

LEGALITY OF ARMING PAKISTANI TRIBALS TO COMBAT MILITANTS

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Abstract

The Pakistan government extended an un-announced support to local elders in the Pakhtun-tribal belt to raise *Lashkars*/militias in the Federally Administered Tribal Areas (FATA) and the first lashkar was formed in Salarzai area of Bajaur agency in 2008. Pakistan has mainly adopted two approaches 'the kinetic approach' and 'bottom-up approach' to counter militancy in the tribal areas. The kinetic approach involves belligerent and offensive measures to annihilate or capture members of the militant networks. While in the community-led 'bottom-up' approach government works with local clans or community and this is how the Pakistani security forces motivated the local tribal elders to raise a *Lashkar*/militias of volunteers to combat militants in the FATA. The theoretical framework for this paper is the community-led 'bottom-up' approach as the government security forces engaged the local tribesmen to fight against militants in the FATA. Apparently, the government exploited the concept of the traditional *Lashkars*/militias and persuaded, encouraged or compelled local tribal chieftain/maliks to raise Lashkars/anti-Taliban militias to guard government installations and patrol along with the security forces during search and strike operations. This paper critically evaluates the legality of arming civilians to fight against insurgents in the Federally Administered Tribal Areas (FATA) of Pakistan. The research is qualitative in nature and the researcher has extensively used the research tools of interviews, focused group discussion (FGDs), personal interactions and observation, as well as both published and unpublished documents and existing literature on the issue.

Introduction

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In 2002 for the first time in the history of Pakistan's armed struggle against militants the government used its army in the tribal areas. This was the time when the Taliban and other militants were coming over from Afghanistan. The government launched a majority of military operations during 2002-2013 in the tribal areas viz Bajaur Sherdil Operation (2008), Momand *Brakhena*/Thunder Operation (2009), Khyber agency Operation Sirat-e-Mustaqeem (2008) and South Waziristan Rah-i-Nijat Operation (2009) (Abbasi, 2014). Simultaneously, as a strategy to win civilian support, the government also raised the *Lashkars*/militias in 2008 in Bajaur and 2009 in Momand agencies. These armed groups of the tribal volunteers were locally called as *AmanLashkar* (Peace Lashkar). As the government did not formally announce these *Lashkars* thus they were given different names for instance *Aman Lakhkar/Laskhar* (Peace Lashkar) *Da Taliban Khilaf Lakhkar/Lashkar* (Anti-Taliban Militias). A tribal armed group can be called as militia¹ as its volunteers are citizens and are trained by the state for military service apart from the regular armed forces. A militia refers to an unorganized military force drawn from within a civilian population and which has taken up arms (Ali, 2016).

The tribes have a long history of forming traditional *Lashkars* in order to punish wrongdoers and outlaws. For the first time the tribal people raised a Lashkar against the British who tried to enter into Mahsud area of Waziristan from Tank (i.e. now the southern district of Khyber Pakhtunkhwa) but faced stiff resistance by a 3000 Lashkar. Next time British attacked Wana camp in 1894/95 but were again pushed back by 2000 Mahsud (Haq et al., 2005).

These traditional Lashkars were usually formed for a short or specified period and would disperse soon after punishing the outlaws (Khattak, 2010). Such Lashkars usually supported the political administration in maintaining law and order situation. Contrary, the Anti-Taliban militias worked on a semi-autonomous basis (Khattak, 2010). Mostly, the volunteers of militias used their

¹ "The term 'militia' comes from the Latin word *miles*, meaning soldier. A civil militia group may be defined as a 'citizen army made up of free men between the ages of sixteen and sixty who [perform] occasional mandatory military service to protect their country, colony or state" (Francis, 2005).

own guns like AK-47 (Kalashnikovs), however, government also granted them some arms. The security forces also issued licenses to volunteers and elders of the militias to carry these arms. Special stickers/labels were usually seen pasted on guns/pistols were also issued to both these volunteers and chiefs of the Anti-Taliban militias (Khan, 2015). As the formation of Lashkars was not officially announced thus these armed groups don't have official name (Feroz Shah, 2015). The government raised the Anti-Taliban militias in Salarzai, Loi Mamond and Wara Mamond Tehsils of Bajaur. Among these militias, the Salarzai Lashkars played effective role against the militants. By the same token, the Anti-Taliban militias were raised in three Tehsils Baizai, Khewzai and Safi of Momand agency (Rahimullah Yusufzai, 2015). The Pakistani government also paid from Rs 10000-150000 (100-150 dollars) salaries to some of the volunteers in the tribal belt.

Tribal Militias and the Frontier Crimes Regulation (FCR)

The Constitution of Pakistan and Pakistan Penal Code (PPC) are not applicable to the FATA. The law in force here is called the Frontier Crimes Regulation (FCR). The British government imposed the Frontier Crimes Regulation (FCR) in the trans-Indus territories in 1901. The British government wanted to control and administer the Northwestern frontier by proxy with the FCR, through local tribal leaders and chieftains, which were commonly known as khans and maliks. The regulation was a comprehensive law, addressing administrative, legal and judicial life in the tribal areas. The FCR was originally designed to consider social, cultural and political traditions in the region in an attempt to limit resistance and societal conflict between the British and the Pakhtun population.

The tribal areas are divided into two categories with distinct legal regimes: areas under administrative control of the federal government and areas under control of provincial governments. The tribal areas under the administrative control of the federal government are referred to as the Federally Administered Tribal Areas (FATA), including seven agencies (quasi districts) like Bajaur, Mohmand, Khyber, Orakzai, Kurram, North and South Waziristan agencies and six frontier regions (tribal areas adjoining settled districts) like Peshawar, Kohat, Bannu, Dera Ismail Khan, Lakki Marwat and Tank districts (Zardari, 2011).

The second category of tribal areas is referred to as Provincially Administered Tribal Areas (PATA). The provincial governments of Khyber Pakhtunkhwa and Baluchistan govern these areas respectively. The difference between FATA and PATA is in their system of governance and controlling authority. The FATA is governed and managed by the federal government, with the governor of Khyber Pakhtunkhwa and subsequently the FATA Secretariat as its agents. The FATA Secretariat, located in Peshawar in Khyber Pakhtunkhwa province, acts as the primary government headquarters for FATA. The PATA, alternatively, is adjacent to and administered directly by the respective provincial governments (Zardari, 2011).

In the tribal areas there is no law of the country, under the Frontier Crimes Regulations (FCR) the absolute power after God Almighty lies with the political agent, and he is accountable to none. The tribal areas are out of the jurisdiction of the parliament and Supreme Court thus the FATA is beyond the country's laws. Self-defence is lawful act but picking up guns to fight against militants is something wrongs as this is the job of the security forces to defend the land and protect the citizens (Ayaz Wazir, 2015).

Even there is also no provision in the Frontier Crimes Regulation (FCR) under which government can arm civilians in the tribal areas. Even after the 2011 reforms in the Frontier Crimes Regulation (FCR) the political administration can only arrest family members or close relatives of an aggressor under the 'collective responsibility' provision (FCR, 2011). Earlier, the political administration could arrest elders of that entire tribe or sub-tribe under the 'collective responsibility.' One of the more substantive reforms included in the 2011 FCR Amendments was, prohibition against arresting an entire tribe under the collective responsibility section. Chapter 4 of the FCR discusses the penalties under section 21 thus: Blockade of hostile or unfriendly tribe. In the event of any frontier tribe, or of any section or members of such tribe, acting in a hostile or unfriendly manner towards the British Government or towards persons residing within British India, the Deputy Commissioner may, with the previous sanction of the Commissioner, by order in writing, direct-

- a) The seizure, wherever they may be found, of all or any of the members of such tribe and of all or any property belonging to them or any of them;
- b) The detention in safe custody of any person or property so seized and;
- c) The confiscation of any such property; and may, with the like sanction by public proclamation;
- d) Debar all or any member of the tribe from all access into British India; and
- e) Prohibit all or any persons within the limits of British India from all inter-course or communication of any kind whatsoever, or of any specified kind or kinds with such tribe or any section or members thereof (FCR, 2011).

Ijaz Afridi, a lawyer of the Peshawar High Court says, "If a state is at war then only in that case the government may arm the civilians and the existing situations were not serious enough when Pakistani government raised or supported militias in the FATA. "However, he admits there is no article in the Constitution and no provision in the FCR that may support his stance that state can arm civilians in war (Ijaz Afridi, 2015).

Tribal Militias: Regional and International Laws

The governments often use militias in counterinsurgency for face saving. The governments might turn to militias to avoid accountability for violence and could rationally deny certain actions. Delegating violence to militias may be another tactic of the government to avoid International Pressure of conforming to human rights standard or facing internal legal action (Sabine Carey, Neil Mitchell, 2015).

The rule of law should be the possible demarcation in terrorism and counter-terrorism acts, "as terrorism is often directed against democracy and the rule of law, counter-terrorism has to be concerned with upholding and directing those values" (Ana Maria Salinas De Fraix, KatjaLh Samuel. Nigel D. White, 2012).

The lacking of a unanimous international definition of terrorism has doubted the status of the terrorist groups and freedom fighters or freedom militias, liberators or liberation movement.

The essence of the terrorism is to violate all existing national, regional and international laws while the counter-terrorist blows

should comply with these laws. However, as terrorist acts and counter-acts often form a never-ceasing upsurge of violence, thus it makes it tough to identify or determine the legal framework or moral judgement of a just cause (Ana Maria Salinas De Fraix, KatjaLh Samuel. Nigel D White, 2012).

The government formed militias in the FATA as militias could be involved in extra-judicial acts. As the government can hardly utilize the state organizations for extra judicial acts as they are bound to operate in a legal sphere. The governments can use the militia groups for the extra judicial services, peculiarly, during elections periods. Because these militia groups have no legal status, state can attribute their violence to the democratisation process, or to criminal activities (Nanjala Nyabola, 2009).

The Anti-Taliban militias in the FATA don't wear any uniform thus it doubted both their legal and Prisoners of War (POW) positions. As according to Meisels, as militias often don't wear any uniform like the regular forces it not only questions the legitimacy of the militias but can also deprive them of the right of the Prisoners of War (POW) status in case they are captured. According to the Hague Convention of 1907 to be entitled to (POW) status the fighters wear 'a fixed distinctive sign visible at a distance', must 'carry their arms openly', must 'obey chain of command', and they themselves obey the customs and laws of war. However, the law is silent about the rights and immunities of the fighters who don't follow these conditions like who don't wear insignia and secretly carry their arms? These provisions were aimed primarily to differentiate soldiers of militias (Meisels, 2007).

The Pakistani government announced support to the Anti-Taliban militias as a counterinsurgency strategy. The government aimed to win support of the tribal people against militants in the FATA. Besides, the Maulvi Nazir-headed Taliban group in South Waziristan and Hafiz Gul Bahadur-headed group in North Waziristan were called as the pro-government Taliban groups. The lacking of the international unanimous definition of terrorism has also doubted the legality of both pro-government Taliban group. According to Karma Nabulsi the 'agreement and practice' about the so-called lawless combatants was not absolutely universal. He argues that all citizens who bear arms for the nation are legitimate combatants. To him the issue of prisoner of war is also equally

controversial (Nabulsi, 1999).

The Anti-Taliban militias were following two of the three rules of the lawful combatants viz they functioned under a command and carrying arms openly. The convention relating to laws of war on land, which is known, as Hague Convention Number IV of October 18, 1907 was first codified as Article 9 of the Brussels Declaration of 1874 (The first international instrument specifying the customs of war). Article 1 of the Hague Convention enumerates that combatants comprise the organized armed forces including militias, volunteer corps and members of the resistance movements of a state or otherwise recognized party to a conflict are lawful combatants, provided that they meet certain criteria: they must be under a responsible command system; wear a fixed distinctive sign; carry arms openly; and conduct their operations in accordance with the laws of war (Roberts, 2002).

Under the international law to acquire a lawful combatant status the distinction between Anti-Taliban militias and civilians is indispensable. As in 1997, delegates from various nations drafted two protocols to the 1949 Geneva Conventions. One of the primary purposes of Protocol I Additional to the 1949 Geneva Conventions was to expand the categories of individuals who would be protected under any of the four original 1949 Geneva Conventions. Article 44(3) of Protocol I, for example, would significantly dilute the traditional requirement under customary law that combatants must distinguish themselves from civilians and otherwise comply with the laws of war as a condition of protection under the Geneva Conventions (Borch, 2003).

Giving combatant status to the Anti-Taliban militias can endanger civilians' lives. As on January 29, 1987, President Reagan refused to recommend Senate approval of 1997 Geneva Protocol 1 additional to the 1949 Geneva Conventions, he said that giving combatant status to certain irregular forces 'would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves' (Roberts, 2002).

The Anti-Taliban militias could be resembled with the *Arbaki* in the neighbouring Afghanistan. According to Mohammad Osman Tariq, Arbakai- a tribal based community-policing system in the neighbouring Afghanistan mainly functions under the customary tribal code of the Pakhtuns (Pakhtunwali). Differing from militia, in

Pashto the derivation of the word 'Arbakai' are 'messengers'. However, with reference to the security system, Arbakai is used in the broader context of security enforcement and it played a positive role in parts of Afghanistan in counterinsurgency as well. A recently published report from the International Legal Foundation (ILF) about customary law in Afghanistan states that the enforcement system used to implement the final decisions of the Jirga is called Arbakai (Mohammed Osman Tariq, 2008).

Mohammad Osman Tariq argues that the Arbakai also faces problems of legitimacy in Afghanistan. The Arbakai have an established method of gaining legitimacy through their establishment and acceptance by the people. "However, Arbakai system is incompatible with several of the rules and regulations, currently practiced by the state police, even where the Arbakai are officially recognized. "Yet examples do exist where the Arbakai were recognized and approached by the state for assistance. For example, the Arbakai were asked to assist the security sector during the elections to secure polling stations. However, legality of the Arbakai in Afghanistan is a problem because customary law as a legal system for the Arbakai clash in many ways with the civil law and Islamic regulations used in the state judiciary system (Mohammed Osman Tariq, 2008).

The Constitution of Afghanistan allows citizens to form association according to the law. However, the associations or parties having military goals are not allowed. Article 35 of the Afghanistan Constitution states, "To attain moral and material goals, the citizens of Afghanistan shall have the right to form associations in accordance with provisions of the law. They shall not have military or quasi-military aims and organizations" (Constitution, 2004).

Tribal Militias From Security Experts/Lawyers' Perspective

The perception of the local population is usually considered very important for the legitimacy of an operation or a strategy. Legitimacy for certain operation and strategy initiates from the people:

Legitimacy starts with the perception by the local population that an organization is operating constitutionally, transparently and within the law. Legitimacy is the distillation of community

expectations of government institutions that produce results with integrity and transparency” (Zambri, 2014).

Seemingly, in Pakistan the security experts and lawyers hold conflicting view regarding the legality of arming civilians or raising the Anti-Taliban militias in the FATA. Those who dub the forming of anti-Taliban militias a legal act don't substantiate their argument with any country, regional and international law provision but share their personal opines based on their war, security studies and personal experiences.

To one such war study expert and author of few books Imtiaz Gul laws often remain silent during wars. Though the decision of Pakistani state to back the formation of the Anti-Taliban militias in the FATA remained a counterinsurgency strategy. Besides, Pakistani government often claims that it is in a state of war. According to security analyst and author Imtiaz Gul, it is an open-ended question, whether arming civilians is legal or illegal, but states take unusual steps to counter unusual threats and this is what Pakistan did (Imtiaz Gul, 2015).

A state can take any decision in unusual situation particularly war. If a country or a nation is at war as the Pakistan government kept saying it is at war then the government can take any decision to defend the country. Yusufzai personally believes if the threat is big then the country can arm the civilians, the government can amend the constitution or can even make new laws (Rahimullah Yusufzai, 2015). Political and security analyst Brigadier (Retired) Said Nazir has also the same personal opinion if a country declares emergency and says that it is in a state of war then every citizen has to take war (Said Nazir, 2015).

According to Feroz Shah Advocate, though law of the country doesn't allow formation of Anti-Taliban militia but perhaps it was a right strategy as it was demand of the situation (Feroz Shah, 2015).

According to Wali Khan Afridi, Lawyer of the Peshawar High Court, the tribals don't need to seek government permission for keeping arms, as the Arms Ordinance has not been extended to some of the tribal areas. That's the reason that there are industries in parts of the FATA like the semi-autonomous Dara Adamkhel near to Peshawar that manufacture different kinds of weapons (Wali Khan, 2015).

Though there is no legal provision that allows the government

to raise Lashkars. This is not a constitutional rather a domestic decision or tradition of the tribals that raise Lashkars. Government raised Lashkars in FATA as a minimum deterrence policy to combat Taliban. The tribals don't need training as they have been using the weapons for years however; this is true that militants hold much-sophisticated weapons as compared to the tribal areas. On one hand the government used Lashkars as a minimum deterrence but on the other hand it exposed them to a highly trained and well-equipped insurgents. Tribal areas where traditions are considered as tantamount to law these Lashkars have a very old and strong tradition (Wali Khan, 2015).

A lawyer Tariq Afridi of the Peshawar High Court personally believes that laws are only meant to deal with the routine issues or crimes. The unusual circumstances that the existing laws can't cope will need unusual steps. Raising or supporting of the Anti-Taliban militias in tribals areas was in fact a step above the law that took to control the unusual circumstances (Tariq Afridi, 2016).

Another lawyer of Peshawar High Court Ijaz Afridi opines that while both the Political Agent (agency head in FATA) holds the discretionary or extra-ordinary powers to form peace committees but these committees would have no constitutional or legal status (Ijaz Afridi, 2015).

Aftab Alam advocate admits that Pakistan has 0.6 million army and the population of Pakistan is 180 million if this 0.6 million is deployed to save the entire population the army will be diluted. He believes this was beyond the control of the 0.6 million army to combat the Taliban and that without the cooperation of the civil population the military operation neither in Swat and nor FATA could succeed.

Alam says: "The formation and arming Anti-Taliban militia was need of the hour, unusual circumstances need unusual decision that is mostly beyond the normal law." He says: "Necessity overcomes law" formation and arming of civil population was the necessity that overcame the law (Aftab Alam, 2015).

Like those who term the formation of the Anti-Taliban Militias a legal act without quoting any provision of the law, those who dub it an unlawful act often have personal opinion based on their extensive war and security study or referring to other law provision, article or section and try to associate them with the

illegal status of forming the Anti-Taliban militias in the tribal belt.

Among them one is a senior journalist Hasan Khan, according to him, the areas in the Federally Administered Tribal Areas (FATA), where the Taliban have strong influence obviously they are parts of Pakistan, as this is responsibility of the state to guarantee security of the people, thus raising of the Lashkars here is a clear violation of the laws (Hasan Khan, 2015).

Protection of citizens and their property is the responsibility of the state, this is not the responsibility of the citizen to pick guns and protect his property, if it happens then where the state and the state institution functions remains and where they stand? When a state asks the citizen to protect himself/herself it shows that the state admitted its failure and weakness (Sher Muhammad, 2015).

In an interview, Abdul Latif Afridi, a renowned lawyer of the Peshawar High Court (PHC) told that the private militias are prohibited in both the Constitution of Pakistan and other laws of the country. In the tribal areas where there was no state as the military was not present there the tribals were raising Lashkars according to their tradition. However, after military were sent in the tribal areas raising of the Lashkars were quite unconstitutional and illegal act (Abdul Latif Afridi, 2016).

In an interview, Lt General Asad Durrani, the former Inter Service Intelligence (ISI) chief told this researcher that the military perhaps didn't think seriously about the legality of the arming civilians.

"The military don't think about the legality of the arming civilians but army recruit locals when they engage in such operations. Military used the tribal militias in FATA as a counter-insurgency strategy without thinking whether this is something legal or illegal. Military officers often think about the successful military strategies and they least bother about the legal provision or legal cover of their strategies" (Asad Durrani, 2015).

Defence and strategic analyst, Maria Sultan argues that the formation of the Anti-Taliban militias was a legal decision as the FATA system is controlled either through presidential decree, Frontier Crimes Regulations (FCR), tribal traditional system and Pakistan Penal Code don't exist here. The FATA is an autonomous region, and the tribal elders have the right to take internal decision

and they don't have the right for the external defence. Three principles economy, defence of the external borders and political borders these are the three areas, which the government of Pakistan has to look in it. When Pakistan Penal Code (PPC) doesn't apply on FATA then this is an autonomous area and this means the people have the right for the autonomy (Maria Sultan, 2015).

Conclusion

The militias don't have legality under Pakistan laws. However, majority of the analysts are of the opinion that government often surpasses laws at the time of unrest or war. Article 256 of the Pakistani Constitution bars formation of the private militias. Likewise, there is no room for the formation of militias in the Frontier Crimes Regulations (FCR) applied in the FATA.

The international laws like Geneva Convention, Hague Convention and Brussels Declaration also put certain conditions to the legitimacy of the civilian combatants. These laws also put certain criteria for both legitimacy and Prisoner of War (POW) status to civilians combatants. Article 1 of the Hague Convention states that fighters including militias, volunteer corps and members of the resistance movements of a state or otherwise recognized party to a conflict are legitimate combatants, provided that they fulfill certain criteria: they must be under a responsible command system; holding a specific insignia or sign; carry arms barely; and carryout their operations as per laws of war.

Appendix

List of informants with their names and other details

Interviewee	Details	Place
Abdul Latif Afridi	Lawyer Peshawar High Court	Peshawar High Court
Aftab Alam	Lawyer	Swat
Ashraf Ali	Head of FATA Research Centre	Islamabad
Asad Durrani	Former ISI chief	Islamabad
Ayaz Wazir	Former ambassador	Islamabad
Feroz Shah	Lawyer	Damghar, Swat
Hasan Khan	Senior Journalist/Analyst	Islamabad
Ijaz Afridi	Lawyer Peshawar High Court	Peshawar
Imtiaz Gul	Security and Defence Analyst	Islamabad
Wali Khan	Lawyer Peshawar High Court	Peshawar
Maria Sultan	Security Analyst/ DG SASSI	Islamabad
Rahimullah Yusufzai	Journalist/Analyst	Peshawar

Said Nazir	Brigadier (Retired)	Islamabad
Sher Muhammad	Justice (Retired)	Hayatabad, Peshawar
Tariq Afridi	Lawyer Peshawar High Court	Peshawar

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