare a state of emergency (Governor's Rule) in Sindh Province. The purpose of the order, as expressed in the order itself, was to empower the governor to take all necessary actions “to create a peaceful environment in which ordinary citizens can conduct their day-to-day affairs in accordance with their constitutional rights and entitlement within the province.”¹⁰

Such laudable ends, however, led to an invitation to the military, acting in its capacity of “aid to civil power,” to take over law and order duties in Sindh Province. The result was the introduction of a form of martial law that was imposed on the province as a whole, but most enthusiastically implemented in Karachi. Perhaps understandably the military, asked to assume functions beyond its normal duties, desired a free hand in its mission. Standing in its way were the civilian courts, with their procedures and processes and their alleged corruption. The remedy, they insisted, was the creation of military tribunals. Nawaz Sharif complied.

The result, the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998,¹¹ is a remarkable document. Promulgated on 20 November 1998, the ordinance, which had application only to Sindh Province, extended broad judicial powers to the military. The ordinance granted military officers at the rank of Brigadier and above the right to “convene as many courts as may be deemed necessary to try offenders.” Such courts could try civilians. Appeals against conviction by such courts would lie only with such appellate tribunals as the military authorities deemed necessary to establish. Moreover, cases pending before other courts (regular courts and ATCs) could be transferred to such newly established military courts. The courts would have jurisdiction to award sentences, including the death penalty, for specified crimes. The ordinance also created a “new crime” punishable with a penalty of up to seven years of rigorous imprisonment—the crime of “civil commotion.”

10. Constitution of Pakistan (1973) Article 232 (30 October 1998). *PLD* 1999 Central Statutes 202.

11. Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998 (20 November 1998). *PLD* 1999 Central Statutes 156.

“Civil commotion” means creation of internal disturbances in violation of law or intended to violate law, commencement or continuation of illegal strikes, go-slows, lock-outs, vehicle snatching/lifting, damage to or destruction of State or private property, random firing to create panic, charging bhatha [protection money/extortion], acts of criminal trespass, distributing, publishing or pasting of a handbill or making graffiti or wall-chalking intended to create unrest or fear or create a threat to the security of law and order....¹²

On 30 January 1999, the jurisdiction of the ordinance was extended to the whole of Pakistan. Also, the ordinance was amended so that accused “absconders” from justice could be tried in absentia by any military court established in Pakistan.¹³

Despite the government’s claims that this ordinance was temporary and necessary given the breakdown of law and order, there was considerable public opposition to the establishment of the military courts. Political opponents of Nawaz Sharif were particularly hostile to the implementation of the ordinance as it gave his government almost unlimited power to harass and imprison opponents. The invention of the crime of “civil commotion,” particularly subject to implementation by military courts, was very troublesome—many of the activities defined as “crimes” could also be interpreted as “normal” political behavior. Numerous constitutional petitions were filed before the superior courts challenging the validity of the ordinance—the Supreme Court consolidated such petitions and heard the petitioners. The result was the landmark decision—*Liaquat Hussain versus Federation of Pakistan* issued on 22 February 1999.¹⁴

The *Liaquat Hussain* decision is one of the most unequivocal, if not harsh, decisions ever rendered by the Supreme Court of Pakistan. It wholly repudiates the impugned ordinance, declaring the Pakistan Armed Forces (Aid to Civil) Act “unconstitutional, without legal authority, and with no legal effect.” Furthermore, the court, as per the unanimous decision of the nine-member full Bench, rejected the

12. Section 6, 158.

13. Pakistan Armed Forces (Acting in Aid of Civil Power) (Amendment) Ordinance, 1999 (30 January 1999) *PLD* 1999 Central Statutes 241.

14. *Liaquat Hussain versus Federation of Pakistan* *PLD* 1999 SC 504.

government's contention that the act was designed to be temporary in duration and/or limited only to Sindh Province. Indeed, it uses the evidence of the aforementioned 30 January amendment to the act to prove the government's bad faith. The court also rejected the government's contention that the ordinance was expedient, and defensible under the so-called "doctrine of necessity."

It may be stated that it seems to be correct that after taking over of the executive power by the Governor in Sindh, commission of crimes has been reduced including the acts of terrorism.... Be that as it may ... if the establishment of the Military Courts is not warranted by the constitution, simpliciter the fact that their establishment had contributed to some extent in controlling the law and order situation or the factum of delay in disposal of the criminal cases by the Courts existing under the general laws or under the special laws ... would justify this Court to uphold their validity. In my humble view, if the establishment of the Military Courts under the impugned Ordinance is violative [sic] of the constitution, we cannot sustain the same on the above grounds or on the ground of expediency.... The Doctrine of Necessity cannot be invoked if its effect is to violate any provision of the constitution, particularly keeping in view Article 6 thereof which provides that "Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason."¹⁵

The court also found the ordinance to be unconstitutional in that: a) civilians cannot be tried by military courts; b) the special courts cannot perform parallel functions to those assigned to regular courts; and c) the military's powers with regard to "aid to civil authority" do not extend to the creation of courts or the exercise of judicial functions.

The court, and particularly the lengthy concurring opinion of Justice Irshad Hasan Khan,¹⁶ was sympathetic with the dilemma facing the

15. *Ibid.*, 595–96.

16. *Ibid.*, 681–853.

government caused by the breakdown of law and order. But, the remedy was in following the advice of the *Mehram Ali* decision. The court also ordered as a procedural amendment to the *Mehram* procedure that cases be assigned to special courts one at a time until the case is decided—that is, that the ATCs should not have a docket of pending cases.

Given the forcefulness of the Supreme Court's verdict, Nawaz Sharif capitulated. On 27 April 1999, the Armed Forces (Acting in Aid of Civil Power) was repealed—however, “civil commotion” was made a crime under the Anti-Terrorism Act.¹⁷ On 27 August the Sharif government made its last revision of the anti-terrorism regime when it further amended the Anti-Terrorism Act to allow for the establishment of ATCs in any province of Pakistan.¹⁸

On 12 October Nawaz Sharif was removed from power by means of a military coup—General Parvez Musharraf as a result inheriting the anti-terrorism regime from his predecessor.

Musharraf's Anti-terrorism Regime

IMMEDIATE CONCERNS

Parvez Musharraf assumed power in October 1999 saddled with several domestic and international liabilities. Within the previous sixteen months (since May 1998) Pakistan had tested nuclear weapons (thus flaunting the long-standing strictures of the non-proliferation regime and inviting international sanctions), and had initiated a dangerous war (the so-called Kargil Operation) with India, which arguably risked the use of the nuclear weapons earlier tested. Moreover, Pakistan's much-heralded “democratic transition” had been tarnished by successive governments' perceived incompetence and malign neglect. The capstone, however, was the military coup itself. The coup belied the assumption that Pakistan's political system had “evolved” into a permanent democratic form; it also challenged the belief that the “democratic wave” so popular with Western journalists was a universal phenomenon.

17. Anti-Terrorism (Amendment) Ordinance, 1999 (27 April 1999). *PLD* 1999 Central Statutes 289.

18. Anti-Terrorism (Second Amendment) Ordinance, 1999 (27 August 1999). *PLD* 2000 Central Statutes 2.

In a practical, albeit Machiavellian sense, the new self-styled “Chief Executive” faced two policy imperatives: (1) he had to deny, finesse, downplay, spin, and/or otherwise confuse the issue of his assumption of power by “martial law”; and (2) he had to legitimize the actions he had taken to seize power—that is, to construct a brief for why the military (read Musharraf) had no choice but to dismiss an elected prime minister.

Accordingly, Musharraf’s first action after seizing power was to promulgate the “Provisional Constitution Order” (PCO). The intent of this document was to deny that Musharraf’s seizure of power constitutes the imposition of martial law. Given the facts, this was a hard sell. Indeed, the vehicle for the argument *was* a “martial law pronouncement” (the PCO), which denied that martial law had been imposed. The PCO claimed that the constitution had remained intact save for those provisions, which contradicted actions taken by the new “Chief Executive”:

Notwithstanding the abeyance of the provisions of the constitution of the Islamic Republic of Pakistan, hereinafter referred to as the constitution, Pakistan shall, subject to this Order and any other Orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the constitution. Subject as aforesaid, all courts in existence immediately before the commencement of this Order, shall continue to function and to exercise their respective powers and jurisdiction provided that the Supreme Court or High Courts and any other court shall not have the powers to make any order against the Chief Executive or any other person exercising powers or jurisdiction under his authority.¹⁹

It is important to note that Musharraf was careful to give himself the title of “Chief Executive” as opposed to the more traditional “Chief Martial Law Administrator” adopted by his predecessors.

Few bought this martial *hiyal*, but it soon became apparent to the chief executive that only Pakistan’s superior judiciary had standing to call his hand. This occasioned the introduction of the 31 December

19. Provisional Constitution Order no. 1 of 1999 (14 October 1999) *PLD* 1999 Central Statutes 446.

Ordinance that required superior court justices to take a fresh oath of office under the terms of the PCO, *not* the constitution.²⁰ Six justices of the Supreme Court and nine High Court judges refused to take the new oath and stood retired.²¹ The reconstituted and now ostensibly more user-friendly Supreme Court quickly consolidated the numerous writ petitions that had been filed challenging the constitutionality of the military coup and on 12 May 2000 issued its landmark finding—the *Zafar Ali Shah* decision.²² The decision, among other things, provided legal cover for Musharraf’s actions. It also granted the regime a three-year grace period (until 12 October 2002) to hold general elections and to restore the national and provincial assemblies. When the dust settled following the decision, the military regime (and the chief executive) had held the field. First, Musharraf’s seizure of power had not been defined as constituting an act of “martial law.” An adverse finding would have occasioned a variety of domestic and international problems. Second, the military coup was defined as regrettable but justifiable. Finally, Musharraf’s regime had been granted legitimacy and given “extra-constitutional” cover, for at least three years. That is, Musharraf had accomplished his first policy imperative—to confuse the issue of his assumption of power by martial law.

The accomplishment of the second policy imperative—to discredit the civilian regime he had replaced and to therefore provide justification for the military coup—required the use of Nawaz Sharif’s anti-terrorism regime itself. On 2 December 1999, Musharraf introduced two amendments to the Anti-Terrorism Ordinance. The first extended the schedule of offenses cognizable by the Anti-Terrorism courts to include several other provisions of Pakistan’s criminal code. The courts’ extended jurisdiction would now include: (1) Section 109—abetment of offense; (2) Section 120—concealing a design to commit an offense; (3) Section 120B—criminal conspiracy to commit a crime punishable by death or with imprisonment greater than two years; (4) Section 121—waging or attempting to wage war against

20. Oath of Office (Judges) Order, 1999 (31 December 1999) *PLD* 2000 Central Statutes 38.

21. Those refusing to take the oath in the Supreme Court were Chief Justice Saeduzaman Siddiqui, and Justices Mamoon Kazi, Khalilur Rehman Khan, Nasir Aslam Zahid, Wajihuddin Ahmad, and Kamal Mansur Alam. Justice Irshad Hasan Khan, who took the new oath, became the new chief justice.

22. *Zafar Ali Shah versus Parvez Musharraf, Chief Executive of Pakistan* *PLD* 2000 SC 869.

Pakistan; (5) Section 121A—conspiracy to commit certain offenses against the state; (6) Section 122—collecting arms with the intent to wage war; (7) Section 123—concealment with intent to facilitate waging of war; (8) Section 365—kidnapping; (9) Section 402—being one of five or more persons assembled for the purposes of committing dacoity; and (10) Section 402 B—conspiracy to commit hijacking.²³ The second, 2 December amendment established two new special courts, one to be located at the Lahore High Court, the other at the Karachi High Court. Each of these new courts would be headed by a High Court judge and each would have the power to “transfer, claim, or readmit any case within that province.” These courts would also serve as Appellate Tribunals for the ATCs.²⁴

With these two amendments in place, the government turned its attention to the disposal of the case brought against Nawaz Sharif and his co-conspirators. The government's case against the former prime minister was designed to bring criminal charges against Nawaz Sharif, which if successful would effectively end his political career, and to absolve Chief Executive Musharraf from any liability associated with staging the military coup of 12 October. The actual charges brought by the government, to an outside observer, seem a bit unusual, if not bizarre. Essentially the facts presented were that Prime Minister Sharif had made the decision to remove General Musharraf from his position of Chief of Army Staff (COAS) but delayed the execution of that decision until Musharraf was away from Rawalpindi. Therefore, when Musharraf went to Colombo, Sri Lanka to attend a conference, Nawaz Sharif struck. Allegedly, Sharif was hopeful that by the time Musharraf had returned the unpleasantness associated with the dismissal of the COAS would have subsided. However, Nawaz Sharif's plans were foiled when key elements of the military remained loyal to Musharraf and refused to accept the actions of the prime minister. When Nawaz Sharif learned that his dismissal of Musharraf was encountering resistance, and in light of Musharraf's imminent return to Karachi (the latter had boarded a PIA commercial flight destined for Karachi), Musharraf struck. He ordered that the flight not be allowed to land in Pakistan. Various offi-

23. Anti-Terrorism (Second Amendment) Ordinance, 1999 (2 December 1999) *PLD* 2000 Central Statutes 8.

24. Anti-Terrorism (Third Amendment) Ordinance, 1999 (2 December 1999) *PLD* 2000 Central Statutes 78.

cials of PIA and the airport authority cooperated with the prime minister's directive, while others failed to cooperate with the directive, but in any case, the aircraft, carrying not only General Musharraf but also more than one hundred other passengers, was diverted from its original flight path. This diversion, in turn, "threatened the lives" of the passengers as the aircraft was running out of fuel and could not comply with the directive to land outside of Pakistan. Eventually, the relevant airport authorities relented, perhaps owing to the involvement of military personnel who had in the meantime occupied the Karachi airport. The plane landed, its passengers inconvenienced and scared, but safe.

Therefore, given the charges that were to be brought against the ex-prime minister, the 2 December amendments to the Anti-Terrorism Ordinance were crucial. The crimes for which Nawaz Sharif would be charged (Sections 109, 120B, 121, 121A, 122, 123, 365, and 402B) were not cognizable before the ATCs prior to the amendments. Ostensibly, then, without the amendments such charges would have had to be filed with the regular courts. Moreover, the apparent venue of such a prospective trial would have been Lahore, *not* Karachi (Lahore is Nawaz Sharif's hometown). That is, the aforementioned amendments were designed to improve the probability of the timely conviction of Nawaz Sharif. Accordingly, one of the main defense strategies of Nawaz Sharif's attorneys was to challenge the standing of the Karachi Anti-Terrorism court, to which his case was assigned. This petition was rejected on 12 January 2000, and the trial was held. On 6 April the Karachi ATC court announced its verdict—Nawaz Sharif was convicted of conspiracy to hijack the PIA flight and was sentenced to life imprisonment. Charges against his seven co-defendants were dropped.²⁵

One could speculate that if this case had been brought before the regular court system the result may have been different. The thread of evidence linking Nawaz Sharif to the "hijacking" was weak, at best. Certainly, a trial conducted through the regular courts would have taken far longer to complete. In any event, Nawaz Sharif appealed the decision to the Appellate Tribunal of the Sindh High Court. But the appeal was never heard; while the appeal was pending, the govern-

25. The trial was covered extensively by the major Pakistani dailies. See on-line editions of *Dawn* and *The News* (Jang group).

ment struck a deal with Nawaz Sharif and his family. In December 2000 Nawaz Sharif and his family were allowed to leave the country for Saudi Arabia. It was reported that the Sharif family was fined more than Rps. 20 million (\$400,000) and agreed to the forfeiture of property worth in excess of Rps. 500 million (\$10 million) as part of the deal.²⁶ It is generally acknowledged that this exile effectively ended Nawaz Sharif's political career. Indeed, neither he nor any of his immediate family members were allowed to contest the October 2002 general elections. Therefore, Musharraf's second policy imperative—to legitimize the military coup—had been accomplished.

With this "mission" accomplished the Musharraf regime turned its attention to other matters that rarely involved the anti-terrorism courts. And, as time passed, such courts became increasingly integrated into the legal structure of Pakistan. The ATCs began to assume the characteristics, both good and ill, of regular courts. The process of adjudication as specified in the Anti-Terrorism Act, which had established that cases should be investigated within one week and that cases once accepted should take no longer than seven working days to be disposed, was largely ignored. Also, ignored in practice was the *Liaquat Hussain* directive that anti-terrorism courts would be assigned only one case to dispose of at a time. Indeed, by mid-2001 some anti-terrorism courts had very significant dockets; delays of several months in the disposition of cases were the norm rather than the exception.²⁷

An extreme example of this tendency is provided by tracing the history of the Hakim Muhammad Said case. As mentioned above, the murder of Hakim Said, on 17 October 1998, had led to Nawaz Sharif's declaration of the state of emergency in Sindh Province. The suspects in the case, nine activists in the MQM, were arrested and their case was tried before an anti-terrorism court in Karachi. They were convicted and sentenced to death on 4 June 1999. The conviction was appealed to the respective ATA, but before the case could be disposed it was transferred to the newly created military courts. There the case stayed until the military courts were disbanded as a consequence of the *Liaquat Hussain* decision. The case was accordingly

26. See *Dawn*, 10 December 2000 (online edition).

27. Hundreds of cases were pending before ATCs in August 2001. *Dawn* reported on 31 August that 451 cases were pending in the three Sindh-based ATCs. *Dawn*, 31 August 2001 (online edition).

transferred to the Anti-Terrorism Appellate branch of the Sindh High Court, which finally disposed of the appeal by acquitting all nine accused on 31 May 2001. The court accepted the defense contentions that the original trial court had violated numerous provisions relating to the gathering and presentation of evidence—including falsifying relevant evidence. The Hakim Said case belied the intentions of the framers of the Anti-Terrorism Act—to provide speedy and effective justice. Not only did the case take nearly three years to be disposed, but the state had accused and convicted the wrong people, while those who actually committed the murder remain unknown and at large.²⁸

Perhaps Pakistan's anti-terrorism regime would have eventually expired, the victim of bureaucratic inattention, but international political events revived the regime in the late summer and fall of 2001.

THE INTERNATIONALIZATION OF “ANTI-TERRORISM”

Although Parvez Musharraf had largely dealt with immediate domestic threats to his regime, Pakistan—and more specifically his government—was still viewed by the international community, and particularly the United States, with concern and suspicion. Pakistan still suffered from the economic effects occasioned by the sanctions imposed on the government following its nuclear weapons testing. Pakistan was also less than a favorite of international nongovernmental organizations (NGOs), human rights groups, and financial institutions owing to its non-democratic government. Also, Pakistan was viewed as unstable, subject to internal disturbances, and generally a bad business risk. Moreover, the Pakistan military and its shadowy (if seemingly all-powerful) institutional ally, the Inter-Services Intelligence (ISI), were generally acknowledged as responsible for the creation and sustenance of the Taliban to the west and “cross-border” terrorism to the east.

It is in this context that Chief Executive Parvez Musharraf presented his 14 August 2001 Pakistan Day address to the nation. The address was extraordinary both with regard to its content as well as its

28. This account is drawn from a reading of *Dawn* relevant dates. Also see Shamim-ur-Rahman, “Sindh High Court Acquits All Accused in Said Murder Case” *Dawn*, 1 June 2001 (online edition).

emotional delivery. In the speech and in his subsequent actions, Musharraf outlined the adoption of a bold, perhaps revolutionary, plan to restructure Pakistan's political and administrative institutions—the Devolution Plan, 2001.²⁹ But, he also outlined a plan to deal with lawlessness and sectarian violence in the state. The latter plan directly involved the use of the anti-terrorism courts and introduced a significant amendment to the Anti-Terrorism Act.

The Anti-Terrorism (Amendment) Act, 2001 issued on 15 August greatly expanded the scope of cases falling under the purview of the terrorism courts. As per the amended act, an act can be defined as “terrorism” if:

- a) it involves the doing of anything that causes death; b) it involves grievous violence against a person or grievous bodily injury or harm to a person; c) involves grievous injury to property; d) involves the doing of anything that is likely to cause death or endangers a person's life; e) involves kidnapping for ransom, hostage taking or hijacking; f) incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance; g) involves stoning, brick-batting or any other form of mischief to spread panic; h) involves firing on religious congregations, mosques, iman-bargahs, churches, temples and all other places of worship, or random firing to spread panic, or involve any forcible takeover of mosques or other places of worship; i) creates a serious risk to safety of the public...; j) involves the burning of vehicles or any other serious form of arson; k) involves extortion of money [bhatta] or property; l) is designed to seriously interfere with or seriously disrupt a communications system or public utility service; or n) involves serious violence against a member of the police force, armed forces, civil and armed forces, or a public servant.”³⁰

Even more significantly, the amended act empowered the federal

29. See Charles H. Kennedy, “Pakistan's Devolution Plan, 2001” (paper presented at South Asian Conference, Madison, Wisconsin, September 2001).

30. Anti-Terrorism (Amendment) Ordinance, 2001 (14 August 2001). As quoted in *Dawn*, 24 August 2001 (online edition).

government to proscribe an organization if it has “reason to believe that the organization is concerned in terrorism.” “Concerned in terrorism” is defined as an organization that “a) commits or participates in acts of terrorism; b) prepares for terrorism; c) promotes or encourages terrorism; d) supports and assists any organization concerned with terrorism; e) patronizes and assists in the incitement of hatred and contempt on religious, sectarian or ethnic lines that stir up disorder; f) fails to expel from its ranks or ostracize those who commit acts of terrorism and present them as heroic persons; or g) is otherwise concerned in terrorism.”³¹

In the days that followed the government implemented this amendment by proscribing two organizations: the Lashkar-i-Jhangvi (LJ), and the Sipah-i-Muhammed Pakistan (SMP), militant offshoots of the Tehrik Nifaz Fiqh-i-Jafaria and Sipah-i-Sahaba, respectively. It was reported that hundreds of the members of these institutions were arrested.

One fruit of this flurry of activity was the announcement made by officials of the World Bank in late August that Pakistan would be granted several million dollars to implement its administrative and political reforms. “Anti-terrorism” has its benefits—then came September 11.

ANTI-TERRORISM AND CONSEQUENCES OF SEPTEMBER 11

The Musharraf administration was confronted with both a threat and an opportunity as a consequence of the horrific acts of September 11 and the resultant U.S. response. Pakistan was “asked” to comply with the U.S. interpretation of the causes of, and remedies against international terrorism. In exchange, Pakistan would be “cut a break” with respect to its lingering “issues.” To be more precise, Pakistan was asked to: 1) cut its ties with the Taliban government in Afghanistan; 2) be helpful with respect to U.S. plans to attack Afghanistan; 3) counter the anticipated extremist fallout likely to occur from the above within Pakistan; 4) reduce sectarian violence within Pakistan; and 5) curb alleged Pakistani state support for jihadi and/or terrorist activities related to the Kashmir issue. In exchange, the United States would be supportive of Pakistani attempts to improve its standing in the international community (particularly with

31. Section 11-A.

respect to international financial institutions),³² and the United States would not put too much official pressure on the military regime to “democratize.” The United States also held out the “promise” that it would at least look with fresh eyes with regard to the Kashmir issue. Of course, underlying this implicit arrangement the United States “promised” not to target Pakistan (as a facilitator or harbor for international terror) if it complied with the U.S. anti-terrorism regime.

Any rational decision maker, military or otherwise, would have quickly accepted the U.S. conditions. Indeed, the conditions were none-too-onerous to accept. As demonstrated above, the Musharraf government was already concerned with sectarian violence within the state. Moreover, it had inherited an intact “anti-terrorist” regime from its predecessor—it did not have to start from scratch—and international support for such a regime would now help to insulate the regime from domestic human rights concerns. And, most Pakistani decision makers (even in the military) had for years been looking for a face-saving way to disassociate themselves from the support of the Taliban. Musharraf’s decision was obvious. But, for domestic and international consumption it was portrayed as difficult, a bitter pill to swallow. Such imagery was also encouraged by U.S. policymakers eager to show that the United States had adopted a no-nonsense approach and was being proactive. The United States was “putting the screws” to Pakistan, and Musharraf was “bowing to U.S. pressure.”

In any case, it proved relatively easy for Musharraf to comply with coalition-friendly policies. With regard to anti-terrorism courts, the government moved quickly to increase the number of anti-terrorism courts and to establish such courts in the NWFP and Baluchistan. Ostensibly, the government was gearing up for the anticipated increase in the caseload of such courts once the crackdown on terrorism went into high gear.³³ Also, the government was quick to arrest

32. The United States waived sanctions and resumed bilateral aid following such actions. Subsequently, Canada, the EU, Japan and multilateral financial institutions followed suit. This change has proven beneficial to the Pakistani economy—Pakistan’s foreign exchange reserves were valued at \$700 million in September 2001; in August 2002 the value was more than \$7 billion. See International Crisis Group, “Pakistan: Transition to Democracy” (Islamabad/Brussels: 3 October 2002), 16.

33. Curiously, the government had decided to close five ATCs before the events of September 11—two in Baluchistan and three in Punjab owing to the “lack of terrorism cases.” *Dawn*, 14 September 2001 (online edition). During September and October eleven new ATCs were established, seven in the NWFP and four in Sindh. By the end of October 2001 Pakistan had forty-one ATCs. *Dawn*, various reports (online edition).

and to publicly announce the arrests of hundreds of members of the outlawed LJ and SMP. Also, there was considerable reportage of the arrest of “jihadi elements” as well. One discordant note deserves attention, however. In late October 2001, at the height of U.S. military involvement in Afghanistan, Pakistani paramilitary and police were inattentive to the thousands of “volunteers” crossing the border to fight with the Taliban. Most notably, the Malakand-based Sufi Mohammad, leader of the Tehrik-i-Nifaz-i-Shariat Muhammadi (TNSM), with perhaps as many as ten thousand “lashkars” crossed the border with little or no opposition from Pakistani authorities. Many of these volunteers, perhaps thousands, were killed in Afghanistan, or at least have never returned to Pakistan. Indeed, some of the families of the missing staged highly publicized protests and demanded that action be taken against Sufi Mohammad for enticing their sons into this hopeless struggle. Under such public pressure Sufi Mohammad was arrested and tried before a tribal jirga (a special court of another kind) in Kurram Agency and sentenced to seven years’ imprisonment in April 2002.³⁴ If one were cynical, one might opine that Pakistani officials turned a blind eye to the TNSM Afghan jihad because they assumed an unhappy end for the jihadis.

Musharraf was also obliged to turn his attention to the madrassa system in Pakistan. It had long been the contention of critics of Pakistan’s Afghan and/or Islamization policy that Pakistan’s madrassas (some of which received state support and funding) were breeding grounds for sectarian violence and jihadi training. After the United States declared war against the Taliban, it became a nearly consensual view that the madrassas in Pakistan were directly responsible for the creation of the Taliban.³⁵ Therefore, the policy implications were clear—Pakistan had to “clean up” the madrassas. Again, this was a policy the Musharraf government was not particularly reluctant to entertain—indeed, it perhaps gave the government the political cover it needed to apply political restrictions and regulations to the operation of the heretofore largely autonomous madrassa system. It also allowed the government to proscribe other Islamist groups—declaring them, like the LJ and SMP, to be “terrorist” institutions, and their

34. *Dawn*, 17 January 2002; 23 April 2002 (online editions).

35. It is hard to overestimate the influence of the works of Ahmed Rashid on this view.

respective madrassas (although none of the proscribed groups actually operated madrassas) to be subject to intense government control. Accordingly, by January 2002 Pakistan had added six new groups to the proscribed terrorist list: 1) Jaish-e-Muhammed (JM); 2) Sipah-i-Sahaba (SSP); 3) Lashkar-e-Toiba (LT); 4) Tehrik-i-Nifaz-i-Shariat Muhammadi (TNSM); 5) Tehrik Nifaz Fiqh-i-Jafaria (TNFJ); and 6) Harkat-ul-Mujahideen (HM). The government also adopted three other related policies toward the madrasa system. First, the policies introduced reforms to make the curriculum more “modern” or “scientific.” Second, they placed the madrassas (depending on the size of the madrasa) under federal, provincial or district control. Third, they placed additional conditions on visa requirements and related matters concerning foreign (non-Pakistani students). None of these conditions were inherently unwelcome to the government—indeed, curriculum reform could be (and soon was) pitched as an important, perhaps vital, target for additional international financial assistance.³⁶

The Musharraf government was also happy to join in the international war against terrorism by placing relatively severe restrictions upon political party activity. As seen above, Musharraf’s government was put under a “deadline” by the Supreme Court in the *Zafar Ali Shah* case to hold elections to the provincial and national assemblies by 12 October 2002. Accordingly, the government was obliged to set up the procedures for the prospective election, including rules regarding political party activity. In this vein the government promulgated the Political Parties Order, 2002 on 28 June.³⁷ The order substantially changed the rules of the political game in Pakistan; for the purposes of this paper, the following sections are particularly relevant. Section 3 of the order prohibits any political party from: “c) promoting sectarian, regional, or provincial hatred or animosity; d) bearing a name as a militant group or section... or e) imparting any military or paramilitary training to its members or other persons.” Section 4 also requires that every political party maintain an official manifesto (“constitution”). And Section 15 provides for the dissolution of a political party if it is “foreign-aided” or is found “indulging

36. For details, see International Crisis Group, “Pakistan: Madrasas, Extremism and the Military” (Islamabad/Brussels: 29 July 2002).

37. Political Parties Order, 2002 (28 June 2002). (National Reconstruction Bureau website).

in terrorism.” If a political party is dissolved, members of that party cannot, among other things, hold political office for a minimum of four years. They are also subject to criminal prosecution if warranted. The ostensible target of such provisions is not the institutions proscribed above (they are not political parties) but rather political parties likely to be opposed to a continuation of military-dominated politics in the state—most notably parties such as the Jamaat-i-Islami, the Jamiat Ulema Islam; and the Muhajir Qaumi Mahaz (MQM). If one “stretches” the ban against “regional parties” one could also contend that the order may be designed to put pressure on the mostly Sindhi-based PPP.³⁸

Finally, the events of September 11 and its aftermath provided the Musharraf government with the political cover it required to further amend the Anti-Terrorism Act. On 30 January 2002 the government announced yet another amendment to the act—the Anti-Terrorism (Amendment) Ordinance, 2002. The most important amendment contemplated by this ordinance is the conversion of the heretofore single-person bench of the ATC to a three-member bench. The newly constituted ATCs would still have, as in the original courts, a judge who is a High Court, Session Court, or Additional Sessions court judge as a member, but they would also each have a second member who would be a judicial magistrate first class and a third member who would be an officer of the Pakistan Army not below the rank of Lt. Colonel.³⁹ Ostensibly, the rationale for the revision to the courts is related to the general perception (or at least the perception of the generals) that the ATCs have not worked very well at all—and certainly not the way they were intended to work. By increasing the size of the courts, the courts will be better equipped to deal with their caseload. By placing a military officer in each court, the civilian members of the courts would be more directly seized with the urgency of their mission (i.e., would be intimidated) into speeding up the process and punishing terrorists. The order mandates that the existing one-member ATCs would be disbanded by 30 November 2002.

38. If this was the intent the policy failed, as the Islamist parties contesting the election under the banner of the MMA did surprisingly well in the October 2002 general elections.

39. Rafaqat Ali, “Army Officers to Be Part of New ATCs: Law Amended to Expedite Terrorism Cases” *Dawn*, 1 February 2002 (online edition). Also see articles in *Dawn*, 13 February and 20 February 2002 (online editions).

This amendment has drawn considerable flak from affected groups. Dozens of bar associations lodged protests against the act, there was a boycott of the courts by aggrieved lawyers in Lahore, numerous petitions challenging the constitutionality of the ordinance were filed with the Sindh, Punjab, Baluchistan, and NWFP High Courts, and the ordinance was largely and loudly decried by members of all major political parties and human rights groups.⁴⁰ Even Amnesty International wrote a special note decrying the amendment.⁴¹ Eventually the Supreme Court called for the petitions filed with the four High Courts and consolidated the case in March. The decision of the Supreme Court remains pending.

One can only speculate as to why the Musharraf government, usually fairly prudent, so blatantly challenged so many domestic interests with regard to the January 2002 amendment. One factor may have been the Daniel Pearl murder case, which at the time was moving fitfully through a Karachi ATC.⁴² Clearly, there are many flaws with the ATC system. Generally, it has not improved the speed of disposition of cases. Also, the new courts have until recently been strapped for funds, understaffed, and perhaps overworked. The ATCs are also not immune from the difficult environment that bedevils the regular judicial system in Pakistan— incompetence and corruption abound in the police and legal establishment of Pakistan. Moreover, the most highly publicized cases concerning the ATCs in Pakistan have involved cases in which the respective appellate tribunal has overturned decisions of the courts of original jurisdiction. Therefore, the ATC system is both relatively ineffective and is perceived as relatively ineffective within Pakistan. It is clearly not perceived as delivering justice. The Musharraf government, therefore, was and perhaps remains, fed up with the system.

On 20 October 2002, during the interim following the general elections but before the national assembly was convened, Musharraf's federal cabinet promulgated yet another amendment to the anti-terrorism ordinance. The Anti-Terrorism (Second Amendment)

40. Numerous relevant articles in *Dawn*, February–April 2002 (online edition).

41. Amnesty International, "Pakistan: New Anti-Terrorist Courts Breach Fair Trial Norms" (Amnesty website: 2 April 2002).

42. On 19 July 2002 a Karachi ATC convicted Omar Sheikh and three accomplices of the kidnap and murder of Daniel Pearl. Omar Sheikh's conviction is currently under appeal before the Sindh High Court. A full text of the ATC judgment is found in *Dawn*, 16 July 2002 (online edition).

Ordinance, 2002, gives the police wide latitude to detain anyone listed on the government's "terrorism list" (activists, office bearers of proscribed groups) for up to one year without filing specific criminal charges. The amendment also prohibits such suspected terrorists from visiting "schools, colleges ... theaters, cinemas, fairs, amusement parks, hotels, clubs, restaurants, tea shops ... railway stations, bus stands, telephone exchange, television stations, radio stations...public or private parks and gardens and public or private playing fields" without the written permission of relevant police officials.⁴³

It is likely that the 2002 amendments will make the system even less effective. Since the existing ATCs will ostensibly be disbanded in November 2002, the proceedings of these courts (never a model of efficiency and expedition) have been disrupted. Also, one may assume that the Supreme Court, when it finally renders a decision with respect to the January 2002 amendment, will not wholly accept the government's position. The Supreme Court has a history of jealously guarding its turf; the introduction of military officers as "judges" within the courts will be resisted as strenuously as the courts are able given the realities of the political system at the time. The draconian October 2002 amendment is also likely to be challenged before the Supreme Court as well.

Conclusions

IF THE PURPOSES of establishing an anti-terrorism regime are to lessen terrorism, punish terrorists, improve the efficiency of the legal system, and dispense speedy justice, Pakistan's anti-terrorism regime has been a complete failure. Conversely, if the purposes of an anti-terrorism regime are to improve one's position relative to one's domestic political opponents, or to improve public relations, or to rehabilitate one's standing with the international community, then Pakistan's anti-terrorism regime has generally been a success.

What can one learn from Pakistan's experience? If a decision maker's true goal is to improve the delivery of justice—the last thing such a decision maker should do is to weaken the regular judicial system. If a decision maker's true goal is to protect the lives and liberties

43. Rauf Klasra, "Sweeping Powers for Police to Curb Terrorism" *The News*, 20 October 2002 (online edition). The article includes the full text of the amendment.

of its citizens—the last thing a decision maker should do is to adopt laws and policies that challenge and limit the rights of its citizens. The tortured history of Pakistan's anti-terrorism regime should give pause to prospective latecomers to the process (e.g., the United States, Britain, EU, Australia). If Pakistan's experience is a guide, anti-terrorism regimes may be expected to cause more problems than they solve.