Anti-Terrorism Act, 1997: Undemocratic Attitude of a Democratic Government

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Abstract
All the democratic and undemocratic regimes in Pakistan have been trying to curb the terrorist activities by enacting special laws and establishing special courts according to the prevailing circumstances. Prime Minister Nawaz Sharif’s government committed itself to the idea of introducing parallel court structure of special courts to obtain speedy justice. Special courts establishment under Anti-Terrorism Act, 1997 abolished the universal rule of equality before law fundamental to any just and democratic society. The legislation demonstrates non-confidence of democratic leadership on democratic values. The act according to many of its critiques provided license to kill the innocent people by law enforcing agencies. The political and social activists in the country staged protest against the law as contrary to the fundamental rights. The judgment of Supreme Court in constitutional petition directed the government to soften the Act by amending certain sections to put the special courts under the control of judicial system already prevalent in Pakistan. The judgment stands prominent among the judgments of Supreme Court in guarding the fundamental rights.

Keywords: Pakistan, Anti-terrorism Act, law, Supreme Court

I. Introduction
The basic objective of the article will be to examine the anti-terrorism act, 1997 promulgated during the second phase of Nawaz Sharif’s government starting in 1997, when Nawaz Sharif’s Muslim League was swept to power with a heavy mandate of two third majorities. The mandate gave Nawaz Sharif a unique opportunity to bring about changes necessary to confront the growing menace of law and order problem. In fact since the days of Zia-ul-Haq, a military dictator, who ruled Pakistan for eleven years the law and order situation in Pakistan had been a source of irritant for all rulers. Therefore the civilian government of both Benazir Bhutto and Nawaz Sharif tried in vain to contain
the ever-deteriorating law and order situation in the country. Finally, Nawaz Sharif during his second tenure, with a heavy mandate took some stringent steps to halt the down side. The paper will examine in some detail the pros and cons of Nawaz Sharif’s initiative. We should call it the irony of fate or a divine intervention that those who had enacted the terrorism law at one point in history were under trial under the same law.

In civilized and democratic societies, “No one’s home can be broken into and searched by the police without a court order showing that there is a good cause for such a search” (Adeeb, 1992). The mid-night knock of the corrupt, inefficient and brutal police has no place in a democracy. Law and order situation in the whole country had been wrecked particularly since the 1988 and the necessity of iron hand was felt to crush these terrorist activities that were destroying the law and order of the country. Ethnic and religious clashes and killings had been common thing in different parts of the country during the period 1988-1997. The political workers; sectarian zealots, ethnic organizations and persons of local mafias were using their muscles to maintain their influence of fear and terror (Baxter and Kennedy, 2000). Curfews, Kidnappings for ransom, decoties and open display of arms had become the order of the day. Most probably it was one of the consequences of the Afghan war and reaction against dictatorship. To combat the state of lawlessness efficiently and effectively, Nawaz Government after detailed consultations with all relevant circles including political parties and parliamentarians decided to enact a special law (Anti-Terrorism Act) and establish special courts under this law. For the satisfaction of the nation and the justification of enacting of this law Government referred to the Northern Ireland (Emergency Provisions) Act 1973, the prevention of terrorism (Temporary provisions) Act, 1974 and The Terrorist and disruptive activities (Prevention) Act, 1987 (TADA, India) - (PLD, 1998). The menace of terrorism was not confined to Pakistan, other states to be exposed to the menace of terrorism and they have enacted stringent laws to combat the terrorism which I have mentioned above. Here it is however interesting to note that the decision of Nawaz Sharif on the issue of special law. In fact some other countries have been statutes more or less identical to our Anti-Terrorism Act. In spite of all these arguments, Pakistan citizen wanted to make out the democratic behavior from the rulers because Pakistan had faced the dictatorship in different decades. Laws like Anti-Terrorism Act can shake the confidence of people on democracy, certainly it has shaken. For a critical evaluation of the anti-terrorism act we will briefly introduce its history.

II. Historical background of Special Courts in Pakistan

First time in the history of Pakistan, the special courts were established in 1975 by the democratic government of Z.A. Bhutto. Parliament passed the special law for the purpose of suppressing acts of sabotage, subversion and terrorism and to provide for speedy trial of offences committed in this connection before the special courts established under the act of suppression of terrorists activities (special courts) act, 1975. The establishment of special courts was against the norms of democratic culture, whereas that government claimed itself to be the first popular democratic government of Pakistan (Awami government). A popular democratic government was searching for solution of terrorist activities in the lap of undemocratic acts. The acts of popular leader and his government reflected his undemocratic attitude. No doubt, Bhutto was the most popular in the history of Pakistan since the death of Quaid-e-Azam, the founder of the nation but he used the tactics of undemocratic culture in the guise of democracy. Under this law,
The federal government was empowered to constitute the special courts for the whole or any part of the Pakistan and appoint the judges for these courts - (PLD, 1975). It was against the justice that the appointment of the judges of special courts was vested with the federal government rather than the High court and Supreme Court. It was the first step of a democratic government towards the establishment of authoritarian rule and establishment of parallel judicial hierarchy. High court within whose jurisdiction the sentence has been passed by the special court was provided as forum of appeal to the convict (PLD, 1975). The special courts established under act of XV of 1975 continued till the imposition of Martial Law in 1977.

**Establishment of Special Courts in Junejo’s government (1987)**

After nine years of Martial Law, civilian set up was restored under the formula of sharing the power rather than transfer of power. During these years due to the activities of Afghan war and suspension of fundamental rights the civil government was facing the problems of terrorist activities and law and order situation also. Under the mixture of democracy and dictatorship, Junejo government in 1987 passed the act in the public interest to provide for the establishment of special courts for speedy trial for certain offences “which, in the opinion of the government, is gruesome, brutal and sensational in character or shocking to public morality or had led to public outrage or created panic or an atmosphere of fear or anxiety amongst the public or a section thereof” – (PLD, 1998). The act was enforced to the whole of Pakistan for the specified period provided that it was extended by the parliament. The appointments of judges of special courts were empowered to the governor of the province that showed the non-confidence on the judiciary. According to the section 4(2) of the act, “the judges to be appointed by the governor in consultation with the chief justice of the high court, who is, or has been, a judge of high court, or is a session judge who is qualified for appointment as a judge of a high court.” – (PLD, 1988). In this act the power of appointment was given to the provincial governor but with the consultation of high court chief justice. The appointments were the discretion of governor because he was not bound of chief justice’s consultation. Again like the 1975 act, government created the parallel judicial hierarchy. The act provided the two opportunities of appeal, high court and Supreme Court against the decisions of special courts. Supreme court was highest court of appeal. The creation of special courts was the negation of the rule of law and fundamental rights and the disbelief on the democratic belief/thoughts.

**Introduction of 12th amendment in the constitution of 1973 for the establishment of Special Courts**

To overcome the spread of violence and terrorist activities, Government of Nawaz Sharif decided to create special courts for the trial of heinous offences on the lines of special courts established in 1975. Parliament introduced 12th amendment in the constitution for this purpose in 1991. The amendment added article 212-B to the constitution for the establishment of special courts for three years. This act provided constitutional cover to these special courts. “In order to ensure speedy trial of cases of persons accused of such heinous offences specified by law as are referred to them by the federal government, or an authority or person authorized by it, in view of their gruesome, brutal and sensational in character or shocking to public morality, the federal government may by law constitute as many courts as it may consider necessary” (PLD, 1991). Federal government like the previous acts of special courts kept the power of
appointment of judges in its hands while only consultation with chief justice was declared necessary but did not make the government bound of this consultation. It means that the government by passed the traditional judiciary and the word consultation was used for fraudulent temptation to satisfy the masses. The federal government was empowered to appoint judges of special courts with the consultation of the chief justice of the concerned High court, a person, who is, or has been, or is qualified for appointment as, a judge of a high court. A person other than a judge of high court can be appointed on the same terms and conditions. It was a positive step of the act that the manner of removal of special court judges was prescribed as same as the judges of high courts. A period of thirty days was fixed to decide the cases both for the special court and supreme appellate court. To hear the appeals against the sentences of a special court, the federal government constituted the supreme appellate court that consisted of “(a) a chairman, being a judge of the Supreme Court to be nominated by the federal government after consultation with the chief justice of Pakistan; and (b) two judges of the high courts to be nominated by the federal government after consultation with the chief justice of the high court concerned”-(PLD, 1991). It was temporary arrangement to control the terrorist activities, thus it became ineffective after a period of three years in July 1994. It was beyond the logic that the act by passed the traditional judicial system, which had no objective other than strengthening the personal authority and unlimited power on the judicial affairs. “The 12th amendment created a hierarchy of courts parallel to the constitutional hierarchy consisting of the high courts and the Supreme Court. A special court under this amendment was not subordinate to the high court and Supreme Court. The supreme appellate court was an anomalous court ranking somewhere in between the high courts and the Supreme Court” – (Khan, 2001).

Prime Minister Nawaz Sharif addressed to the nation on 6th November 1991 and said that the special courts established in pursuance of the 12th amendment have started providing quick justice. He cleared that special courts are functioning in accordance with the principles of law and justice and the allegations leveled by the opponents that these courts would be used for political vengeance have proved, like other accusations of theirs, as unfounded. (PMA, 1991)

**Introduction of Anti-Terrorism Act, 1997 for the establishment of Special Courts**

Ethnic terrorism in Karachi, for years and spread of religious violence in Punjab, Kidnappings for ransom, decoties and open display of arms had become the order of the day in different parts of the country. The above disease of terrorism had kept all the democratic governments preoccupied with the law and order situation. Due to the deteriorated situation of law and order, the economic activities of the country were touching its worst level. The Prime Minister viewed that peace and economic development were interlinked, and restlessness in the society hampered the economic activity, causing hunger, poverty, ignorance, diseases, and backwardness - (The Muslim 1997). For these heinous reasons Prime Minister convinced after consultation with his cabinet members and high officials that for combating terrorism with an effective and efficient method, the enactment of special law, obviously, current situation demands the presence of iron hand to suppress the terrorist activities for restoring the confidence of the people and restoring the healthy economic activities. Prime Minister after consultations with cabinet and government officials announced the introduction of Anti-Terrorist Act. Prime Minister and Chief Justice of Pakistan discussed the idea but could not reach on
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Conclusion for the setup of special courts. Later on in a meeting, “The Prime Minister said that courts should help the government to weed out crime from the society. The government wanted to eliminate terrorism.” The chief justice on this occasion said, “The number of judges was to be increased for early dispensation of justice.” – (News, 1997)

Controversy between the Prime Minister Nawaz Sharif and the Chief Justice of Pakistan on the issue of Anti-Terrorism Act

Even, the Pakistan Law Commission in its meeting opposed the idea of setting up of special courts for curbing terrorism – (The Dawn, 1997). The meeting of the committee of chief justices was held in which the ways of early disposal of heinous crimes cases under the suppression of terrorists activities act, 1975 with some amendments was considered. The committee opposed in advance, the special law and special courts for speedy trials on the pattern of those that were provided under the 12th amendment. The committee suggested that the High Courts would nominate additional session judges through an administrative order to deal with heinous crimes cases only and there was no need for setting up special courts under a parallel judicial system because the people had full confidence in the existing judicial system – (The Muslim, 1997). The code of conduct of the judges forbids them entering into any controversy and any kind of dialogue with other constitutional institutions. Though the judges do not speak but their decisions speak. On the issue of Anti-Terrorist act, Once again both persons hold discussion in the presence of Majeed Nizami, editor-in-chief of daily Nawa-I-Waqat in Lahore and the matter was solved amicably in this meeting – (The Nawa-I-Waqat, 1997). Prime Minister Nawaz agreed with the chief justice but he changed his mind later. “This brought the judiciary and the executive on a collision course” – (Arif, 2002). The meeting was seen by historians as a black satin/spot on our political and constitutional history that the prime minister and chief justice were concluding the agreement on the future legislation, though, it is the pure jurisdiction of legislature who is sovereign body and responsible to the people. In this way judiciary was transgressing into the legislative and executive organ of the state whereas the constitution has defined their orbits of influence clearly. Judiciary was criticized severely during debate on the 5th amendment bill in the National Assembly by the treasury benches particularly by the Prime Minister Zafqar Ali Bhutto himself. He declared in the National Assembly on 4th September 1976, “The judiciary cannot become a parallel executive by wholesale misapplication, misrepresentation and misinterpretation of the laws. This must be very clearly understood… and anyone who does not understand it does so at his own peril... each organ must remain in its sphere of influence and in its own orbit. It cannot transgress into the executive function, into the executive organ. It has been necessary to introduce Fifth Amendment as a result of the transgressing by the judiciary of its functions into the executive branch.” (Arif, 2002). The language of Prime Minister Zafqar Ali Bhutto in National Assembly was very insulting towards the judiciary. He faced the aftereffects of this humiliating tone after the imposition of Martial Law in 1977, during the proceeding of murder case registered against him during his own regime – (Shad and Benazir, 2001) Federal Education minister, Mr. Abdul Hafiz Pirzada said, “The judiciary had been trying to encroach upon the functions of the legislature and the executive. If the judges were not happy with their positions, then they should quit their office and contest elections to occupy seats in the parliament” – (The Dawn, 1976). Chief Justice Sajjad Shah mentioned the compromise and chief justice Lahore High Court made a statement for the
newspapers on behalf of the chief justice of Pakistan that the government had been told not to set-up special courts, but to rely on the existing judicial system, as the forum of parallel judicial system had always been used for victimization of political opponents – (Shah, 2001).

It is right to say that the confrontation began between the judiciary and executive on the issue of the introduction of Anti-Terrorist Act in 1997 for combating the terrorist activities in the country. In later months, it was converted into the clash of two personalities. All was happened because both constitutional functionaries (Prime Minister, Chief Justice) have adopted sticky attitude for satisfaction of their false egos rather than the interest of nation. The question was that on what grounds chief justice of Pakistan raised the roar on this law. Although, court’s duty is to interpret the laws while not to make laws, it is the duty of the legislature who was doing its function. For this purpose, Nawaz government in its second term legislated the new law, Anti-Terrorists Act, 1997. The Anti-Terrorist Act was passed by the parliament on 13th August 1997. The Anti-Terrorist law was a gift from the government to the people of Pakistan on the eve of golden jubilee celebrations. “The National Assembly looked like a fish market during the entire proceedings in spite of the presence of the leader of the house, and repeated calls for order made by the speaker of the house” – (Shah, 2001). Members of Mujahar Quami Movement (MQM) remained absent and the PPP staged a walk out after mounting, the bill is against fundamental rights. Nawaz government used its two third majority stick and got passed the act. The law provided special courts for trial of terrorist activities with appeal to an appellate tribunal other than high court and forum of Supreme Court as a final; court of appeal was excluded. Parliamentary opposition and Aitzaz Ahsan, leader of the opposition in the senate, declared that this black law might be used for political victimization, add to the miseries of innocent people and a deathblow to the existing judicial system (The Dawn, 1997). The act was the charismatic dilemma of two third majority of Nawaz government, which exposed the love of Pakistan Muslim League (Nawaz) and its leadership with democracy. “Government sowed the seeds of enmity with superior judiciary by passing the act for establishment of special courts. It reflects the dictatorial nature of the regime” – (Babar, 2001). General Jehangir Karamat supported the new law and said that new law was the first step in the right direction and it might bring peace and stability – (Shah, 2001). Qazi Hussain Ahmad (Ameer Jamat Islami) said that this kind of black law had no precedent even in the colonial era of British rule – (The Muslim, 1997).

Shahbaz Sharif, a brother of Prime Minister was more touchy for the establishment of special courts than other provincial governments. The Anti-Terrorists Act provided special courts for trial with appeal to an appellate tribunal consisting of high court judges other than high court. High Court was not the forum of appeal, so the further appeal would not lie before the Supreme Court. Thus, under the Anti-Terrorists law, the Supreme Court and high court were excluded from the due process. The judges of the special courts were to be appointed by the federal government and did not enjoy security of tenure – (Khan, 1999). The mode of appointments opened the ways for pressurizing and interfering in the judiciary.

According to the act, the civil and armed forces could open the fire on a person likely to commit a terrorist act and if it was done fallaciously then the security forces
were exempted from any liability if the action was taken in good sense - (Farooqi, 2004), confession made admissible before the police officer, admission to entering a house without search warrant, the law provided special tribunal for appeal other than the high court against the decision of Special Court while the highest court of appeal in the country, supreme court was excluded that meant the establishment of parallel judicial system without the administrative control of the existing judiciary – (Khan, 1999). This act (Anti- terrorist act) brought the judiciary and the executive on a collision course. Prime Minister Nawaz Sharif and his government were committed to establish a parallel court structure of Special Courts for accommodating the members of Pakistan Muslim League (Nawaz) and their relatives as special courts judges. On the other hand, chief justice stressed to achieve the objective through traditional judicial system, which was time-tested system. However, the government could obtain the objective of dispensation of cheap and fastest justice to the masses at their doorsteps under the supervision of existing judiciary rather than the establishment of Special courts under the direct supervision of federal government. It was clear that the special court judges would function under the pressure of appointing authority in the absence of constitutional guarantees as enjoyed by the traditional judiciary. In a nutshell it was a right step towards combating of terrorist activities but their decision to establish parallel hierarchy of courts by ignoring traditional judicial system was beyond the logic. Government’s blame was acceptable to some extent in this regard that the slow and traditional process of existing courts is responsible for the different kind of terrorist activities. But the objective must have been achieved within the constitutional/traditional system of judiciary.

Anti-Terrorism Act challenged before the Lahore High Court

The Anti-Terrorism Act was challenged in the Lahore High Court as violative of fundamental rights and a license to kill for the law enforcing agencies by a number of petitioners. A full bench of the Lahore High Court upheld the Anti-Terrorism Act as valid by a majority of four to one. There was difference of opinion among the learned members of bench but the majority view held that the ATA was completely enacted. However, it was also held by the majority view that certain provisions of the ATA required to be amended in the order to validate the same, namely sections 14,16,19(10) 26,31 – (PLD, 1998).

Anti-Terrorism Act challenged through constitutional petition before the Supreme Court

A number of constitutional petitions were filed against the Anti-Terrorism Act in 1997. Mr. Mehram Ali and others filed the constitutional petition before the Supreme Court challenging the judgment of Lahore High Court and Anti-Terrorist Act in 1998. It is important perhaps logical that government had felt the sentiments of the public, reaction of opposition parties and resistance of chief justice of Pakistan, thus government expressed his desire through attorney general that they are ready to amend the provisions of the Anti-Terrorist law that are inconsistent with the fundamental rights of the constitution in conformity with the recommendations made by the supreme court. Government seems to be a nervous rather helpless due to the opposite views of chief justice of Pakistan against Anti-Terrorist Act and special courts. It may be fear or helplessness of government to resist in achieving its goal. It was positive step of the government towards the establishment of rule of law and honoring the highest court of the country by accepting his supervision. The critics should have taken this step in
positive sense but they saw it as a retreat of government. Now the ball was in the court of Supreme Court and all the eyes had been fixed on the coming judgment of the Supreme Court. In its judgment, the Supreme Court took a pragmatic view of the prevailing situation and directed the government to amend the Anti-terrorist Act in the light of its observation – (Baxter and Kennedy, 2000).

**Decision of Supreme Court**

A five-member bench of the Supreme Court in its decision invalidated the twelve sections (5(2)(I), 10, 14,19(10)(b), 24,25,26,27,28,30,35 and 37) provisions of the act and brought special courts at par with ordinary courts working within the existing judicial system. It was the right decision at the right time and in the right direction, which escaped the innocent people and opposition from the misuse of Anti-Terrorist law – (PLD, 1998) “Supreme court observed that section 14 of the act which provides for composition and appointment of presiding officers of special courts does not provide the security of the tenure of the judges there under. The security of tenure of judges is a sun qua non for independence of judiciary. The framers of the above provision of the constitution were mindful of the fact that in the absence of security of tenure no judge can function impartially and independently” – (PLD, 1998). This was the basic dispute of government and opposite forces, which was solved by the Supreme Court. The government made the amendments in the act in terms of the Supreme Court judgment. “The effect of this was that the special courts under the act came under the administrative and judicial control and supervision of High Courts like the other subordinate courts of the country. The presiding officers of the said courts also came under the administrative and judicial control of the high courts for all purposes. The draconian provisions of the act were eliminated” (Ajmal, 2004).

The bench unanimously held that the powers of law enforcing agencies (power of the police to enter houses and search these without warrants, trial in absentia, confessions before police officers) should be amended justice ably as the existing system is providing security to the fundamental rights of people. On the other words the police and army can be a terror for the public having authority to life and death, in this way a further terror was began rather to finish the old. The bench also directed the government to make suitable amendments in the Anti-Terrorist Act to vest the appellate power in a High Court instead of an appellate tribunal. That the law would be administrated within the normal judicial system and Supreme Court would be the final court of appeal. It is better for the government to choose the normal way rather than to adopt parallel hierarchy of courts because the government officials/politicians should not forget that it might be possible that they have to face these courts in future as Nawaz Sharif had to face the Anti-Terrorist Court in kidnapping/hijacking of plane case. In its judgment, the Supreme Court took a pragmatic view of the prevailing situation and directed the government to amend the Anti-terrorist Act in the light of his observation.

What a misfortune for the founder of the Anti-Terrorism Act that he had to appear as accused in the special court on the charges of attempt of murder, treason, hijacking, and kidnapping which were set up by him. Nawaz Sharif’s son demanded that the case against his father should be tried in a civil court and not in a special court under special law. “The judgment was acclaimed as a good verdict, whereby the judiciary
established that judicial power could be shared only by the courts and tribunals which could fall within the framework of the constitution” (Ajmal, 2004).

III. Conclusion

It is very unusual in this civilized age that a democratic government has established separate courts for the management of law and order situation. Though the nation was facing security and economic problems but laws like Anti-Terrorism Act were not proper solution. The democratic government should find solution to national problems within the boundaries of the constitution--the basic law of the land. It is due to this law that privacy of the society was in danger and the implementation of this uncivilized and undemocratic act was against the universally accepted rule, 'equality before law'. The citizens under a democracy submit to the law because they recognize that, however indirectly, they are submitting to themselves as to the makers of the law. Such laws are not thrust upon them and are in complete harmony with their ideas. When laws are established by the people who then have to obey them, both law and democracy are served. This act of the government exposed its incompetence, lack of sense and direction and dedication to the nation. Government attempted to establish a parallel system of courts, not subject to judicial review, or administrative control of the superior courts. The hasty delivery of justice may carry injustice in disguise. The Supreme Court by its judgment saved the nation from the brutal act of a so-called democratic government. Supreme Court met in accordance to the constitution in deciding the petition against Anti-Terrorism Law and its judgment saved the nation from the establishment of a parallel court system as compared to a tested traditional judicial system. This kind of policies reflects the undemocratic behavior of a so-called democratic government. This was a great success of the democratic forces and a moral defeat for the so-called democratic government.

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