Journal of Peace, Development and Communication

Volume 07, Issue 02, April-June 2023
pISSN: 2663-7898, eISSN: 2663-7901
Article DOI: https://doi.org/10.36968/JPDC-V07-I02-14
Homepage: https://pdfpk.net/pdf/
Email: se.jpdc@pdfpk.net

Article:	**A Comparative Study of National Laws Dealing with Terrorism in Broad and Narrow Senses, and their Implications for Civil Liberties, especially in the US and Pakistan**
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Published:	30th June 2023
Publisher Information:	Journal of Peace, Development and Communication (JPDC)
To Cite this Article:	Hameed, U., Qaiser, K., & Qaiser, Z. (2023). A Comparative Study of National Laws Dealing with Terrorism in Broad and Narrow Senses, and their Implications for Civil Liberties, Especially in the US, UK and Pakistan. *Journal of Peace, Development and Communication, 07*(02), 172–190. https://doi.org/10.36968/JPDC-V07-I02-14
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Abstract

National strategies to combat terrorism differ from state to state relative to their capacity and general principles of the national justice system. For this reason, some states implement broad definitions of terrorism authorizing preventive action, even so no crime is committed. In contrast, there are states which adopt narrow definitions of terrorism to safeguard due process rights of the suspects. While this approach may be more humane, it undermines the ability of states to act in anticipation of a terrorist attack. Clearly, the emphasis of the former strategy is to preserve national security even at the cost of civil liberties. In reverse, the latter approach aims at preserving civil liberties despite the threat of terrorism. Recently, the Supreme Court of Pakistan has re-defined terrorism to narrow down its scope, making it applicable to those acts only which are motivated to coerce a government or intimidate a civilian population to advance a religious, sectarian and ethnic objective. In furtherance of the new interpretation, these courts will be trying only most serious cases, such as those involving attacks on state infrastructure or state personnel. Apart from these, all other acts will be deemed regular crimes for want of motive to commit terrorism. This article will elucidate whether states driven by national security concerns define the word terrorism broadly criminalizing even the preparatory acts, such as, making donation to the charitable arm of a designated entity. And which aspects regarding the above provides a narrow approach.

Keywords: terrorism, transnational laws, judicial system, crime, preventive action.

1. Introduction:

The Supreme Court of Pakistan in its seminal judgement titled Ghulam Hussain v. the State (2020 SC 61) has held that henceforth only those acts shall be regarded as acts of terrorism which are intended to coerce a government or intimidate public to advance a religious, sectarian or ethnic cause. In other words, acts not intended to intimidate the public or to coerce a government shall not be deemed terrorism, if intimidation or coercion results as a consequence of the act.

One outcome of this binding judgment (2020 SCMR 1494 SC), has been that more and more cases of mass killings involving use of firearms, deadly weapons and explosives are being sent to regular courts for trial in accordance with ordinary criminal law, rather than anti-terrorism law for want of motive requirement. Without anti-terrorism clauses, the trial in these cases is conducted for the remaining charges of murder, grievous hurt and destruction of property etc. Since these crimes are compoundable under the ordinary law (Ref. sec 345 Cr.p.c (1898), a suspect charged with these can put pressure on the heirs of the victim(s) to pardon the same in exchange for blood money or badl sulh. For this reason, Ghulam Hussain judgement can be seen as beginning of the end of special law on terrorism in Pakistan. At the same time, the judgment points to the fact that unlike some western countries i-e Australia and Canada, Pakistan is not prepared to usurp civil liberties of a suspect in the name of national security. Having said this, Ghulam Hussain judgment raises doubts as to rationale behind establishing special anti- terrorism courts. At times, it is argued that these courts exist to settle scores with political opponents because release on bail is hard to come by and detention may continue up to 12 months. The law further allows preventive detention, proscription of individuals/ organizations, reverse presumption against person in possession of explosives, admissibility of confession before police and use of armed forces in prevention and interrogation (Hussain, 2023).

Holding off on that, since intention is a subjective element, proving it becomes incredibly difficult when prosecution is required to establish not just the intention to carry out the crime but also special intention to achieve certain stated objectives. Keeping this in mind, one can argue that Pakistan has adopted a considerably narrow definition of terrorism which makes it challenging to prove the crime in the backdrop of constitutional guarantees aimed at protecting civil liberties of suspects, laid down in judgment (2021 PLD 660 SC). Therefore, it can be suggested that counter-terrorism strategy of Pakistan revolves around prosecution of the suspect as against preventing the crime from happening in the first place.

On the contrary, counter terrorism laws of some advance countries, such as the UK, Canada and Australia are tailormade to prevent the crime of terrorism, whereas prosecution of the suspect assumes secondary importance. To achieve this objective, these states have broadly defined the act of terrorism. The upshot of their strategy is that a terrorist act cannot be averted merely by criminalizing its execution, its preparation should be made equally culpable. In other words, it is only through criminalizing preparation, states can ensure that the act would never take place. Criminalizing preparation means penalizing acts like planning, facilitating, masterminding, abetting, conspiring, possessing, glorifying, funding and participating in the act in one way or the other. The negative side of this strategy is that it comes at the cost of civil liberties. For example, following this strategy, a person can be apprehended on suspicion of taking part in an ostensibly legitimate funding campaign of charitable wing of a designated

terrorist entity (Roach , 2009). Similarly, possessing maps or pictures of strategic locations or literature designed to glorify terrorism or meeting a known terror suspect, albeit innocently, may turn you into an associate or accomplice in terrorism.

According to these laws, any of the afore mentioned acts can be viewed as facilitating or encouraging the launch of a terrorist strike. As there is no requirement that the actual terrorist act should necessarily take place, preparatory acts being crimes all by themselves, the prosecution is not obliged to prove that the preparatory act in question resulted in facilitation or execution of the terrorist strike. Otherwise stated, presumption of innocence will be reversed making the defendant liable to prove that he did not knowingly take part in fund-raising campaign of a designated entity or possessed sensitive information for a purpose other than facilitating a terrorist strike, and/or conversed with a jihadist over the internet, not knowing him to be the one (Roach, 2009). The obvious causality of this strategy is civil liberties of the individuals who may expose themselves to arrest and detention only by engaging in a seemingly harmless or innocent activity (ref. (2012) 3 S.C.R. 555)

This paper will discuss whether prevention or prosecution should be the nucleus of an exemplary counter-terrorism strategy. Otherwise stated, should states be implementing broad or narrow definitions of crime to combat successfully the phenomenon of terrorism? To what extent, exclusive focus on either of the two strategies can impede a state's ability to respond effectively to terrorism? What has been the reaction of national courts when confronted with prosecution versus prevention approach? At what point, do national courts interfere in legislative and executive domain to uphold civil liberties and how far the courts have been deferential to them. Can it be said that exclusive emphasis on prosecution may result in suspects being let go for the sake of upholding civil liberties? Likewise, to what level, undivided attention on prevention has prompted the courts to defer to the executive branch of the government in disregard of the cardinal principles of common law such as fair trial, presumption of innocence and proving guilt beyond reasonable doubt. Has there been any change in counter-terrorism policy of states long after the unfortunate events of 9/11? Is there any evidence of courts' assuming more proactive role in reviewing draconian legislative and executive measures in the name of counterterrorism?

At the same time, the paper will examine if counter terrorism strategies of states are linked with traditional principles of national justice system. Are some states forced to adopt human rights-oriented strategies because of the traditional principles of their national justice system? Finally, but most importantly, the paper will analyze how far racial, religious, political, ideological and ethnic motivations can be used to circumscribe the definition of terrorism? What are the implications of adopting such a restricted approach? In the light of all these considerations, suggestions will be made to formulate a balanced counter-terrorism strategy.

1.1: Preventing terrorism through broad definitions

Policy of prevention and consequent fixation with preparatory crimes came under discussion in several key cases decided by justice systems of the so-called advanced countries i-e, United Kingdom in (2013) UKSC 64 . As for example, in R v. Khwaja, breath and width of Canadian anti-terrorism law was put to challenge on the ground that if a preparatory act is to be tried as act of terrorism, the prosecution should be able to establish a link between the said act and the actual terrorist strike intended to be facilitated by it. The defense responded that the crime of participating in or contributing to activities of the terrorist group violates the

Canadian Charter of Rights and Freedoms, therefore, it should be declared ultra-vires the Charter's Sc.7. The court, however, preferred to use statutory interpretation to determine criminal liability. Therefore, unimpressed with the defense argument, it went on to observe that section 83.18(2) of Canadian criminal code , provides that the offence can be committed irrespective of whether participation or contribution of the accused enhanced the ability of a terrorist group to carry out a terrorist activity. The court held further that the preparatory acts are independent crimes whose purpose is to facilitate the occurrence of a deadly terrorist strike (Stewart, 2013). Obviously, laws targeting such crimes ought to have implications for civil liberties of citizens.

Similarly, Faheem Khalid Lodhi was charged with several terrorism-related offences under Australian Criminal Code. In June 2006, the Supreme Court of New South Wales convicted him, in [2007] NSWCCA 360, of following three crimes and sentenced him to life in prison:

- Preparation of a terrorist crime.
- Exchanging emails about purchase of a chemical capable of making explosives.
- Buying two maps of electricity grid connected with preparation for a terrorist act.

In the words of Broadbent, Lodhi presented a unique challenge to the court by making it deal with preparatory offences. As the law establishing these crimes gave unprecedented powers to state authorities to arrest, detain and investigate the suspects, courts were obliged to strike a balance between exigencies of national security and protection of fair trial rights. (Broadbent, 2007).

From this perspective, it can be argued that in the estimation of states employing preventive approach, avoidance of a terrorist strike is as much, if not more important as bringing the offender to justice. Therefore, if someone takes part in or contributes to an activity which strengthens the capacity of a terrorist group to launch an attack, regardless of whether the attack occurs, such person can be held liable for setting in motion the terrorist attack. (Broadbent, 2007). Arguably, if this is the benchmark for regarding an act as act of terrorism, even a lawyer may be held accountable for representing a terrorist knowingly that a favorable verdict will allow his client to pursue terrorist activity again. Thus, in R v Gul, the Supreme Court of the UK found the accused guilty of disseminating terrorist publications and uploading on YouTube attacks against military targets in Chechnya, Iran and Afghanistan constructing a crime under the Terrorism Act 2006. Likewise, in Rehman [2001] UKHL 47, indefinite leave to remain of a Pakistani religious cleric was refused because of his association with a terrorist organization in the Sub-Continent. The Commission of Appeals noted that for a suspect to constitute a threat to UK's national security, he must be encouraging violence to target the UK. The House of Lords, nevertheless, dismissed his appeal against deportation, declaring it conducive to public interest (Coco, 2013). Also, in the UK, the question arose, should a non-citizen be prevented from deportation to his home county due to risk of torture there, and could he be detained indefinitely in the UK (A and others v. Secretary of State [2004] UKHL 56. Would such detention breach article 5 of European Convention on Human Rights (ECHR)? The Supreme Court of the UK held that as the legislation on counter terrorism was promulgated in public emergency, it could not be deemed to have breached ECHR which was a peacetime treaty. The court expressed deference to the executive to the extent of authorizing detention of non-nationals, however, it refrained from allowing indefinite detention (Honeywood, 2016). That said, as far as Roach is concerned, such draconian laws were promulgated in post 9/11

scenario as a knee jerk reaction to a realistic threat to existence of states (Roach, 2009). As we shall see, with passage of time, in some countries, the judicature softened the bite of these laws through humanistic interpretations, whereas in others, measures have been proposed to protect fair trial rights of terror suspects.

1.1.2. Creation of preparatory crimes under national law:

If the purpose of a special law is to prevent a crime from happening, quite a few preparatory crimes will have to be established. It was held in 2012 SCC 69, that since preparatory offences are crimes in themselves, there is no need to prove their link with the possible terrorist attack, for the facilitation of which they are committed. Thus, under national laws of states subscribing to broad definitions of terrorism, the need to establish a link between a preparatory crime and the principal crime has been dispensed with (UNODC, 2010). Nonetheless, tracing a link between a preparatory crime with possible terrorist strike is vital to prove intention behind a preparatory crime (UNODC, 2010). Preparatory crimes, for instance, may include acts like taking part in fundraising campaign of a terrorist entity, glorifying or inciting terrorism, membership of a proscribed organization, celebrating known terrorists as heroes, possessing literature on terrorist ideology, giving fatwas or religious opinion about legitimacy of a terrorist act, making contact with a known terrorist, masterminding a terrorist strike, keeping videos of terrorist activities and giving or receiving jihadist training. In all these activities, it is almost impossible to prove intention without establishing a link between the preparatory act and proposed terrorist strike. Yet, quite a few western states, including US, UK, Canada and Australia, have criminalized these acts regardless of whether the actual terrorist strike towards the commission of which they are directed is facilitated by these. Thus, in several cases like R. v. Khwaja and R. v. Lodhi, the accused were punished for preparatory crimes although the intention to carry out the actual terrorist act could not be established. However, as it was not required under the applicable laws that the actual terrorist crime should take place because of preparatory crimes, the suspects were punished for preparatory crimes only.

Still, as commented by Broadbent, fairness should be brought in the trial of a suspect charged with a preparatory crime (Broadbent, 2007). To illustrate, when accepting video recording in evidence, Pakistan's law of evidence necessitates physical presence of the maker of video in the court along with the device with which the recording is made. Furthermore, it only allows original recording to be used as evidence in a trial and not its copies. Accordingly, in case titled Ahmad Omar Sheikh v. State, the Supreme court of Pakistan insisted on producing original video of beheading of the victim and refused to accept its copies uploaded on YouTube. Additionally, the court demanded that the maker of the video ought to be produced as a prosecution witness and the camera or device with which the clip is made must be exhibited to establish its authenticity. Clearly, same level of evidentiary proof was demanded by the Supreme Court of Pakistan in a high-profile counter-terrorism case, as was required, Ref. QSO, art. 164 (1984), in a case of regular crime. In this way, presumption of innocence was kept intact and so was the responsibility to prove the case beyond reasonable doubt. Considering this, it can be argued that counter terrorism strategy of Pakistan is focused on prosecution of the offenders rather than prevention of crimes. In parallel, the advance justice systems of the UK Australia, Canada and the US are geared towards preventing terrorism. Possibly, the real difference lies in the judicial approaches of these states. Apparently, the judges of Pakistan are

reluctant to do away with fair trial guarantees of suspects involved in terrorism, notwithstanding, implications of the crime for national security.

1.1.3- Quest for less invasive options

An effective counter-terrorism strategy necessitates all three branches of a state, namely executive, judiciary and legislature to work in tandem. Unlike ordinary crimes, terrorism has implications for national security too, therefore, it makes perfect sense to take on board security and law enforcement agencies when designing any such strategy. Criminalization of preparatory crimes enables all stake holders to join forces in formulating a sound anti-terrorism strategy. Hence, in several states, preparatory acts have been criminalized, so that investigative agencies and armed forces may work together to combat terrorism through joint surveillance and interrogation operations (Mersel, 2005). Thus, in Pakistan, the anti-terrorism law allows the government to form Joint Investigation Teams (JIT) comprising of military and civil officers to inquire into cases of preventive detention, and proscription of organizations. Likewise, A JIT may also be constituted to conduct terrorist investigations and to prevent the acts of terrorism. However, as expected, all these measures are subject to judicial review of the constitutional courts.

The strategy of prevention will obviously have implications for individual human rights. The key is to have less severe breaches of human rights, for which states would need to ensure that their counter terrorism measures are proportionate to the threat sought to be removed (Michaelsen,2010). For example, while investigating a preparatory offence such as possessing an explosive or firearm, the accused may be asked to produce a license to reduce the intensity of the rights violation. Intriguingly, under the anti-terrorism law of Pakistan, reverse presumption may be drawn against a person in possession of explosives that the same is for the purposes of terrorism.

Similarly, in states where incitement to violence and glorification of terrorism have been criminalised, prosecution should be obliged to prove that the crimes are directed towards achieving a political, racial, religious or ideological objective. Thus, in Rehman although the Appellate Commission noted that the accused could only be refused indefinite leave to remain if he had incited his followers to target the UK, the House of Lords, nonetheless, proceeded to deport him on charges of his association with a terrorist entity in Sub-Continent. In his postscript, Lord Hoffman contended that such decisions may have ramifications for the integrity within community, so they should be carefully made (Roach, 2009). Therefore, it stands to reason that counter-terrorism measures should be proportionate to the threat sought to be removed. Ultimately, these breaches of civil liberties will be challenged in national courts. According to Honeywood, when giving their decisions, courts should be guided by the rule, whether less invasive options were available to neutralize the threat? (Honeywood, 2016).

For example, the anti-terrorism laws of both Indian and Pakistan recognize the lawfulness of confessions made to police during investigation, although their regular criminal codes make no such exceptions, Ref. Kartar Singh V. State of Punjab. Nevertheless, to minimize the violation of due process rights, Indian Supreme Court has authorized the subordinate courts to reject such confessions, if they find any element of coercion in their making. On the other hand, the courts of Pakistan will only accept these confessions if made to an officer, not below the rank of Superintendent of Police. In the like manner, Indian

counter-terrorism law allows anonymous testimony with a view to guarantee the protection of witnesses. Comparably, the law of Pakistan reproduces this provision in section 21.

To make certain that such testimony does not encroach on suspects' due process rights, the trial court is vested with discretion to determine if the same can be made basis of conviction. Likewise, Indian Supreme Court pronounced that executive has right to designate a group or individual as a terrorist. According to court's reasoning, an individual or group wrongfully listed would still have the remedy of judicial review. Identically, the right to review against the decisions to proscribe an organization is conceded under the anti-terrorism law of Pakistan. Furthermore, Indian Supreme Court has upheld the legislative requirement that not providing information when the same is asked for by a police officer will constitute a crime. The anti-terrorism law of Pakistan replicates this provision with the difference that it obliges the person aware of a terrorist activity or its possibility to report it to a police officer. As remarked by Roach, less invasive options could have been explored, such as requiring the person suspected to be aware of a terrorist activity to cooperate with a Magistrate rather than Police officer (Roach, 2009).

1.1.4: The application of preventive approach in the United States

The Supreme Court of the United States held in US v Yousuf that the definitions of terrorism abound, however, it cannot be said that any of these convey exact meanings of the term. There can be multiple definitions within a single justice system. For instance, some state laws within the US define terrorism with respect to motive, others regarding objectives to be achieved, still others with reference to victims and targets.

As an illustration, the infamous Unabomber was awarded death sentence by a court in the US for killing three civilians and injuring scores others to register protest against certain government policies. Evidently, the purpose was not to advance a religious, sectarian or political agenda (Maggs, 2010). In the same way, John Muhammad was awarded death sentence for unprovoked killing of innocent people with the help of his accomplice, Malwa. When Muhammad requested for reduction in sentence by arguing that the intention behind the act was to create a utopia for immigrants in Canadian woodlands. Once more, the objective was not to promote a sectarian, religious or political agenda. In the same way, Aimal Kasi was sentenced to death for killing two CIA operatives. During sentencing hearing, he pleaded leniency on the ground that there was a political angling to his trial as one of the jurors disclosed in his media talk that Kasi was punished for attacking the American way of life. The court, in 508 S.E.2d 57 (Va. 1998)., dismissed the argument by observing that Kasi was not being punished for his views about America but for the act of killing two CIA operatives in cold blood and injuring three others.

Along the same lines, under one federal law, terrorist acts abroad against United States nationals can be committed by anyone who kills, kidnaps, or assaults a person within the United States as part of conduct transcending national boundaries as per18 U.S.C. § 2332b(a)(1). The prosecution does not have to prove a terrorist motive or an affiliation with a terrorist organization. Obviously, under this law, terrorism is defined with reference to the victims and targets selected.

From Gregory's point of view, if motive is to be used as a key requirement to charge a person with terrorism, then other essentials will have to be disregarded, including those delineated by the Security Council (Maggs, 2010). For example, means and methods used to

perpetrate the crime will have to be ignored, which will be a pity because as reported by UNODC, it is the nature of the weapons used, such as, firearms and explosives which make an offence a threat to national security (UNODC, 2009). Succinctly speaking, in the US justice system, motive of the offender is given little to no consideration when awarding sentence for terrorism.

In view of the above, it can be argued that terrorism can be committed for multiple purposes including putting pressure on the government to withdraw taxes, giving financial concessions and establishing a utopia in the woodlands. What is considered at sentencing stage is the manner of committing the crime.

Now, it seems appropriate to discuss a landmark court case revealing that the judges in the US are inclined towards stretching the definition of terrorism, with a view to justify executive action to prevent terrorism. As might be expected, in these circumstances, civil liberties inevitably give way to national security concerns.

1.4.1.1: US v. Hammoud

Hammoud, in (381 F.3d 316 (4th Cir 2004 (en bloc)), was prosecuted and sentenced in the US for providing material support to a foreign terrorist organization (FTO), named Hizballah. His case throws light on the circumstances under which contributing to cause of a designated entity may expose you to charges of terrorism in the US. Hammoud was charged inter-alia with financially supporting Hizballah. In his defence, Hammoud challenged the constitutionality of the relevant law, i.e., 2339B on the basis that the law in question infringed upon his constitutional right to freedom of association by preventing him to connect with an organization having both legitimate and illegitimate objectives. On the one hand, Hizballah was providing humanitarian support to Lebanese citizens, on the other, it was raising Jihad against the US and its allies for supporting Israel to establish its hegemony in the Middle East. Hammoud contended that the first amendment placed a limit on state's ability to impose liability on a person solely because of his association with another person. He relied on NAACP v. Claiborne Hardware Co. to argue that a blanket prohibition would pose a serious threat to legitimate political association or expression. Hammoud concluded that he could only be punished if he had specific intent to further the illegitimate objectives of Hizballah. As the law in question carries no such intent requirement, it should be adjudged unconstitutional for violating the first amendment (Maggs, 2010).

In response, the US Court of Appeal held that Hammoud was not being prosecuted for associating with Hizballah but for the act of giving $3500 to it. The relevant law 2339B does not prohibit mere association with a foreign terrorist organisation, it criminalises the act of providing financial aid to it.

2. Understanding prosecutorial model of combating terrorism

Parallel to preventive approach to combat terrorism, we have prosecutorial model. Pursuant to this approach, a person accused of terrorism is prosecuted, tried and punished like an ordinary criminal. All common law guarantees of due process are extended to him, including establishment of guilt beyond reasonable doubt, presumption of innocence, fair trial rights and no detention without a charge. This model can be said to represent the opposite of the preventive model. Simply put, instead of expanding the definition of terrorism to fortify national security, in prosecutorial model, the emphasis is on targeting those acts only which have a sectarian, religious, ideological political or ethnic agenda to advance. As we shall see,

despite universal appeal of this model in post-9/11 world, if taken to an extreme, it can place in question the very rationale of having a special anti-terrorism legislation.

2.1.1. Pakistan- A case study of prosecutorial approach

Expressively, the counter terrorism policy of Pakistan, highlighted in 2021 PLD 600, tilts in favour of defending civil liberties of suspects through judicial review of the executive action. In contrast, western policy, as enunciated in Part 5.3 of Criminal Code Act 1995 of Australia, gives more impetus to prevention of terrorism, in collaboration with judiciary. Carried to extremes, both policies have their pitfalls. In prosecutorial approach, for instance, the prosecutor may find it extremely difficult to prove simplest of the cases due to excessive focus on establishing motive. Strictly speaking, under this policy it is not the nature of the act which matters, but the intention behind it. As for instance, in Farooq Ahmed, the accused committed murder of the deceased in Sessions Court, accordingly he was tried by the special court under the 1997 Act. However, the Supreme Court held that the motive of the crime was previous enmity as the deceased had killed the brother of the accused, and there was nothing on record to show that the accused wanted to create terror, fear and insecurity in and around Sessions Court premises, hence Ss. 6 and 7 of the 1997 Act were not attracted. By contrast, under the preventive approach, a suspect is punished for actus reus whereas mens rea goes to background (Honeywood, 2016).

There may be no difference in laws adopted by states following either of the two policies, but the difference lies in the approach taken by their judges regarding interpretation of those laws. As for instance, the Lahore High Court of Pakistan set forth stringent conditionalities in a recent case, 2023 YLR 564 LHC, to prove the charges of associating with a terrorist outfit and raising funds for it. The court held that testimony of decoy witnesses is not enough to bring home guilt of the suspect, other independent witnesses must also be produced who may have heard the conversation between the suspect and the decoy witness. Furthermore, the decoy witness must also explain how he identified the suspect and the factum of such witness giving donation to the cause of banned outfit must be reduced into writing. Additionally, the articles recovered from the suspect, such as books and pamphlets inciting sectarian hatred must be preserved and their chain of custody be maintained. Over and above, the investigating officer must inquire into antecedents and history of the suspect to establish his connection with the banned outfit. Contrarily, in the US, Hammoud was held guilty of associating with a foreign terrorist organization merely for paying $ 3500 in donation to Hizballah.

2.1.1.1 Significance of Ghulam Hussain in anti-terrorism jurisprudence of Pakistan

The Supreme Court's judgement in Ghulam Hussain provides a classic example of taking to extreme the prosecutorial model. As per the judgement, henceforth only those acts will be adjudged as acts of terrorism which are intended to advance a religious, ethnic or sectarian objective by way of coercing a government or intimidating a civilian population or community. Through this judgement, the Supreme Court has laid down the rule that having intention to achieve the stated objectives shall be a pre-requisite to try an act as act of terrorism, irrespective of its consequences. To be precise, no matter how brutal an offence is, the underlying motive should be to terrorize the public or coerce a government to advance religious, ethnic or sectarian objectives. To rationalize this interpretation, the Supreme Court relied on Anti-Terrorism (Amendment) Ordinance 2001 whereby the definition of terrorism

was amended by the legislature and the element of intention or premeditation was introduced. One can differ with this logic as the same definition stipulates that motive requirement need not be fulfilled where firearms, deadly weapons or explosives are used in the commission of the crime. Since, very rarely a terrorist crime is carried out in the absence of such ammunition, almost all terrorist cases can be said to fall under this proviso which clearly dispense with the motive requirement. Furthermore, the amended definition also includes a sub-clause which provides that all those acts shall also be deemed as acts of terrorism which are designed to terrorize the public or section of public having the effect of discouraging them from taking part in their day-to-day business or trade. Notwithstanding these counterarguments, as the judgement is binding under article 189 of the constitution on subordinate courts and tribunals, it has led the anti-terrorism courts to transfer many cases to regular courts for trial in accordance with ordinary law. When cases are tried under ordinary law, section 302 of PPC becomes applicable for the crime of murder, section 324 for attempt to murder and section 337 for different kinds of hurt. Because all these offences are compoundable, it is customary that soon after the conviction, the accused and his family members would put pressure on victim's legal heirs to pardon the crime. In most cases, pardon is granted after accepting blood money or the complainant party realizing that there would be no end to litigation. At times, pardon is granted out of the concerns for safety of the survivors. If major offences are pardoned, the courts (mainly appellate) begin to find loopholes in the investigation carried out with respect to subsidiary offences, such as those under Arms Ordinance 1965 and Explosives Act 1884. On failure of the prosecution to establish these charges beyond reasonable doubt, the accused gets a clean chit and is released from the prison.

Ever since Ghulam Hussain judgement, all those cases of mass killing, regardless of their grotesque, harrowing and barbaric nature which are motivated by personal enmity, private rivalry and emotions such as honour, disgrace or provocation are being transferred to ordinary courts. It is reaffirmed that the definition of terrorism under the 1997 Act still carries enough latitude to embrace these crimes as acts of terrorism if their commission involves the use of firearms, deadly weapons and explosives. However, the emphasis in Ghulam Hussain to prove motive or premeditation to cause fear and panic or governmental coercion has overshadowed the imports of this subsection. Interestingly, while discussing this subsection in Ghulam Hussain, the Supreme Court admitted that 'the provisions of subsection 6(3) were quite problematic as they did not piece well with remaining provisions of Sc. 6 as far as the matter of defining terrorism was concerned.' The Court held further that 'the legislature may like to have another look at 6(3) and consider deleting or suitably amending g the same to bring it in harmony with remaining provisions of the Act.'

In the light of above, it goes without saying that Pakistan is pursuing a prosecutorial as opposed to preventive approach to combat terrorism in which civil liberties are given priority over security concerns. Nevertheless, it can be argued that the policy could have been more balanced, had the motive requirement not been so rigorous or consequences of the act not been altogether dismissed in gathering terrorist intention. Keeping in view sub-clause (3) of section 6, the 1997 Act does not appear to rule out a crime from the definition of terrorism only because it was motivated by personal grudge or previous enmity, if it was carried out by using firearms or explosives. However, the dictum of the Supreme Court in Ghulam Hussain and succeeding judgements obviously convey this impression.

2.1. 2. Disadvantages of narrow definition: - Practical difficulties of narrow approach

Even though the Ghulam Hussain leaves out acts driven by personal vendetta and private feuds from the definition of terrorism, there can be situations where a terrorist may be motivated simultaneously by two distinct emotions, a desire to take revenge and to spread fear and panic to establish his dominance or invincibility. For example, in one case, the voters of a political leader were wounded and killed in a bomb and grenade attack. Although the case was registered under section 6 and 7 of the Anti-terrorism Act 1997 along with some provisions of the regular penal law, at appellate stage, the provisions of anti-terrorism law were removed keeping in view previous enmity between the parties. While the court concluded that the motive was to settle a personal score, it can equally be argued that the accused wanted to spread fear and panic in a section of the public to keep them from voting for his opponent. Similarly, in another case, corrosive substance (acid) was thrown at the victim because he had had a row with the accused a few days before the occurrence. It caused the victim loss of hearing and eyesight, along with permanent disfigurement of face. Once again, the court held that the ghastly incident was a consequence of private feud, consequently charges under the 1997 Act were dropped. One can argue that the motive of the accused was not merely to exact revenge but also to teach a lesson to the people of the locality, so that no one dared pose a challenge to his authority in future. Despite these realistic possibilities, the act was punished as a crime under section 336-B of Pakistan Penal Code 1860 in place of section 7 of Anti-Terrorism Act, 1997. Analogously, in a separate case, a whole family of five, including three children were allegedly butchered by the son-in law of the deceased to usurp their property. This time, the accused was acquitted of all the charges against him on the basis that there was not enough evidence to connect him with the commission of the crime. The court noted in its judgement, the heinous nature of a crime should not blur the eyes of justice. No matter how serious the crime is, guilt must be proved beyond reasonable doubt.

Given this, it can be said that after Ghulam Hussain, those subversive acts are deemed as acts of terrorism which are directed against state infrastructure or state functionaries or acts motivated by sectarian, ethnic and religious considerations.

Indeed, counter-terrorism law is distinguishable from ordinary law in the sense that it allows inter-alia: induction of special judges and prosecutors, in-camera trials, and special measures for protection of judges, counsels, prosecutors and witnesses etc. For all that, if the application of the law is to be confined to attacks against government installations and officials, and the acts designed to advance religious, sectarian and ethnic objectives, one may question the need of investing so dearly on establishing these special courts. Why can't we simply amend our ordinary penal laws giving special powers to regular courts to deal with these matters expeditiously?

It was stated in Muhammad Akran V. the State , that at the very minimum, the term motive can be stretched to increase the number of crimes regulated by the legislation. Notably, if a few more motivating factors are inserted on the pattern of the UK law, such as ideological, racial and political, at least, crimes inspired by primitive ideologies, like honor killing and denying right of inheritance to women can be covered by the special legislation.

2.3: Understanding Pakistan's Anti-Terrorism Act 1997 in the light of case law

In the paragraphs that follow, I shall analyze some recent decisions of the superior courts to see if the dictum of Ghulam Hussain is still being followed faithfully or has there

been a change of hearts, of late. Putting it differently, this review shall manifest, if the courts are adhering to the policy of narrowly defining terrorism to guarantee fair trial rights, or national security concerns have taken precedence over the latter.

2.3.1 Nawab Siraj Ali Case

In this case, 2023 SCMR 16 Sc, firearms were used to cause death of a victim who exchanged words with the accused to restrain them from harassing his sister. Since the occurrence took place in a popular residential area, it also fell under the mischief of subsection 6 (2) (i). Despite the vicious nature of the crime, the High Court ordered a retrial of the accused because the parties had entered a compromise. The civil society activists impressed upon the Supreme Court to take up the case in public interest under article 184 (3) of the constitution to do complete justice. Their understanding was that even if the charge of murder had been pardoned by the heirs of the deceased; the charge of terrorism held ground as the same was non-compoundable. Notwithstanding this, the Supreme Court proceeded to acquit the accused of terrorism on the grounds that the act was caused by revenge or egoistic rage. To constitute terrorism, it should have been committed with the prior intention to coerce a government or intimidate a population with a view to advancing sectarian, ethnic or religious objectives.

2.3.2: Muhammad Akram v. State

Similarly, in Akram, the accused was charged with terrorism when he killed his wife with gunshot when she was being taken to the court in a police van on the allegation of theft. During the incident, a police constable also sustained firearm injury. Although the accused was arraigned with two distinct crimes under section 6 of the Anti-Terrorism Act 1997, i.e., killing his wife in police custody and wounding a police official with firearm, the court found him not guilty of terrorism. The justification was that the act of killing took place under the impulse of 'gairat' or personal insult/ disgrace. According to the court, the accused lost control as he could not tolerate the humiliation caused by his wife by indulging in theft. It was held further that the policeman was injured not because he was the target, rather, he came in the range of fire. Therefore, in the opinion of the court, the requisite intent to commit the act of terrorism was lacking. Noticeably, under section 6, there is no need to prove motive where the crime is committed with firearms, explosives or deadly weapons. The court, nevertheless, held that motive for the crime was a personal vendetta, not a design to spread fear or panic in public or to coerce a government.

Not surprisingly, the judgement was delivered after the heirs of the deceased had pardoned the accused, and so did the injured police constable. Bearing this in mind, it can be argued that following a compromise between the parties, the court might have found itself at odds with the decision to convict the accused. Therefore, it got itself engaged in an exercise to look for reasons to disprove charges of terrorism.

2.3.3 Akhtar Khokhar and Waqar Khokhar v. the State

In this case, an elected member of the provincial assembly was gunned down in public as she enraged the accused by encouraging her sister to stand up for her rights in the inheritance of her deceased husband. Evidently, there was no personal enmity between the deceased and the accused. On top of that, there can be no denying that the brutal murder of a public representative must have caused fear and panic in the people of the locality. Even here, the court held that the petitioner would be at liberty to file an application under section 23 of the Anti-Terrorism Act 1997 to transfer the case from special anti-terrorism to the regular court.

In the light of above, it can be pointed out that the Supreme Court due to its conservative approach has
further qualified the definition of terrorism past Ghulam Hussain by observing that the acts motivated by rage, honor, disgrace, grudge, previous enmity, provocation or impulse will be out of its scope. Apropos to this, it seems obvious that states implementing narrow definitions slowly begin to think of terrorism as an act of violence, destruction and coercion against the state itself, to the exclusion of its subjects.

2.2.3: Case by Case application of Ghulam Hussain-A way out?

All things considered; it can be suggested that the blanket application of Ghulam Hussain in every case relating to terrorism does not seem prudent as it casts doubts on the rationale of having special anti-terrorism courts. According to the definition of terrorism, there is no need to prove motive where the prohibited act is committed by using firearms, deadly weapons or explosives. Furthermore, an act of terrorism can also be committed by terrifying the public to the point of discouraging them from taking part in day-to-day business. When faced with suchlike situations, the requirement to have motive to advance a religious, sectarian or ethnic objective need not to be over-stressed. This should not be taken to mean that Ghulam Hussain rule i.e., looking at the intent, not consequences of an act should be altogether abandoned. Instead, the purpose here is to re-emphasize that Ghulam Hussain criteria may complement, not substitute the definition as set out by the legislature.

Conclusions

States are at different levels of advancement in terms of dealing with a terrorist threat as they must keep in view legal traditions of their national justice systems as well as their capacity while designing a counter-terrorism strategy.

With that being said, it can be argued that basically, there are two types of states, those in favor of restricting personal liberty in anticipation of terrorist threat and those not in this favor. However, as the threat of terrorism is no longer a major concern for most of the states, several key international players previously affected by terrorism have begun to review their broad anti-terrorism policies. For example, the courts in the United States did not initially entertain petitions brought to them about human rights abuses in Guantanamo Bay and Abu Gareb. This was the aftermath of 9-11 and courts were still in shock of the incident. However, when the judges came out of it, they started questioning the abuses. Thus, in Rasul v. Bush, the United States Supreme Court reversed the lower courts which held that they had no jurisdiction to review detention of non-citizens incarcerated by the United States in the military camps in Cuba. Furthermore, the judges of the Supreme Court concluded that there should be a habeas corpus right for nationals as well as non-nationals imprisoned in the detention facilities established by the US. As held by the US Supreme Court, it was a right guaranteed by the constitution and could not be taken away by the executive policy or special legislation. The court went on to state that a non-national resident had as much a right to file habeas petition as a state citizen. It held further that non- nationals could not be deported to states of their origin if they had reason to believe that they would be subjected to torture in those places. This judicial activism first compelled the executive to pass legislation to protect fair trial rights of the inmates, and thereafter led to closure of these detention centres under the Obama administration.

By way of contrast, there are states like Pakistan which do not make a distinction between a terrorist act and a crime under ordinary law in the matters of affording fair trial rights. These states subscribe to narrow definitions of terrorism and recommend equal protection of fair trial rights for a terror suspect and a suspect charged with an ordinary crime. The problem arises when these states begin to adopt more complaisant policies towards treatment of terror suspects under the impression that the threat of terrorism is defused to a large extent. Thus, when the legislature of Pakistan brought a change in the definition of terrorism by introducing a motive requirement, the judiciary further confined the reach of the applicable law. Consequently, every act motivated by factors like previous enmity, personal grudge, disgrace or humiliation, sudden provocation, impulse and emotions was left out of the definition of terrorism.

Like broad definitions of terrorism, its narrow definitions are plagued with problems of their own. Broad definitions can be said to be unfair as they make it possible to indict a suspect for preparatory crime without requiring proof of its link with the terrorist attack planned to be facilitated by it. In the like manner, narrow definitions by overemphasizing the motive requirement can rescue the suspect, if prosecution fails to prove the intention to spread fear and panic or to coerce the government to achieve certain stated objectives. Although narrow definitions ensure fair trial rights to a suspect, they can at times be harsh on the victims. For instance, suspects may come to position to put pressure on the victims to pardon the remaining crimes, if charges of terrorism are dropped or disproved.

Against this background, it can be suggested that both approaches taken to extreme will serve no useful purpose. Consequently, a balanced approach would need to be drawn. The advocates of broad definitions would need to bring in requirement to establish a link between a preparatory crime and facilitation of actual terrorist attack through it. On the other hand, the proponents of narrow approach should take into consideration consequences of a crime, in addition to premeditation to extract the motive. Although counter-terrorism laws of different states may appear to be the same, it's the interpretation of those laws by national courts which distinguish the policy of one state from another. Question is, can judicial interpretations be separated from entrenched principles of a national justice systems?

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