

Journal of Law & Social Studies (JLSS)

Volume 4, Issue 3, pp 441-448

www.advancelrf.org**Protection of Human Rights in Post Conflict Situations: Application of the Theory of Transitional Justice****Same Ur Rahman**

Associate Professor of Law,

University of Faisalabad.

Email: hod.law@tuf.edu.pk**Abstract**

No doubt, the 9/11 attacks on the Twin Towers and Pentagon of the United States in 2001 have drastically changed the entire world including Pakistan. George Bush, the then US President, in a dramatic way declared war on Al-Qaida and its associates by attacking Afghanistan to avenge the attacks justifying these to be in self-defense under the garb of War on Terror. Pakistan was coerced to be initially an ally to the war but later emerged as a frontline state in the fight against terrorism. The country has been badly hit since then sacrificing more than sixty thousand human lives including a former prime minister. Amongst other parts, the provinces of Khyber Pakhtunkhwa and Baluchistan have sustained almost irreparable loss as a result. Thousands of innocent citizens have not only suffered at the hands of various terrorist groups but also due to repressive measures taken by law enforcement agencies in the country. This paper intends to deploy theory of Transitional Justice to critique security laws, policies and rules of the country that resulted in the violations of human rights in the two provinces particularly at the hands of the security agencies combating terrorism. Theory of Past Injustices is used to restore or repair the human rights violations since the inception of War on Terror. To conclude, innocent citizens in the two provinces have suffered a lot in the War on Terror. Effective laws, policies and mechanisms are required to be put in place to remedy for the human rights violations in the country particularly the two provinces.

Keywords: Human Rights Law, War on Terror, Transitional Justice, Non-International Armed Conflict

Introduction

In Pakistan, the incident of 2001 has played the role of ignition to the existing security situation as the situation had remained volatile since the Afghan refugees started to cross the borders in 1978. We became the frontline for the allied forces against the so-called war on terror since 2001, which was started against al-Qaeda in Afghanistan. Hence, the Afghan refugees in Pakistan were also being affected by that war. There are many conspiracy theories which were born in that era. FATA (now the part of the KP), was hugely damaged due to the war on terror. The attack on Army Public School in Peshawar on 16 December 2014 was the turning point in the history of Pakistan against the war on terror and other acts of terrorism, which resulted in the formation of the national action plan. The national action plan paved the way for the establishment of the most controversial military courts, where civilians are being prosecuted summarily, but this idea of military courts extending jurisdiction to civilians is not new.

The problem here is that the government through 25th constitutional amendment has merged the tribal belt of FATA in the Khyber Pakhtunkhwa province but has not been able yet to address the issues of human rights violations occurred from 2001-2019. We need a legal framework to deal with concerns of justice administration that arise after a war has ended. To fill this problematic area, we need to focus on the doctrine of transitional justice, which would work as the theoretical framework of this research.

Punishment may be sought via the legal system. However, for those whose lives have been turned upside down by widespread violence and terrible human rights violations, it may also be a means of coming to terms with the past and forging a peaceful future. For many, the pursuit of justice, reconciliation, and peace are intrinsically linked (www.researchgate.net/publication/30940048). However, few transitional justice experts place their study in a peace-building framework, more significant effort to foster peace via the protection and advancement of civil liberties and the rule of law. I contend that looking at transitional justice through its role in fostering peace allows for a more nuanced approach that considers the hopes of impacted communities and the connections between addressing the past and creating a more peaceful and reconciled future. "It is, therefore, essential when deciding the specific path to take in any transitional justice context to take into account the needs, expectations, and experiences of perpetrators, victims, survivors, and other members of society directly affected by the violence and intimately involved in reconciliation and peace-building."

Transitional Justice

After violent wars or authoritarian governments, transitional justice has become an internationally recognized method for dealing with the past. Since its inception in the early 1990s, transitional justice has expanded to include various processes and organizations designed to address historical wrongs, restore victims' dignity, and provide justice throughout periods of change. There have been many wars recently worldwide, and there is a lively discussion in the academic community about how to define transitional justice. The summaries may be categorized as having some connection to the theoretical framework of transitional justice. Often, the ideas about transition and justice that drive transitional justice rhetoric and practice are in tension with restoring victims' human rights. These beliefs were shaped by events such as the Nuremberg Trials and the Tokyo Trials following World War II, the transition of dictatorships to democracies in South American countries, and the creation of international criminal tribunals such as the tribunals for the former Yugoslavia and Rwanda; or the Truth and Reconciliation Commission (TRC) in South Africa. The challenge is that the experiences influence, limit of transitional justice for situation like Pakistan during NIAC. The theoretical approach is to explore the different dimensions of transitional justice concerning human rights violations and the role of international institutions with state legal requirements. The transitional is inter-disciplinary and wide range of issues needs to be captured in situation like Pakistan and the NIAC. The initiative emerged for the synopses is the human rights protection during NIAC and the discussion revolved around to analyze the transitional justice. The synopses highlight the significance of promoting theoretical framework for the human rights equalities for specific groups during NIAC on a conceptual level.

This research aims to shed light on the views of local affected communities on transitional justice in the context of peace-building after widespread violence. By relying on assumptions and ideas from the fields of conflict transformation, reconciliation, and peace-building, this study aims to develop a transformative justice model. Because of this, the significance we place on "transition" as a bridge between the present and the future must be re-evaluated. After ensuring human rights in a war zone, the next step is "transformation," which refers to institutionalized, long-term changes. It entails legally recognizing and responding to victims' requirements for transitional justice in a manner that

can be compared to other standard procedures. Transformative justice necessitates a shift in legal and political institutions, power dynamics, and transitional justice systems.

Law and Order Problem or an Armed Conflict

Pakistan has never accepted that there was any armed conflict in its PATA/erstwhile FATA or Balochistan due to reasons better known to the government. The situation in former FATA and PATA has remained volatile since 2001 after the 9/11 incident. Pakistan became an ally of the USA and its allied forces and played its role as a frontline in the war against terrorism. The result of that alliance has consequently made a disastrous impact on the security and human rights situation in the tribal belt of the KP province. Below are some of the glimpses of how Pakistan has tackled this issue.

After being elected in 1977, Zulfikar Ali Bhutto's administration (Zahoor, 2017) confronted an increasingly unstable national and tribal security environment. Because of protests over election fraud initiated by the then-opposing parties, law and order crisis developed. Z.A. Bhutto amended the Army Act in 1952 and established summary military tribunals under Article 245 of the Constitution of 1973 when the governments of Sindh and Punjab failed to bring the situation under control.

The Government's move was challenged in Lahore and Sindh high courts, which ruled in favor of the challengers in *Darwesh M. Arbey vs Federation of Pakistan* (PLD 1980 Lahore 206) and *Niaz Ahmed Khan vs Province of Sindh* (PLD 1977 Karachi 604), respectively, showing that neither civil authorities nor security forces could exceed their authority under the Constitution.

On October 17, 1979, General Zia Ul Haq established military courts for trial of the civilians. He imposed ban on all political activities and restrained the activities of media to his own choice. In order to prevent and punish violation of ban and deter the rest, he established 100 military courts, empowered to take cognizance of any matter transferred to them. Large number of political activists and journalists were arrested and detained by the military and hundreds of people were flogged and sentenced for involvement in political activities.

An ordinance was passed in 1998 by the administration of Nawaz Sharif to create military tribunals. Article 245 of the Constitution was used to bring the armed forces to the aid of the civilian government. However, the act of establishing military courts by Nawaz Sharif's administration was pronounced unconstitutional and unlawful by a full Supreme Court bench headed by the then chief judge, Ajmal Mian, in the landmark verdict in *Sheikh Liaquat Hussain's Case* (1999 SCMR 569). The verdict made it abundantly apparent that neither civil nor military authority may exceed the bounds set by the Constitution.

Establishment of the Military Courts

It is however noteworthy that in *Sheikh Liaquat Hussain's case*, the Honourable Supreme court had issued certain directives to the then government for refurbishing the existing anti-terrorism judicial process. The directives were based on the plea of Government for establishing military courts, which were never implemented:

- All cases involving terrorism shall be referred to the Special Courts already established or which may be established under the Anti-Terrorism Act, 1997 (henceforth referred to as the ATA) or under any law, as determined by the judgment of this Court in the case of *Mehram Ali and others vs. Federation of Pakistan* (PLD 1998 SC 1445).
- A special court should never have more than one case on its docket at a time and should be focused only on that one case until a decision has been made.

- Third, the appointed Special Court should continue hearing evidence and deliberating on the matter daily, with a final ruling issued within seven days or within a longer or shorter time frame as may be specified by ATA or any other legislation.
- The challenge of a case should be submitted to the appropriate special court only after extensive preparation has been completed and it has been guaranteed that all witnesses will be produced as and when asked by that court.
- The appellate forum must rule on any Special Court order or judgement appeal within 7 days of the appeal's filing.
- If the investigating and prosecuting bodies make a mistake, they will be punished swiftly in accordance with the law.
- If any cases or appeals must be decided in conformity with these rules, the Chief Justice of the appropriate High Court will select one or more judges.
- The Chief Justice of Pakistan may appoint one or more Supreme Court judges to oversee how these rules are carried out. If a petition for leave or appeal with leave is submitted, the nominated judge or judges will see to it that it is heard and decided as quickly as possible by the Supreme Court.
- That the Armed Forces can be called into service from the time a case is filed, excluding the judicial adjudication of guilt and the quantum of sentence, and continuing through the execution of the sentence, in accordance with Article 245 of the Constitution. It includes ensuring the safety of the presiding officer, the attorneys, and any witnesses involved in the case.

When General Musharraf declared a State of Emergency (PCO No. 1 of 2007) on November 10, 2007, he also altered the Army Act to provide the security forces with authority to try civilians suspected of crimes against the defense or security of Pakistan in military courts. Effective January 2003 (www.dawn.com/news/275354), the law was deemed to apply retroactively. After determining that General Musharraf's emergency declaration and all subsequent measures in response to it were unconstitutional and without legal validity (PLD, 2009; SC 879), the Supreme Court declared the amendment null and void in 2009.

According to the previous section, on January 7, 2015, "the Pakistani government established military courts for two years as part of its 20-point National Action Plan against terrorism in response to the attack on the Army Public School in Peshawar, which resulted in the deaths of 148 people, nearly all of whom were children." Human rights groups, political opponents, and the United Nations have voiced grave concerns about civilians being tried in military tribunals, the secrecy of military court cases, and other fair trial difficulties (www.hrw.org/news/2017/03).

The Constitution of Pakistan was further amended in April 2017; whereby 23rd Constitutional Amendment Act 2017 gave effect to military courts for another 2 years, with a sunset clause (Constitution 23rd Amendment Act, 2017).

Principles of Applicable International Law

This study, grounded on the theory of transitional justice, seeks to elaborate on the fundamental international rules and principles that might be used to safeguard human rights in the post-conflict era in tribal areas. The human rights protection under the post-conflict regime in KP and military tribunals are also analyzed to demonstrate how they breach international law and human rights principles.

The study, thus, highlights the State's international obligation to protect human rights during NIAC or other situation of violence (OSV) and the provision of justice to the aggrieved parties in the shape of criminal prosecutions, establishment of truth finding commissions, reparation programs

and institutional reforms-which are considered as the back bone of the transitional justice system. The study will also elaborate the available institutional mechanisms for the implementation of principles of IHRL, applicable in internal conflicts, in Pakistan.

Pakistan's different criminal laws are set against the background of escalating violence, which may develop into a full-fledged armed war with no international dimension. For simplicity's sake, we have included three significant groups here, but it is easy to imagine adding other subgroups and categories between and within them.

- First, the Code of Criminal Procedure and the Pakistan Penal Code are included in a list of general criminal legislation.
- The Anti-Terrorism Act of 1997, the Protection of Pakistan Act of 2014 (which has since been repealed), and the Pakistan Army Act of 1952 (which governs the country's Military Courts) fall under the second heading, which addresses sectarian violence and terrorism.
- Third, military activities in the formerly federally and provincially administered tribal areas (former FATA/PATA) are considered an internal armed conflict within the Actions (In Aid of Civil Power) Regulations 2011.

Human Rights Violations

Specifically, from the vantage point of post-conflict human rights protection, the subject of human rights breaches during the war has acquired prominence in the modern world. The academic consensus is that fighting existed in at least certain portions of Pakistan's tribal belt after 9/11, even though the Pakistani government never acknowledged the existence of such a conflict. Criminal prosecutions, truth commissions, compensation programs, and institutional changes are the four fundamental pillars of transitional justice studied in numerous countries but, sadly, not in Pakistan. Some of the essential books covering a wide range of topics related to this topic are discussed here.

Compliance with the Law of Armed Conflict

International humanitarian law (IHL) is a set of rules that govern how parties to a conflict should act. It provided further details on the ban on specific methods of warfare and weaponry. Most crucially, it is set aside to shield specific individuals and types of property from danger. These restrictions and prohibitions apply during hostilities of an international or non-international armed nature and are grounded on various legal sources.

Difficulties Concerning the Use of Human Rights Jurisprudence in Military War

Many disagreements centre on whether human rights legislation remains applicable during armed conflict and, if so, how these two bodies of law could complement one another. This enduring relevance of human rights legislation is an encouraging trend. However, some issues develop when attempting to apply both IHL and HRL simultaneously, and these need to be fixed. Economic, social, and cultural rights in times of war; the challenges presented by non-international armed conflicts; the extraterritorial application of human rights legislation; the mission and competence of human rights authorities; the linguistic and conceptual disparities between the various bodies of law.

Human Rights and the War on Terror

Foreign policy jargon has shifted significantly since the end of the cold war, with human rights being the primary focus. The events of September 11 raised the issue of whether the time for human rights has passed. Too many books have been written on foreign issues after 9/11 to include them here. Many analyses the political impact of the attacks and the U.S. reaction to terrorism, while

others try to weigh the justness of the U.S. military's operations in Afghanistan and Iraq. Reports of human rights crimes committed by the United States and its allies in these two nations abound. Human rights have been violated in a significant and widespread manner as a result of the so-called war on terror. Some instances include internment camps, torture, and other cruel and brutal treatment forms (Wilson, 2005).

Human Rights and Pakistan's Counter-Terrorism Legislation

The effects of terrorism and militancy on Pakistan's government, economy, society, and, most significantly, the law have been far-reaching. In the last five years, Pakistan has adopted a steadily more stringent line of counter-terrorism laws in response to this crisis. There were three levels of courts in Pakistan in 2015 and 2016 with jurisdiction over terrorist cases: Military Courts, Special Courts under the Prevention of Terrorism Act (PoPA), and Anti-Terrorism Courts under the ATA. "The number of terrorist strikes has dropped significantly in recent years. For the most part, you can thank Operation Zarb-e-Azb, which took place in the once terrorist-infested FATA/PATA region. For such ideas to spread across the legal community and broader civil society, we need an open conversation on the value we put on defending human rights while combatting terrorism." Every culture and government face the question of balancing human rights with the need to keep the country safe. Some individuals strike a balance by arguing that we must reduce the risk of violence while preserving basic protections. In contrast, others fail to do so and instead enable the circumstances that foster violence via their national security apparatus (RSIL, 2017).

IHL and Pakistani Domestic Law

Although there are many areas of overlap between international humanitarian law and human rights law, they are nevertheless distinct branches of the law. Those issues have not vanished. As a state party to the 1949 Geneva Conventions, Pakistan is also bound by the additional customary principles of international humanitarian law (IHL) that apply in situations of armed conflict. Pakistan has signed Additional Protocols I and II. Even in internal conflicts, human rights law may be applicable. The International Covenant on Civil and Political Rights is one of many fundamental human rights instruments to which Pakistan is a party. Concerns have been raised concerning the relevance and efficacy of international humanitarian law (IHL) in Pakistan considering those above. The perception of international humanitarian law amongst the general public at large is the subject of several investigations. The time has come for domestic actors (lawmakers, judges, military personnel, police, teachers, etc.) to be educated on and held accountable to international humanitarian law (IHL). It is crucial that Pakistan uphold its obligations under IHL and that the Armed Forces and Civil Armed Forces conducting military and law enforcement operations have more precise guidelines to follow (RSIL, 2016).

Preventive Detention: Pakistan's Domestic Regime

Preventive detention is used in conjunction with military and counter-terrorism operations as an alternative to the employment of more vital forces against individuals and organizations that participate in violent anti-state or extremist behavior. Both international and domestic legislation are equally specific and nebulous when it comes to preventative detention. International humanitarian law (IHL) provides substantial reasons and processes for depriving individuals of liberty in various circumstances, notably in relation to international military conflicts. However, international humanitarian law is far more elusive regarding wars between states. Human rights law also states that a person's loss of liberty in a home setting that does not include an armed conflict must not be arbitrary; nevertheless, this legislation is not comprehensive enough to prohibit preventative detention in all circumstances. Preventive detention is authorized under many regimes within Pakistani domestic law, with varying degrees of specificity in the corresponding procedures.

However, when imprisonment is employed in situations other than war, it may be challenging to keep activities within the bounds of the law. It necessitates a careful adherence to the legality and legitimacy of preventative detention as established by international law (RSIL, 2016).

Conflict Models and their Legal Implications in Pakistan

It is crucial to understand the fundamental differences between the tribal regions of Pakistan and the rest of the country regarding how conflicts are conducted, and laws are enforced. "In order to better understand the interplay between the conduct of hostilities paradigm and its legal foundation in IHL and the law enforcement paradigm and its legal foundation in domestic and international human rights law regimes, the International Committee of the Red Cross convened a comprehensive conference of specialists. This paradigm recognizes the use of force as inherent to military operations since the goal of war is to defeat the opposing armed forces." The core principles of IHL were developed as a response to this fact. The RSIL also convened a group of specialists to discuss the situation in North Waziristan. They all agreed that declaring an armed war and having the government implement international humanitarian law were good ideas. The panel concluded that it was in Pakistan's strategic interests to ensure that the necessary IHL provisions were implemented because the benefits to the region's citizens and the State itself vastly outweighed the actual or perceived disadvantages associated with applying IHL to the present conflict (RSIL, 2015).

Conclusion

The United States and her allies were humiliated beyond belief when they were beaten in Afghanistan by the Taliban, armed with almost nothing. Since they are on the front lines of the so-called war on terror, Pakistan has suffered much, and now they are suffering again due to the withdrawal of US soldiers. Terrorism is a problem because of the human rights abuses in Pakistan's tribal regions. Many innocent individuals have lost their lives, been maimed or tortured, and had their human rights abused in ways that run counter to the guarantees made by the Islamic Republic's constitution. The means of the transitional justice system must be used to administer justice in conformity with the principles of natural justice and morality.

References

- Anuradha Chakravarty, *Surrendering Consent: The Politics of Transitional Justice in Post Genocide Rawanda*, an unpublished PhD thesis at the University of Cornell, 2009
- Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*
- Constitution 23rd Amendment Act 2017
- <https://www.dawn.com/news/275354>
- <https://www.hrw.org/news/2017/03/20/pakistan-dont-reinstate-secret-military-courts>
- https://www.researchgate.net/publication/30940048_Transitional_Justice_and_Peacebuilding_after_Mass_Violence, accessed on 21-07-2019
- Jacqueline Parry, *Transitional Justice and Displacement: Lessons from Liberia & Afghanistan*, unpublished PhD thesis at the Australian National University, 2016

- Marco Sassoli and Laura M. Olson, The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts, IRRC, Vol: 90, Issue: 871
- Noam Lubell, Challenges in applying human rights law to armed conflict, IRRC: Volume 87 Number 860 December 2005.
- PLD 1977 Karachi 604
- PLD 1980 Lahore 206
- PLD 1998 SC 1445
- Proclamation of emergency of the of third day of November 2007 and the Provisional Constitution Order (PCO) No 1 of 2007
- Richard Ashby Wilson, Human Rights in the War on Terror, Cambridge university Press, 2005
- Ruben, Cristian and Elena, Forms of Justice, A Guide Prepared by the ICTJ
- RSIL, Expert Meeting: The Legal Implications of Adopting a Conflict Paradigm in Pakistan
- RSIL, Human Rights and Pakistan's Counter-Terrorism Legislative Landscape: A report
- RSIL, Preventive Detention: A Guide to Pakistan's Operation
- RSIL, Understanding International Humanitarian Law: A Primer on IHL and Pakistan's Domestic Law
- Sindh High Court Bar Association Vs Federation of Pakistan. (PLD 2009, SC 879)
- Sussane, Teresa and Friedrike Transitional Justice Theories, Routledge.
- Zahoor, Muhammd Abrar, Behaviour and Ouster from Power, Journal of the Punjab University Historical Society, Volume No. 03, Issue No. 2, July - December 2017
- 1999 SCMR 569