

Antiterrorism Law

Zulfiqar Hameed

Since the beginning of 2005, Pakistan has experienced an alarmingly high rate of terrorist attacks. Incidences spiked in 2009 and, though they receded in 2011, the numbers are still concerning. Terrorist attacks are not new to Pakistan; according to one estimate, there were at least 4,438 such attacks throughout the country from 1974 to 2010.¹ Attacks subsided from 1997 to 2005 but then reached unprecedented rates between 2007 and 2011.² Figures of fatalities vary; according to one estimate, there were more than 40,000 fatalities attributable to terrorist attacks from 2003 to 2012.³ Faced with such a serious onslaught, Pakistan must reform its criminal justice system in order to ensure that terrorism is being handled effectively, that perpetrators are adequately punished, and that the menace of terrorism is brought under control.

While law enforcement agencies and civil legal institutions are the most appropriate forums in which to tackle terrorism, the performance of those bodies has been anything but satisfactory. Without a major reform effort, civilian law enforcement agencies, including the police, will continue to be unequipped to handle the herculean challenge facing them.

Pakistan's police force is underresourced, poorly trained, badly paid, low in morale, and viewed with suspicion by the courts and society because of its poor human rights record. Most police are regarded as corrupt, inefficient, and unprofessional. There are minimal forensic facilities or modern equipment to assist them in doing their job.

The situation in the courts is similarly dismal, and there is deep and widespread dissatisfaction with their record in punishing terrorists. In their defense, the courts contend that the police fail to provide enough evidence; the police respond that the courts favor defendants and that the standard of evidence is impossible to attain. In this back and forth, the larger goal of addressing the issue of terrorism suffers.

Anti-Terrorism Act 1997 was enacted at the federal level and applies nationally except in the Federally Administered Tribal Areas. The Act establishes special antiterrorism courts and confers special powers on these courts as well as law enforcement agencies⁴ Two serious criticisms have been made of the Act.

Pakistan must reform its criminal justice system in order to ensure that terrorism is being handled effectively.

¹ Global Terrorism Database, University of Maryland, accessed March 17, 2012, http://www.start.umd.edu/gtd/search/Results.aspx?chart=attack&casualties_type=&casualties_max=&country=153.

² Ibid.

³ South Asia Terrorism Portal, Pakistan Data Sheets, accessed March 17, 2012, <http://www.satp.org/satporgtp/countries/pakistan/database/index.html>.

⁴ For details, see "The Anti-Terrorism Act (ATA), 1997," Federal Investigation Agency, Pakistan, accessed May 31, 2012, <http://www.fia.gov.pk/ata.htm>.

The first is that it is overly broad and does not provide sufficient safeguards against abuse of its special provisions.⁵ The second is that it is ineffective in achieving its objective of punishing terrorists.⁶

Though these criticisms may be legitimate, an accurate assessment of the Act's effectiveness has yet to be conducted because of a critical lack of data. To rectify this situation, this chapter will analyze data on police performance, the record of cases prosecuted under the Anti-Terrorism Act, the types of cases registered under the Act, and judicial decisions made under the Act. The data that follow pertain to Punjab Province, which was selected as a case study because it is both the largest and the most populated province and because it was severely affected by the recent spate of attacks from 2008 to 2011. The data pertain to the years 2005 to 2011 unless otherwise stated and were obtained from the Investigation Branch of the Punjab Police, which collects all such data relating to police work in the province.

Police Performance under the Anti-Terrorism Act

Police performance can be measured by looking at the number of cases registered by the police under the Anti-Terrorism Act in the first instance and the ratio of cases that ultimately are sent to court and tried (see Table 1). Although the general perception of terrorism cases is that most involve bomb blasts, suicide attacks, or weapons of mass destruction,⁷ in actual practice, any case that is defined under Section 6 of the Anti-Terrorism Act as a purported act of "terrorism" falls under the jurisdiction of the antiterrorism courts and therefore is investigated and tried under the act.⁸

Looking at the data reported in Table 1, several observations can be made:

- The total number of cases registered (by the police) and tried (by the courts) under the Act is quite large—more than 4,000 in seven years, averaging 574 annually.
- A relatively large number of cases are registered incorrectly in the first instance. This conclusion is drawn by looking at cases "cancelled" by the police (263, or 6.54 percent of total cases), wrongly applied, or "deleted" (88 cases, or 2.19 percent). Cases that are cancelled are those that the police found during the investigation to be wrongly registered because the incident did not occur, and thus the allegation is false. Deleted cases are those in which the underlying incident is found to be correct but that the police investigation found should have been registered under the Pakistan Penal Code instead of the Anti-Terrorism Act. Together, then, more than 8 percent of cases are incorrectly registered in the first place.
- Around 5 percent of the cases registered are not pursued and so are declared "untraced," with the possibility that they may be reopened if subsequent leads arise.
- The most important number from the point of view of police work is the "Challan" ratio, which represents the number of cases sent to court for trial. A "complete Challan" indicates that the case has been completely investigated and sent to court; an "incomplete Challan" indicates that all perpetrators have not been arrested, but the arrested perpetrators have been sent to court. Slightly over 52 percent of cases

⁵ See Charles H. Kennedy, "The Creation and Development of Pakistan's Anti-Terrorism Regime, 1997–2002," in *Religious Radicalism and Security in South Asia*, ed. Satu Limaye et al. (Honolulu: Asia Pacific Center for Security Studies, 2004), 387–412; and Amnesty International, *Pakistan: Legalizing the Impermissible: The New Anti-Terrorism Law* (London: Amnesty International, 1997).

⁶ See "Pakistan and Its Flawed Anti-Terrorism Laws," Policy Research Group, July 15, 2010, accessed May 31, 2012, http://policyresearchgroup.com/regional_weekly/hot_topics/835.html; and Rabia Shakoor and Eqbal Alavi, "Why Can't Pakistan Convict Any Terrorists?," *Let's Build Pakistan*, July 7, 2010, accessed May 31, 2012, <http://criticalppp.com/archives/12078>.

⁷ There is, interestingly, no definition of suicide bombing or weapons of mass destruction in the Anti-Terrorism Act to this day, despite widespread attacks in Pakistan in the last few years falling under these categories.

⁸ Section 6 of the act defines such acts of terrorism in very broad and vague terms, and Section 7 is the penal section for such offenses. For details, see "The Anti-Terrorism Act (ATA), 1997."

Table 1: Cases Registered and Investigated under the Anti-Terrorism Act⁹

Year	Total Cases	Cancelled	Untraced	Incomplete Challan	Complete Challan	ATA Deleted	Under Investigation
2005	403	18	37	96	240	7	5
2006	468	10	21	116	311	5	5
2007	541	14	17	143	358	7	2
2008	575	28	39	168	313	6	21
2009	729	31	25	246	359	3	65
2010	613	81	36	132	306	35	23
2011	690	81	17	221	228	25	118
Total	4019	263	192	1122	2115	88	239
%	100	6.54	4.78	27.92	52.63	2.19	5.95

are considered complete Challan, while 28 percent of cases are considered incomplete Challan; when both categories are combined, the total percentage of cases sent to trial is only 80 percent. Considering that these are the most high-profile cases in the criminal justice system, this number leaves much to be desired in terms of police performance.

Table 2 reveals an interesting and instructive statistic regarding the annual registration of cases under the act. Only 4.6 percent of cases involve bomb blasts or suicide attacks—cases traditionally perceived as acts of terrorism—while the remaining 95 percent of cases fall under miscellaneous categories such as kidnapping for ransom, murder, acid throwing, police encounters, and other offenses. In reality, “terrorism” should refer to only those cases that involve actions that attempt to inflict widespread damage with a terrorist, political, or sectarian intent or a connection to a terrorist organization.

The problem with the way in which the Anti-Terrorism Act is presently being applied, as is evident from the foregoing figures, is that in a large majority of cases, there is no connection with a terrorist organization or presence of terrorist intent. Cases that should be registered under the ordinary law of Pakistan (i.e., the Pakistan Penal Code) instead are being registered under the Anti-Terrorism Act. This is attributable to a lack of a precise definition and the absence of safeguards against wrong registration within the Act. Arguably, some of these cases may involve terrorist organizations, but by no means the majority. The implications of these numbers for resource allocation among the police and the antiterrorism courts established under the Act are obvious. With meager resources, such overburdening of the system has debilitating effects for real terrorism cases.

It appears that the reasons for this wide-ranging registration of cases are twofold. First, the Anti-Terrorism Act includes the broad-based spectrum of offenses in its Third Schedule.¹⁰ The Third Schedule gives the government the power to include any offenses not originally covered under the Act but within the ambit

⁹ The data for this and all subsequent tables were obtained by the author from the Investigation Branch of the Punjab Police as of December 31, 2011.

¹⁰ Section 34 of the Act, read with the Third Schedule, empowers the government to add, modify, or delete any entry in the Schedule, with the effect that offenses to be covered under the Act can be added, amended, or deleted.

Table 2: Cases Registered Under the Anti-Terrorism Act (percent)

Year	Explosives Act	Kidnapping for Ransom	Police Encounter	Multiple Murder	Murder	Acid Throwing	Other
2005	2.24	21.08	26.91	3.59	8.30	0.22	37.67
2006	3.92	20.68	22.82	5.53	0.00	0.00	47.06
2007	6.02	28.09	21.91	3.34	0.00	0.67	39.97
2008	6.90	35.23	19.34	3.00	3.75	6.90	24.89
2009	5.96	35.95	12.78	3.07	5.11	6.47	30.66
2010	3.09	34.27	16.57	2.53	3.51	5.48	34.55
2011	4.48	28.50	20.52	3.39	3.65	3.27	36.18
Average %	4.66	29.11	20.12	3.49	3.47	3.29	35.85

of the act through a notification. Beyond that, the Act contains provisions that indirectly allow this broad scope to be enlarged if certain acts that fall outside the ambit of the legislation are perceived to be serious by the police. This measure is meant to give the police latitude in pursuing serious offenses. The potential for abuse here is glaring, and this leads to an overburdening of the machinery meant to cater to cases of terrorism. An inevitable consequence is that the courts have, over time, become wary of awarding harsher punishments even in real terrorism cases. Looking at all incidences of wrong registration under the Act, the wider point is that the intent of the lawmaker is being abused because of a misapplication of the Act and a critical absence of safeguards against such abuse within the Act itself.

Prosecution of Cases under the Anti-Terrorism Act

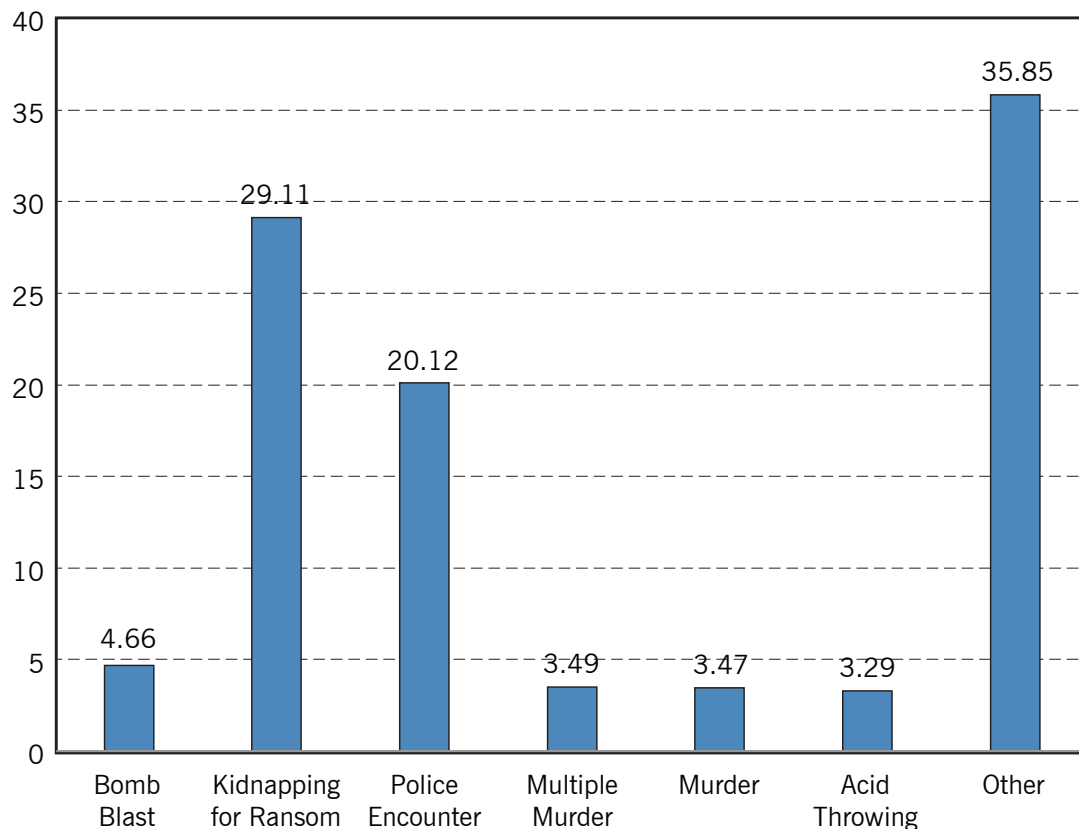
Having examined the cases that are sent to the antiterrorism courts on the basis of police investigation, an analysis of the cases that are actually tried is in order. The earlier examination reflects quantitative police performance in terms of numbers, but the following analysis reflects the quality of investigations and prosecution. Further, it analyzes the performance of the courts operating under the Anti-Terrorism Act and the effectiveness of antiterrorism law in terms of punishments, convictions, and deterrence.

Tables 3A and 3B detail prosecutions in antiterrorism courts from 2005 to 2011 in absolute and percentage terms, respectively. It is important to note that there is a considerable lag between the registration date of these cases and their eventual decision in court—generally several years—and that after these cases are decided, most enter into a lengthy appeals process before sentencing commences.

Looking at the figures, several observations can be made:

- The most telling statistic in these figures is the rate of conviction in cases registered under the Anti-Terrorism Act. The highest conviction rate is slightly over 28 percent, and the annual average is just over 18 percent. This means that approximately 82 percent of the total cases tried do not end in conviction. When this figure is combined with the total cases sent to court after registration (80 percent), it reveals that the chance of a case registered under the act ending in a conviction is approximately 14 percent. Conversely, the average rate of acquittal is high, at slightly over 36 percent.

Figure 1: Average Share of Cases Registered under the Anti-Terrorism Act in Punjab, 2005–2011



Source: Investigation Branch of Punjab Police, Police Headquarters

- In nearly 13 percent of the cases that arrive in antiterrorism courts, the court finds that the act was applied incorrectly, and therefore the case should be tried in ordinary courts (“transferred”). When this figure is added to the combined total of cancelled and deleted figures (6.54 percent and 2.19 percent, respectively) in Table 1, the extent of the problem becomes clear, as almost 22 percent of cases registered under the act in the first instance are ultimately determined to be out of the Act’s scope.
- A large proportion of cases remain under trial at the end of each year, illustrating the extensive decision time for cases tried under the Act.

Table 4 reveals an interesting fact about the present legislation. In cases in which explosives are used for the purposes of terrorism, the act of possession or use is not covered under the Anti-Terrorism Act, but under the 1884 Explosives Act. Similarly, recovery of illegal weapons, even when involved in cases of terrorism, is covered not under the Anti-Terrorism Act, but under the 1965 Arms Ordinance. In order to examine the outcomes of cases involving terrorist acts, not in technical terms but in terms of their impact, it is necessary to look at cases in which the Explosives Act has been applied in addition to the Anti-Terrorism Act. Looking at the conviction data in cases involving the Explosives Act (see Table 4), it is clear that the ratio of convictions in these cases is abysmally low—even when compared with the otherwise low

Table 3A: Prosecution in Special Antiterrorism Courts, 2005–2011

Year	Previous Balance	Newly Instituted	Total	Convicted	Acquitted	Transferred	Under Trial
2005	512	665	1,177	170	213	180	560
2006	560	854	1,414	335	455	178	446
2007	446	819	1,265	287	477	153	351
2008	351	768	1,119	169	383	206	361
2009	361	791	1,152	150	450	149	407
2010	407	831	1,238	240	593	79	326
2011	326	687	1,013	167	401	117	326

Source: Investigation Branch of Punjab Police, Police Headquarters

Table 3B: Prosecution in Special Antiterrorism Courts, 2005–2011 (percent)

Year	Convicted	Acquitted	Transferred	Under Trial
2005	14.44	18.10	15.29	47.58
2006	28.46	38.66	15.12	37.89
2007	24.38	40.53	13.00	29.82
2008	14.36	32.54	17.50	30.67
2009	12.74	38.23	12.66	34.58
2010	20.39	50.38	6.71	27.70
2011	14.19	34.07	9.94	27.70
Average %	18.42	36.07	12.89	33.71

Source: Investigation Branch of Punjab Police, Police Headquarters

conviction rates under the Act. Ultimately, this means that the area truly meant to be addressed by the Act (i.e., terrorist attacks involving explosives with a potential for mass casualties) has not been adequately addressed because of the absence of a separate definition and punishment for possession or use of weapons of mass destruction under the Act.

Police Rules and High Court Rules

An important piece of corroborating evidence is the identification parade of accused by the victims of offenses. Even in terrorism cases, courts ask that one be conducted. The present procedure for the identification parade given in the Police Rules¹¹ and in the High Court Rules¹² is outdated and does not ensure the protection of witnesses. The practice requires a victim to go to jail, stand in front of a lineup, and virtually touch the accused

¹¹ See 1934 Police Rules. Rule 26.32 for the procedure of identification parades dates back to 1934.

¹² The Lahore High Court Rules, Volume 3, Chapter 11, Part C deals with identification of accused and dates back to instructions issued in 1936.

Table 4: Convictions under the Explosives Act by Antiterrorism Courts in Punjab, 2008–2011

Year	Total Convictions	Convictions in cases where Explosives Act applied	% of total convictions during the year
2008	169	5	2.96
2009	150	14	9.33
2010	240	17	7.08
2011	167	14	8.38

Source: Investigation Branch of Punjab Police, Police Headquarters

who has been identified. The complete disregard for the safety of victims has obvious ramifications. Similarly, there is no provision in the Act for “trial incognito” or victim protection through voice and face distortion during trial proceedings, even though these are considered international best practices.

The 1984 Evidence Act defines “evidence” only as direct testimony in court.¹³ Modern types of evidence are not covered under the Act.

Changes in the Police Rules can be made through the instructions issued by the government, while changes in the High Court Rules require the assent of the High Courts. Amendments to the Evidence Act can be introduced by Parliament.

Recommendations

The foregoing picture illustrates the unsatisfactory nature of the present legal and institutional regime for pursuing terrorism cases in Pakistan. While the data are limited to Punjab, the lessons can be easily applied across Pakistan. If these steps are taken, along with other measures to buttress the antiterrorism institutional regime in Pakistan, the police and the courts can be effective in responding to and controlling terrorism in Pakistan. In view of the foregoing analysis, the following recommendations are proposed:

- Completely revise the Anti-Terrorism Act 1997 to ensure that it addresses the areas it was intended for and does not leave room for abuse.¹⁴ This would require at least five actions:
 1. Assign circumscribed, relevant, definitions for the following key terms: terrorism, terrorist act, weapons of mass destruction, and suicide bombing. These definitions should reflect a careful understanding of the types of crimes that should be covered under the Act.
 2. Prescribe new categories of offenses that cover crimes that are currently out of scope of the Act but are inexorably linked to the terrorist problem and thus should be prosecuted under the Act. These include the following:
 - Federal offenses for both the interprovincial transportation of explosives and arms and conspiracy to attack across provincial boundaries.
 - Attacks on buildings and infrastructure of special national significance.

¹³ The Qanoon-e-Shahadat Order 1984; see Article 2 of the Order for a definition of “evidence.”

¹⁴ This recommendation draws considerably on the article by Zulfiqar Hameed, “The Need for Reform in Anti-Terror Laws,” *Friday Times* (Pakistan), January 13, 2012, accessed May 31, 2012, <http://www.thefridaytimes.com/beta2/tft/article.php?issue=20120113&page=8>.

- Possession of arms or explosives for use in terrorism, as a strict liability offense with heavier penalties for larger quantities.
- Use of nuclear, chemical, or biological weapons in terrorist attacks.

There is no provision in the [Evidence Act] for “trial incognito” or victim protection through voice and face distortion during trial proceedings.

3. Provide procedural safeguards to ensure that strictly terrorism cases are registered under the Act. This involves removing non-terrorism-related offences (such as murders and police encounters) from the ambit of the Act. Next, as a safeguard against abuse, registration should require the approval of senior police officers.
 4. Modify the Evidence Act and High Court Rules to provide for incognito trials, protection of the identity of witnesses, a simpler procedure for admissibility of modern types of evidence (e.g., cell phone call data) in terrorism cases, and more effective rules for police testimony.
 5. Confer legal powers on investigating officers to obtain a broader spectrum of information on a real-time basis for suspects involved in terrorism cases. Examples include basic information such as travel history, financial and banking transactions, phone call details, and cell phone data. Such information is presently either unavailable or subject to lengthy, delayed procedures.
- Create a special cadre of terrorism investigators, given the chronic shortages of manpower, logistical resources, and expertise in ordinary police stations. Although the Anti-Terrorism Act provides for special courts, the same consideration is not made for investigators. These investigators should be properly trained, equipped with the necessary resources, and granted the legal powers outlined earlier. Punjab has already taken a step in this direction by establishing the Counter Terrorism Department within the Punjab Police.¹⁶ All terrorism cases should be assumed in the first instance by investigators from this cadre, instead of ordinary investigating officers, who are unequipped to handle such complicated and high-profile cases.
 - Establish a specialized federal agency for federal offenses under the act. The National Counter Terrorism Authority (NACTA), established in 2009, represents a step in the right direction, but the organization has been hampered by legal, organizational, and financial constraints.¹⁷ If freed from these constraints, NACTA could have jurisdiction over federal offenses under the Act as well as all national counterterrorism efforts. It would also serve as a national clearinghouse for all data on terrorism.
 - Create an effective protection program for victims, witnesses, and officials (investigators and judges). Data from a recent report shows that the most common reason for acquittal in terrorism cases in Punjab is related to witness issues, with hostile witnesses representing 48 percent; lack of witness testimony, 27 percent; and witnesses retracting their testimony because fear of reprisal, 27 percent.¹⁸ An effective witness protection program is urgent in view of these findings.
 - Introduce modern methods of investigation into the legal regime. The concepts of plea bargains, polygraph testing, and relative guilt have been suggested, and they are positive ideas for reform. Police also need effective forensic support, and the legal regime must provide for forensic evidence admissibility in cases of terrorism.

¹⁵ For more details, see Counter Terrorism Department (CTD), Punjab Police, updated April 17, 2012, <http://punjabpolice.gov.pk/ctd>.

¹⁶ For more details, Ahmad Hassan, “Counter-Terrorism Authority Dormant,” *Dawn*, May 25, 2012, accessed May 31, 2012, <http://dawn.com/2011/05/25/counter-terrorism-authority-dormant/>.

¹⁷ See “Why Do Terrorism Cases Fail in Court? An Empirical Analysis of Acquittal Cases in Punjab,” report submitted by the CTD to the government of Punjab, 2011. This report was compiled by Syed Ejaz Hussain Shah, deputy inspector general of police of the CTD.
