

Definition of Terrorism and its Application in Pakistan

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Conspectus

The latest judgment of the Supreme Court of Pakistan in case of Ghulam Hussain vs. the State¹ is an attempt to interpret the codified definition of 'terrorism' in Pakistan's anti-terrorism law. Before entering into the legalese of the judgment itself, it is imperative to ask this question: Why should the Supreme Court of Pakistan venture to interpret the definition of 'terrorism'? There are two chief reasons that led the Supreme Court to look into the definitional aspects of the terrorism. The first reason is that the criminal justice system in vogue empowers police to control the entry of a victim into the system by allowing him to register or to deny registration of a criminal case. The denial or entry into the criminal justice system is permitted by police on their own terms, and to dictate these terms, the application of relevant law on information received by police becomes pivotal. In the arena of the anti-terrorism law, applying the anti-terrorism law on a formal criminal case (through the First Information Report² (FIR)) by police becomes the nodal point, on which, all the subsequent criminal proceedings depend. In a predatory criminal justice system with the propensity to accord evidentiary value to the FIR by the judiciary, the application of terrorism law on a criminal case results in excessive litigation with regards to application of terrorism law by police on the information received by the complainant. The application of terrorism law on a formal criminal case not only makes it graver but also affected the applicable procedure that allows remand of an accused up to thirty days³ as against fourteen days under the ordinary process. Its application also enabled constitution of a joint investigation team⁴ and trial in an anti-terrorism court. The controlling effect of the application of terrorism charges by police in a criminal case has become a bane in itself and may be the Supreme Court wanted to arrest this trend by providing a more definite definition of terrorism. The second reason that must be noted is that during a trial, a terrorism court looks at evidence of an act and its effect on the society at large instead of looking at the evidence of an act and the motive or design behind it; hence, giving rise to two approaches that may be categorized as 'Effect-Based-Approach' (EBA) and 'Object-Based-Approach' (OBA). As both the approaches were backed by the case law, the Supreme Court

¹Criminal Appeals No. 95 and 96 of 2019, Civil Appeal Non. 10-L of 2017 and Criminal Appeal No. 63 of 2013. Available at

https://www.supremecourt.gov.pk/downloads_judgements/crl.a. 95_2019.pdf

² Section 154 of the Code of Criminal Procedure, 1898.

³ Section 21 E of the Anti-Terrorism Act, 1997.

⁴ Section 19 of the Anti-Terrorism Act, 1997.

noted that it remained ‘divided’⁵ on the issue, and it was imperative to ‘examine and scrutinize’ all the precedent cases. In doing so, the Supreme Court has offered its reasons, which will be stated in second section of this write up. Insofar as the instant case is concerned, the facts as noted in the judgment⁶, link the matter to post-conviction or appellate proceedings.

Reasoning

After contextualizing the issue of definition of terrorism, it is now apposite to look at the reasoning offered by the judgment. The judgment has been authored by the Chief Justice Mr. Asif Saeed Khosa who headed a larger bench of seven judges to articulate determinative test for distinguishing terrorism cases from ordinary cases. He had the advantage of authoring a judgment on the subject in 2004⁷, excerpts from which he reproduced in the latest judgment. The crux of his judgment, to which, his fellow judges agreed, was that the definition of terrorism was to be punctuated by object and nexus as required by the statutory language and earlier case law. On behalf of the Bench, he challenged the contrary view that the definition of terrorism was not controlled by object and nexus and mere terrorist acts were sufficient to constitute the offence of terrorism. The reasoning employed by him can be summed up for the sake of brevity: First, he noted that the first anti-terrorism law was introduced in 1974⁸ in Pakistan, which was sans a definition of terrorism. It only contained a reference to the term terrorism in its Preamble. On the other hand, the latest anti-terrorism law⁹ provided detailed definition of the term ‘terrorist act’, which was amended by definition of the term ‘terrorism’¹⁰. He noted that the courts kept on interpreting the term ‘terrorist acts’ in their judgments and did not fully take into account the ‘conceptual transformation’¹¹ introduced by the amendment that changed the diction from ‘terrorist acts’ to ‘terrorism’.

⁵ Para 10 of the judgment.

⁶ Para 2 of the judgment noted that Ghulam Hussain was convicted for killing two minors by an anti-terrorism court, and after unsuccessful appeal at the High Court, he was allowed a leave to appeal to ‘reappraise’ the evidence.

⁷ Basharat Ali vs. Special Judge, Anti Terrorism Court II, Gujranwala (PLD 2004 Lah 199)

⁸ The Suppression of Terrorist Activities (Special Courts) Act, 1974.

⁹ The Anti-Terrorism Act, 1997.

¹⁰ The term ‘terrorist act’ was substituted with the term ‘terrorism’ through the Anti-Terrorism (Second Amendment) Ordinance, 1999.

¹¹ Para 8 of the judgment.

Secondly, due to divergent case law, there was a ‘controversy’¹² in the Supreme Court about the definition of the term ‘terrorism’. In true judicial tradition, the judgment has documented the excerpts from both sets¹³ of judgments i.e. (a) object controlled definition and (b) effect/acts controlled definition. He has distinguished the two sets of judgments chiefly on the ground that facts of category (b) cases related to ‘personal purposes’¹⁴.

Thirdly, the judgment squared itself with the principles of criminal law that require *mens rea* (guilty act) and *actus reus* (guilty act) to constitute an offence. The reasoning is very persuasive and makes perfect sense.

Fourthly, the formulation of ‘terrorism’ through amendment in 1999 in the anti-terrorism law, it was observed was akin to the international trends of legislation in countries like the United States¹⁵, the UK¹⁶, the Northern Ireland¹⁷, India¹⁸ and Australia.

Fifthly, the judgment recorded that with the exception of the Attorney General for Pakistan, all chief law officers of the provinces and territories agreed with the object controlled definition of terrorism. The Attorney General, the judgment noted, argued that the effect of section 6(3) of the Terrorism Act, 1997 must be examined by the Court. Section 6(3) unequivocally states that the use or threat of use of any weapon, explosive or firearms will ‘satisfy’ the constitution of ‘terrorism’. The judgment opined to ‘...read down the statute to save the main Act and its purposes...’¹⁹. The reading down of the statute has been balanced by the judgment when it implored upon the legislature ‘to have a look at the said provisions’²⁰.

Finally, the effect of the offences stated in the Third Schedule of the Anti-Terrorism Act, 1997 have also been discussed. The judgment clearly

¹² Para 1 of the judgment.

¹³ Para 10 records the judgments that support the object controlled definition of terrorism, whereas Para 11 records the judgments that support the effect/acts controlled definition of terrorism.

¹⁴ Para 12 of the judgment.

¹⁵ Section 802 of the Uniting and Strengthening America Act by Providing Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, 2001.

¹⁶ Section 1 of the United Kingdom’s Terrorism Act, 2000

¹⁷ Section 58 of the Northern Ireland (Emergency Provisions) Act, 1996

¹⁸ Section 3 of the Prevention of Terrorism Act, 2002.

¹⁹ Para 14 of the judgment.

²⁰ Para 14 of the judgment.

states that these offences (like kidnapping for ransom²¹ or acid/corrosive substance throwing cases) were not '*per se*' offences of terrorism and the courts should punish them as offences of Third Schedule.

IMPACT:

The judgment has been authored by the Chief Justice Asif Saeed Khosa who has an established reputation in interpreting criminal law in Pakistan. The fact that no judge added his reasons to the judgment shows the trust of his fellow judges in him. The principal decision of choosing between the two approaches i.e. Object-Based-Approach (OBA) and Effect-Based-Approach (EBA) has been made by the judgment; by doing so, the court also aligned jurisprudence on the subject with the international perspectives that link terrorist acts with object or design²². The immediate impact of the judgment is delinking the terrorism law from cases of 'personal enmity and private vendetta'. The Court noted:

“It is further clarified that the actions specified or mentioned in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta”²³.

The consequential legal superstructure (based on further case law or legislation) may flow from this principal decision in coming years on the following points:

1. How should police be regulated in their powers to apply terrorism charges in ordinary criminal matters? Should wrong application of law be penalized?
2. What should be the role of a prosecutor in applying terrorism charges on a case? If a prosecutor is empowered to apply the terrorism charges, how to regulate his powers?
3. How to cleanse the criminal processes from mingling/mixing information with evidence at the time of registration of a criminal case?
4. What should be admissible evidence for OBA? How to prove the relationship of an act with an object in terms of evidence?
5. The judgment has surely raised the bar for the investigation agencies by adopting OBA as the investigation agencies/police will now be obliged to collect evidence on both *actus reus* and *mens rea* as required by the judgment. What is to be done by police leadership to

²¹ Section 365-A of the Pakistan Penal Code, 1860.

²² Para 15 of the judgment.

²³ Para 16 of the judgment.

address this aspect of the investigation especially in the context of counter-terrorism financing under the much rigorous requirements of the Financial Action Task Force regime?

6. By embracing OBA, has the judgment not required judges to follow a more onerous approach? Are there any guidelines that can be provided to trial judges to ensure legal certainty and consistency?

By and by, Ghulam Hussain Case has tried to underline the fact that constructive interpretation of law can direct and shape the legal processes that affect the adjudicatory processes affecting public at large; simultaneously, it evinced that the executive and legislature must follow the direction set by the judicature to ensure that the rule of law prevails in the country.