

# ESSAY

## The Evolving Pakistani Criminal Justice System: A Study of the Raymond Davis Matter

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I. INTRODUCTION .....	108
II. THE DAVIS INCIDENT .....	110
III. THE DIPLOMATIC IMMUNITY PREDICAMENT.....	112
IV. THE TURMOIL OF THE CRIMINAL JUSTICE SYSTEM—THE COURTS.....	115
V. THE POLICE INVESTIGATIVE AND COURT PROCESS—THE CRPC .....	123
VI. THE WEAKNESS OF THE CRIMINAL JUSTICE SYSTEM—THE PROSECUTORS.....	127
VII. THE WEAKNESS OF THE CRIMINAL JUSTICE SYSTEM—THE ATTORNEYS .....	131
VIII. THE WEAKNESS OF THE CRIMINAL JUSTICE SYSTEM— SECURITY .....	132
IX. DEFENSE DISMISSAL MOTION.....	134
X. THE LEGAL FRAMEWORK—INFLUENCES OF COLONIAL BRITAIN AND ISLAM .....	135
XI. DIYAT APPEARS TO PREVAIL.....	138
XII. BEATING RETREAT—CHOREOGRAPHED ORDER OVER TURMOIL.....	140
XIII. CONCLUSION .....	142

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## I. INTRODUCTION

[F]rankly, nobody really knows what to do about any of the bigger mess, the one that involves Afghanistan, Pakistan and the Taliban, and so they all focus on one Raymond Davis, a man who never thought he'd be the flash-point of a critical juncture between the world's sole superpower and its schizophrenic buddy state . . . .<sup>1</sup>

—Dawn

During February and March of 2011, it became a test of strength for Pakistan to control the fate of Raymond Davis, a U.S. government contractor charged with double homicide and incarcerated in Lahore's Kot Lakhpat Jail pending trial.<sup>2</sup> As the U.S. government requested that the then President of Pakistan, Asif Ali Zardari,<sup>3</sup> secure the release of Davis on diplomatic immunity grounds, it soon appeared that Zardari had little influence to control the situation.<sup>4</sup> Even though Davis reportedly held a diplomatic passport, was attached to the U.S. embassy in Islamabad, and worked out of the consulate in Lahore,<sup>5</sup> his fate was

1. Bina Shah, *Saving Private Raymond*, DAWN (Feb. 24, 2011), <http://www.dawn.com/news/608535/saving-private-raymond>. Established in 1941 by Mohammad Ali Jinnah (the founder of Pakistan), *Dawn* is Pakistan's oldest and most widely read English-language newspaper. DAWN, <http://www.dawn.com> (last visited Nov. 18, 2014); *Pakistani English Daily Dawn Was Started by Jinnah in Daryaganj, New Delhi*, NEWS MINUTE (Aug. 28, 2014), [http://www.thenewsminute.com/news\\_sections/1229](http://www.thenewsminute.com/news_sections/1229); see also, Roger D. Long, *Dawn and the Creation of Pakistan*, 15 MEDIA HIST. 407 (2009). Shah's satirical article was published during the daily onslaught of news articles and television reports as the Davis matter unfolded in Pakistan from late January through March 2011.

2. *America and Pakistan: Stuck with You*, ECONOMIST (Mar. 3, 2011), <http://www.economist.com/node/18289296>.

3. Asif Zardari served as the 11th President of Pakistan from 2008 to 2013 and is currently cochairman of the Pakistan Peoples Party (PPP). He is the first-ever democratically elected president of Pakistan to have successfully completed his five-year tenure. Zardari rose to prominence after his marriage to Benazir Bhutto in 1987, becoming the First Gentleman in 1988. According to his BBC profile, "his career has veered from being imprisoned for corruption—complaining that he was tortured while behind bars—to taking the country's top job by leading the PPP to victory in the 2008 general elections the year after his wife's death." See *Profile: Asif Ali Zardari*, BBC NEWS (May 2, 2013), <http://www.bbc.co.uk/news/world-asia-16066406>.

4. Imtiaz Gul, *Pakistan Couldn't Give Davis Immunity Even If It Wanted To*, FOREIGN POL'Y (Feb. 23, 2011), [http://southasia.foreignpolicy.com/posts/2011/02/23/pakistan\\_couldn\\_t\\_give\\_davis\\_immunity\\_even\\_if\\_it\\_wanted\\_to](http://southasia.foreignpolicy.com/posts/2011/02/23/pakistan_couldn_t_give_davis_immunity_even_if_it_wanted_to).

5. Sumera Khan et al., *Lahore Shootings: As the Case Unfolds, the Mystery Deepens*, EXPRESS TRIB. (Jan. 29, 2011), <http://tribune.com.pk/story/110900/lahore-shootings-as-the-case-unfolds-the-mystery-deepens/>. There is much confusion in the Pakistani press on whether Davis carried a diplomatic passport; however, U.S. sources clarify that Davis "traveled on a diplomatic passport." Jake Tapper & Lee Ferran, *President Barack Obama: Pakistan Should Honor Immunity for 'Our Diplomat'*, ABC NEWS (Feb. 15, 2011), <http://abcnews.go.com/Blotter/raymond-davis-case-president-barack-obama-urges-pakistan/story?id=12922282>. The U.S. embassy is located in Islamabad, the capital city of Pakistan. With a population estimated at roughly 196 million, Pakistan has four provinces. *The World Factbook: South Asia: Pakistan*, CENT. INTELLIGENCE AGENCY (June 20, 2014), <https://www.cia.gov/library/publications/the->

apparently caught up in a power struggle between President Zardari and the political rulers of Punjab—the Sharif family.<sup>6</sup> For some, the Davis case provided a golden opportunity. There was speculation that by fueling the anger on the street against both President Zardari and the United States, various groups could use this incident of the “American Rambo” to inflame public opinion and bolster their own popularity.<sup>7</sup> The

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world-factbook/geos/pk.html. U.S. consulates are situated in the capital cities of three provinces: Lahore, the capital of Punjab; Karachi, capital of Sindh; and Peshawar, capital of Khyber Pakhtunkhwa (KPK) (formerly North-West Frontier Province). *U.S. Mission to Pakistan*, U.S. EMBASSY ISLAMABAD, PAK., [http://islamabad.usembassy.gov/about\\_the\\_ambassy.html](http://islamabad.usembassy.gov/about_the_ambassy.html) (last visited Nov. 18, 2014). Quetta, the capital of Balochistan, does not have a consulate. *See id.*

The provinces are subdivided into 105 districts, plus Islamabad. *Administrative Units of Pakistan*, FINDPK, <http://www.findpk.com/yp/html/Districts-Administrative-Units-of-Pakistan.html> (last visited Nov. 18, 2014). There are also several administrative units, including the Federally Administrated Tribal Areas, Gilgit-Baltistan, and Jammu-Kashmir. *Provinces & Administrative Units of Pakistan*, GOV'T PAK.: MINISTRY INFO., BROADCASTING & NAT'L HERITAGE, <http://www.nationalheritage.gov.pk/provinces.html> (last visited Nov. 18, 2014).

Karachi is possibly the world's most violent megacity. It experienced its deadliest year on record in 2013, with 2,700 casualties, mostly in targeted attacks. In addition, possibly 40% of businesses fled the city to avoid growing extortion rackets. *See Policing Urban Violence in Pakistan, Asia Report N°255*, INT'L CRISIS GRP. (Jan. 23, 2014), <http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/255-policing-urban-violence-in-pakistan.pdf> [hereinafter *Asia Report N°255*]. However, all provincial capitals as well as the national capital suffer from similar problems and threats as criminal gangs and jihadi networks continue to wreak havoc. *See id.*

6. Nawaz Sharif is the eighteenth and current Prime Minister of Pakistan, in office since June 2013. A veteran politician and industrialist, he previously served as Prime Minister from November 1990 to July 1993 and from February 1997 to October 1999. Sharif is the president of the Pakistan Muslim League-N (PML-N), which is currently Pakistan's largest political party and remains the main political force in Punjab. Toppled by the military in 1999, jailed and then exiled to Saudi Arabia, he returned to the country in time for the 2008 elections and thereafter led the opposition to Zardari's PPP. *Profile: Nawaz Sharif*, BBC NEWS (Sept. 24, 2013), <http://www.bbc.com/news/world-asia-22167511>. His father, the late Muhammad Sharif, founded the Sharif Group, which is one of the largest industrial conglomerates in Pakistan. His brother, Shahbaz Sharif, has been the Chief Minister of Punjab since 2008. *Board of Directors*, SHARIF GROUP, [http://www.sharifgroupn.com/en/index.php?option=com\\_content&view=article&id=64&Itemid=81](http://www.sharifgroupn.com/en/index.php?option=com_content&view=article&id=64&Itemid=81) (last visited Nov. 18, 2014). As of the date of this writing, however, Prime Minister Sharif is caught up in a political crisis threatening his rule. Populist cleric Tahir-ul-Qadri and cricketer-turned-politician Imran Khan have led thousands of demonstrators opposing the Prime Minister's rule. Escalating the crisis, the Lahore High Court ordered the police to register an FIR (investigation) against senior government officials, including Sharif, over the killing and injuring of Qadri's followers during a protest march in Lahore on June 17, 2014. Alman Aslam & Shahid Aslam, *Murder Case Registered Against PM, Punjab CM, 19 Others*, NEWS (Aug. 29, 2014), <http://www.thenews.com.pk/Todays-News-13-32521-Murder-case-registered-against-PM-Punjab-CM-19-others>. Sharif recently gave permission for the army chief to engage the two leaders and play the role of mediator, thereby fueling speculation that the military would reassert its dominance over the civilian government. *See Cornered PML-N Justifies Army Involvement in Political Crisis*, DAWN (Aug. 29, 2014), <http://www.dawn.com/news/1128550/cornered-pml-n-justifies-army-involvement-in-political-crisis>.

7. *Money Is Thicker Than Blood*, ECONOMIST (Mar. 17, 2011), <http://www.economist.com/node/18389209>.

volatile Lahore courts would be reluctant to defy public anger by accepting U.S. claims of Davis' diplomatic immunity.<sup>8</sup> This incident so incited the Pakistani people that the name Raymond Davis provoked instantaneous furor on the streets and in the markets of Pakistan.<sup>9</sup>

In the Pakistani court system, "the accused is the favorite child of the law."<sup>10</sup> But the local media and popular opinion were demanding conviction and a likely death sentence.<sup>11</sup> Against this background, this Essay explores the intricacies of the Pakistani criminal justice system, how a criminal defendant fares in the system, and the prospects for reform in what has been described as an "anarchic criminal justice sector."<sup>12</sup>

## II. THE DAVIS INCIDENT

According to public accounts, on January 27, 2011, on a congested street in Lahore, Davis shot and killed two apparent robbers who had been following him on a motorbike. When one attacker got off the motorcycle and approached Davis' car with his gun drawn, Davis reportedly took his Glock pistol and shot through the car windshield, shattering the glass and hitting the man numerous times. As the accomplice tried to flee, Davis allegedly got out of his car and likewise shot him several times. Both men died on the spot.<sup>13</sup> An SUV, while

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8. *Id.*; Gul, *supra* note 4.

9. *See America and Pakistan: Stuck with You, supra* note 2.

10. Suzanna Koster, *Pakistan's Travesty of Justice*, GLOBAL POST (Oct. 6, 2011), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/pakistan/111005/pakistan-justice-terrorism-qadri-taseer-blashphemy-law> (quoting a Pakistani prosecutor).

11. *See, e.g., America and Pakistan: Stuck with You, supra* note 2, lead photo; Gul, *supra* note 4, lead photo; *Timeline of US-Pakistan Relations since Raymond Davis Shooting*, TELEGRAPH (Apr. 12, 2011), <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8445972/Timeline-of-US-Pakistan-relations-since-Raymond-Davis-shooting.html>. These photos vividly display the throngs of people congregating daily on the streets of Lahore and other major cities calling for Davis' head by carrying printed posters and hanging banners demanding his execution. More than two dozen offenses in Pakistan are punishable by death, including blasphemy, extramarital sex, and trafficking of narcotics. There are currently 8,526 prisoners on death row in Pakistan. Hanging is the only method of execution. No civilian has been executed in Pakistan, however, since a moratorium on the death penalty was declared in 2008. *See Death Penalty Worldwide: Pakistan*, DEATH PENALTY WORLDWIDE (Apr. 4, 2014) <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=pakistan>; Hasnaat Malik, *Crime and (Capital) Punishment: Moratorium on Death Penalty Hangs in the Balance*, EXPRESS TRIB. (Sept. 30, 2014), <http://tribune.com.pk/story/769003/crime-and-capital-punishment-moratorium-on-death-penalty-hangs-in-the-balance/>.

12. *Reforming Pakistan's Criminal Justice System, Asia Report N°196*, INT'L CRISIS GRP., at i (Dec. 6, 2010), <http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/196-reforming-pakistans-criminal-justice-system.aspx> [hereinafter *Asia Report N°196*].

13. *The Raymond Davis Case: Blood for Money for Blood*, ECONOMIST (May 3, 2012), <http://www.economist.com/blogs/banyan/2012/05/rammond-davis-case>; *Loss and Risk Manage-*

rushing to Davis' aid, reportedly accidentally hit and killed a passing Pakistani motorcyclist.<sup>14</sup> The driver then fled the scene.<sup>15</sup> Davis was arrested nearby; his car allegedly containing a camera, a phone tracker, and ammunition.<sup>16</sup>

Compounding public anger, the despairing wife of one of the victims committed suicide and instantly became a martyr for anti-American groups inside Pakistan.<sup>17</sup> Because Davis was such an object of hatred, Pakistan took extensive precautions to protect Davis while he was detained. He was placed in a special cell that was detached from the normal barracks and set up for high-profile and high-value prisoners. His guards were kept unarmed for fear they might kill him, and a ring of paramilitary troops were posted outside the jail to protect against any mob assault.<sup>18</sup>

As observed by *The Economist*, anti-Americanism was spiraling out of control, with the Davis case becoming a stroke of luck for Pakistan's main military-intelligence body, the Inter-Services Intelligence (ISI).<sup>19</sup> The ISI allegedly suspected that American agents were working independently in Lahore and Karachi tracking al-Qaeda, Taliban, and other militants.<sup>20</sup> Hence, *The Economist* further asserted, the ISI took advantage of the Davis situation by leaking prejudicial information, such

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*ment: A New Setback in the Accident-Prone Alliance Between Pakistan and America*, ECONOMIST (Feb. 3, 2011), <http://www.economist.com/node/18073379>. Just before the incident, the two men reportedly had committed armed robberies on two other motorists stuck in traffic, stealing their cell phones and foreign currency. Khan et al., *supra* note 5. As remarked by the Banyan columnist, it was unclear whether the two men were simple street robbers, were working for the ISI with orders to follow Davis, or were members of an extremist group. Nor was it apparent whether the two men posed a genuine threat to his life or if Davis overreacted. *The Raymond Davis Case: Blood for Money for Blood*, *supra*; see also Kamran Yousaf, *Raymond Davis Case: Men Killed in Lahore Were Intelligence Operatives, Says Official*, EXPRESS TRIB. (Feb. 5, 2011), <http://www.tribune.com.pk/story/115225/raymond-davis-case-men-killed-in-lahore-were-intelligence-operatives-says-official/>.

14. Rameez Khan, *Drama in Lahore: US Diplomat Faces Double Murder Charge*, EXPRESS TRIB. (Jan. 28, 2011), <http://tribune.com.pk/story/109868/american-kills-pakistani-in-self-defence-police/>.

15. *Id.*

16. Khan et al., *supra* note 5; see also *Court Releases Detailed Judgment in Davis Case*, DAWN (Mar. 19, 2011), <http://www.dawn.com/news/614440/court-releases-detailed-judgment-in-davis-case>; *Loss and Risk Management*, *supra* note 13.

17. Ahtishamul Haq, *Raymond Davis Case: Wife of Man Killed Commits Suicide*, EXPRESS TRIB. (Feb. 7, 2011), <http://tribune.com.pk/story/114921/raymond-davis-case-wife-of-man-killed-attempts-suicide/>.

18. Ansar Abbasi, *Multiple Security Layers Erected for Raymond Davis*, NEWS (Feb. 11, 2011), <http://www.thenews.com.pk/Todays-News-13-3920-Multiple-security-layers-erected-for-Raymond-Davis>; *America and Pakistan: Stuck with You*, *supra* note 2.

19. *America and Pakistan: Stuck with You*, *supra* note 2.

20. *Money Is Thicker Than Blood*, *supra* note 7.

as that Davis had fired twelve bullets at his assailants, including shots fired into the back of one victim.<sup>21</sup> The ISI allegedly continued to fan the flames, working behind the scenes through radical newspaper editorials, nightly television talk shows, *mullahs*, and other nationalist “rabble-rousers.”<sup>22</sup> Under this constant onslaught, public opinion in Pakistan was soon virtually unanimous: President Zardari must not give in to Washington’s demands; Davis should be tried and hanged for his crimes.<sup>23</sup>

### III. THE DIPLOMATIC IMMUNITY PREDICAMENT

At a news conference on February 15, 2011, President Obama referred to Raymond Davis as “our diplomat in Pakistan” and said that Davis should be released immediately under the principle of diplomatic immunity.<sup>24</sup> The rules concerning diplomatic immunity are set forth in the 1961 Vienna Convention on Diplomatic Relations, which has been agreed upon by 187 countries, including the United States and Pakistan.<sup>25</sup>

Davis appeared to meet the requirements for diplomatic immunity. He reportedly had been admitted into Pakistan on a diplomatic passport and was declared as an embassy staff member to the Pakistani Ministry of Foreign Affairs.<sup>26</sup> There was a dispute, however, about whether Davis’ assignment at the Lahore consulate, as opposed to the U.S. embassy in Islamabad, gave him full diplomatic immunity.<sup>27</sup> Under the Vienna Convention, embassy officers, administrative and technical staff, and members of their immediate families are immune from *all* criminal prosecution and most civil lawsuits.<sup>28</sup> But, under the Vienna Convention on Consular Relations of 1963, consular officers serving in consulates

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21. *Id.*

22. *See id.*; *The Raymond Davis Case: Blood for Money for Blood*, *supra* note 13.

23. *America and Pakistan: Stuck with You*, *supra* note 2; Gul, *supra* note 4.

24. The President’s News Conference, 2011 DAILY COMP. PRES. 11 (Feb. 15, 2011), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201100088/pdf/DCPD-201100088.pdf>.

25. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, available at [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).

26. Tapper & Ferran, *supra* note 5; *FO Did Not Grant Diplomatic Status to Davis: US*, DAWN (Feb. 4, 2011), <http://www.dawn.com/news/603753/fo-did-not-grant-diplomatic-status-to-davis-us>.

27. *FO Did Not Grant Diplomatic Status to Davis: US*, *supra* note 26.

28. *Diplomatic and Consular Immunity*, U.S. DEP’T ST. 4 (July 2011), <http://www.state.gov/documents/organization/150546.pdf>. With respect to civil lawsuits, administrative and technical staff are immune from civil lawsuits arising only out of their duties, whereas embassy officers are immune from any civil lawsuit, no matter how unrelated to their duties. *Id.*

have a lower level of immunity, extending *only* to crimes committed within the scope of their regular work responsibilities.<sup>29</sup>

Given his declared diplomatic status as an embassy staff member, Raymond Davis should have been immediately released by the Punjab police and quietly whisked out of the country.<sup>30</sup> Instead, within twenty-four hours of the incident, Davis became a cause célèbre in Pakistan, where events then took on a momentum onto themselves.<sup>31</sup> When several Lahore attorneys each filed separate petitions demanding that the Lahore High Court rule as a matter of law that Raymond Davis did not enjoy full immunity,<sup>32</sup> the court *suo moto* accepted the petitions.<sup>33</sup> Under the use of *suo moto* judicial review, which is an anomaly to the South Asian subcontinent, the Supreme Court can exercise jurisdiction in matters of

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29. *Id.* at 5; see Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The Pakistani media firestorm against Davis used both his lack of a diplomatic accreditation card and the question of where he worked as further evidence of an alleged American conspiracy to infiltrate Pakistan. At the time of his initial entry into the country, Davis reportedly was declared to the Pakistani Ministry of Foreign Affairs (MFA) as a staff official doing “administrative and technical” work at the Embassy. *FO Did Not Grant Diplomatic Status to Davis*, *supra* note 26. The declaration places the subject person under the protections of the Vienna Convention on Diplomatic Relations. At that time, however, the MFA was not issuing diplomatic accreditation cards to administrative and technical staff, in what was arguably a clear deviation from the Vienna Convention on Diplomatic Relations article 37, which clearly states, “Members of the administrative and technical staff of the mission . . . shall . . . enjoy the privileges and immunities . . .” Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, available at [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf). In its first press statement on the Lahore incident, however, the embassy referred to Davis as a “consulate staffer.” *FO Did Not Grant Diplomatic Status to Davis*, *supra* note 26. That statement was thereafter amended to state that he was a diplomat assigned to the embassy in Islamabad. Consequently, his diplomatic status remained a source of debate. *Id.*; see also Tariq Hassan, *Diplomatic or Consular Immunity for Criminal Offenses*, 2 VA. J. INT’L L. ONLINE 17, 20-21, 27 (2011); *Davis Case Confusion*, DAWN (Feb. 23, 2011), <http://www.dawn.com/news/608224/davis-case-confusion>.

30. Gul, *supra* note 4.

31. *America and Pakistan: Stuck with You*, *supra* note 2.

32. *Trial Court To Decide Davis’ Immunity, Says LHC*, PAKISTAN TODAY (Mar. 15, 2011), <http://www.pakistantoday.com.pk/2011/03/15/national/trial-court-to-decide-davis-immunity-says-lhc/>. There are five high courts of Pakistan, with one based in the capital city of each of the four provinces and the fifth recently established to cover the Islamabad Capital Territory. The high courts exercise appellate jurisdiction over decisions of the district and sessions courts and also exercise powers of revision (i.e., increase or decrease criminal sentences). Dr. Faqir Hussain, *The Judicial System of Pakistan*, SUP. CT. PAK. (Feb. 15, 2011), [http://supremecourt.gov.pk/web/user\\_files/File/thejudicialsystemofPakistan.pdf](http://supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf); Masood Khan & Niaz A. Shah, *Judicial Appointments in Pakistan* 5-6 (Institute of Governance Public Policy and Social Research, Working Paper No. QU/GOV/5/2003, 2003), available at <http://www.law.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofGovernance/Publications/briefingpapers/Filetoupload,47653,en.pdf>.

33. *Trial Court To Decide Davis’ Immunity, Says LHC*, *supra* note 32. The Lahore High Court maintained jurisdiction over the diplomatic immunity issue until March 14, 2011. It then closed the matter, ruling that the decision on Davis’ immunity should be made by the lower (sessions) court since it was already hearing the criminal trial. *Id.*

public interest even when the technical requirements for a case have not been satisfied.<sup>34</sup> The Chief Justice of the Lahore High Court extended this same power to the high court.<sup>35</sup>

Accordingly, the petitions were collated into one matter to be heard before the Chief Justice.<sup>36</sup> Raymond Davis did not attend. The United States, whose interests would be directly affected by an adverse ruling, was not a named party.<sup>37</sup> President Zardari's administration apprised the court that it was the official position of the federal government that it would leave the issue of diplomatic immunity for the high court to decide.<sup>38</sup>

The diplomatic immunity hearing was held three weeks after the shootings. The hearing was reportedly one of utter pandemonium, with a hundred lawyers pushing and shoving, all clamoring to be heard.<sup>39</sup> The Chief Justice listened to the impassioned arguments and then adjourned

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34. The Supreme Court of Pakistan, which sits in Islamabad, has wide appellate jurisdiction. The Supreme Court also has original jurisdiction to address matters relating to a "question of public importance with reference to the enforcement of any of the Fundamental Rights [contained in the Constitution]." PAK. CONST. art. 184. The Supreme Court has held that this jurisdiction may be exercised *suo moto* by the Court—that is, on its own initiative. As a result, the Supreme Court regularly addresses cases that are not formally brought before it and may even originate in a newspaper clipping. These decisions have touched on very important political matters and the use of the power has deeply affected the balance of powers between the Supreme Court, Parliament, and the President's office. Because *suo moto* cases take precedence, cases that are already pending before the Court are delayed even further. Hussain, *supra* note 32; Khan & Shah, *supra* note 32; *Suo Motu: Pakistan's Chemotherapy?*, DAWN (Aug. 31, 2011), <http://www.dawn.com/news/655910/suo-motu-pakistans-chemotherapy>.

35. *The Exercise of Suo Motu*, DAWN (Mar. 30, 2010), <http://www.dawn.com/news/840435/the-exercise-of-suo-motu>.

36. *Trial Court To Decide Davis' Immunity*, *supra* note 33.

37. *See Witness with Quatrina* (Express 24/7 television broadcast Feb. 7-10, 2011).

38. Hassan, *supra* note 29, at 22; *Pak Court Adjourns Raymond Davis' Case till March 14*, INDIA TODAY (Feb. 17, 2011), <http://indiatoday.intoday.in/story/pak-court-adjourns-american-diplomat-raymond-davis-case-till-march-14/1/130118.html>.

39. *News Live* (GEO TV television broadcast Feb. 17, 2011) (Islamabad, Pakistan). Television news in Pakistan regularly covered local court hearings. Cases other than *Davis* also caught the public's attention. For example, in early January 2011, a few weeks prior to the *Davis* incident, a group of attorneys from the Islamabad and Lahore defense bar achieved worldwide notoriety when seen on local television news hailing as a hero and showering rose petals upon Mumtaz Qadri, the bodyguard and alleged killer of Punjab Governor Salman Taseer. Qadri apparently had been influenced by clerics who issued a decree of death against Governor Taseer for opposing the blasphemy law and sympathizing with a Christian woman convicted under the law. *See Lawyers Shower Roses for Governor's Killer*, DAWN (Jan. 5, 2011), <http://www.dawn.com/news/596300/lawyers-shower-roses-for-governors-killer/>. Over 500 lawyers offered to defend Qadri without payment. Michael Georgy, *Politics Makes Convicting Pakistani Assassin Difficult*, REUTERS (Jan. 15, 2011), <http://www.reuters.com/article/2011/01/15/us-pakistan-blasphemy-suspect-idUSTRE70E10920110115>. The judge, who convicted Qadri and sentenced him to death, had to leave the country soon after passing the judgment; he still has not been able to return. Mohammad Nafees, *Blatant Misuse of Blasphemy Law*, CENTER FOR RES. & SEC. STUD. (Sept. 29, 2014), <http://crss.pk/story/blatant-misuse-of-blasphemy-law/>.



until March 14, ordering the federal government in Islamabad to certify by that date whether or not Davis enjoyed diplomatic immunity.<sup>40</sup> If the certification was forthcoming, then the high court would order Davis' release. If not, then Davis' potential trial in a lower court would proceed without legal hindrance.<sup>41</sup> The high court thereby put President Zardari into an uncomfortable dilemma: he would have to choose between the displeasure of the U.S. government and the fury of the Pakistani people.<sup>42</sup> Meanwhile, in the sessions court of Lahore,<sup>43</sup> the criminal case against Raymond Davis was building.

#### IV. THE TURMOIL OF THE CRIMINAL JUSTICE SYSTEM—THE COURTS

May God save even my worst enemy from disease and a court case.<sup>44</sup>

—Punjabi saying

As in many countries, the core problem with the criminal justice system in Pakistan is that the courts and prisons are overburdened.<sup>45</sup> This overburdening appears to arise from a number of interrelated factors, including a lack of resources spent on maintaining the system, a shortage of courts and judges, and the sheer volume of civil and criminal cases

40. *Pak Court Adjourns Raymond Davis' Case till March 14*, *supra* note 38.

41. *See Raymond Davis: Pakistan Court Avoids Immunity Ruling*, BBC NEWS (Mar. 14, 2011), <http://www.bbc.co.uk/news/world-south-asia-12729849> ("It looks as if the Lahore High Court has also wriggled out of the situation by passing responsibility to a lower court, our correspondent says.")

42. Gul, *supra* note 4; *Davis Case Confusion*, *supra* note 29.

43. The district and sessions judges serve on the courts of principal civil and criminal jurisdiction. When hearing civil cases, the court is called the district court; when it hears criminal cases, the sessions court. Original criminal jurisdiction is exercised in cases entailing the death penalty, longer sentences, and the *Hudood* (Islamic criminal) laws. The sessions court will also hear criminal appeals against convictions by the courts of judicial magistrates. Unlike high court judges, who are usually selected from among prominent members of the high court bar in each province, lower court judges reach the bench through a qualifying examination administered by the Public Service Commission and generally serve their entire careers on the bench. Career incentives are limited, since lower court judges are rarely elevated to the high court and judges are transferred frequently. Judges are hampered by subpar working conditions—including insufficient salary, poor physical infrastructure (most courtrooms are cramped, damp, ill-lit, and suffocating, with peeling wall-paint), a failed docketing system (record rooms are dark with thousands of case files stacked in no discernible order), few training opportunities, an unmanageable workload, and security concerns. OSAMA SIDDIQUE, *PAKISTAN'S EXPERIENCE WITH FORMAL LAW: AN ALIEN JUSTICE* 377 (2013) (Dr. Siddique was, until recently, a Professor at the Lahore University of Management Sciences (LUMS) Shaikh Ahmad Hassan School of Law); *see also* Hussain, *supra* note 32; *Pakistan Rule of Law Assessment-Final Report*, U.S. AGENCY FOR INT'L DEV. (USAID) 27-28 (Nov. 2008), [http://pdf.usaid.gov/pdf\\_docs/PNADO130.pdf](http://pdf.usaid.gov/pdf_docs/PNADO130.pdf) [hereinafter *USAID Assessment*].

44. ANATOL LIEVEN, *PAKISTAN: A HARD COUNTRY* 107 (2012).

45. *See, e.g., Asia Report N°196*, *supra* note 12, at 8; *see also* Irfan Aslam, *Caged: Behind the Walls of Pakistan's Prisons Is a World Unto Itself (Five Reports)*, DAWN (Sept. 7, 2014), <http://www.dawn.com/news/1130263>.

introduced into the system.<sup>46</sup> A significant percentage of the “mountain of cases”<sup>47</sup> is frivolous (family or clan feuds)<sup>48</sup> and/or arises out of land disputes.<sup>49</sup> Approximately two million civil and criminal cases are pending every year in the lower and higher courts across Pakistan.<sup>50</sup> This sum includes the 200,000 cases in the appellate courts (which consist of the provincial high courts, the Federal Shariat Court,<sup>51</sup> and the Supreme Court of Pakistan).<sup>52</sup> Today, in the Punjab alone, the magistrate, district, and sessions courts are facing over 800,000 pending civil and criminal cases.<sup>53</sup> Nationwide, approximately 900 magistrates—who have both civil and criminal jurisdiction—handle 75% of all criminal cases.<sup>54</sup> This burden outweighs the capacity to investigate and prosecute, resulting in judicial paralysis.<sup>55</sup>

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46. SIDDIQUE, *supra* note 43, at 117-18, 378-79.

47. *Id.* at 378.

48. According to the Asian Development Bank, “[v]arious assessments recorded frivolous litigation [before the courts] accounted for between 25% and a staggering 50% of all cases.” *Completion Report: Pakistan: Access to Justice Program*, ASIAN DEV. BANK para. 6 (Dec. 29, 2009), <http://www.adb.org/sites/default/files/projdocs/2009/32023-01-pak-pcr.pdf>.

49. SIDDIQUE, *supra* note 43, at 117-18, 378-79, 393 n.122. Professor Siddique argues that much of the excessive civil litigation that is “burying the courts in a mountain of cases” is a direct result of the widespread inefficiency and alleged corruption in the land revenue department. Land records are complex, inaccurate, unclear, and allow significant room for manipulation. Sixty to eighty percent of the courts’ civil caseloads are land acquisition and titling disputes, with a large percentage arising out of the gross misappropriation of property through the use of forged documents and violence—known as “land grabbing.” Those cases clog the courts because they are not easy to resolve speedily and can last years, even decades. Correspondingly, a significant percentage of the filed criminal cases involve murders arising out of long-standing land disputes. *Id.*; see also Lubna Hasan, *Rule of Law, Legal Development and Economic Growth: Perspectives for Pakistan*, PAK. INST. DEV. ECON. 11, 15-16 (Sept. 30, 2010), [http://mpr.ub.uni-muenchen.de/25565/1/MPRA\\_paper\\_25565.pdf](http://mpr.ub.uni-muenchen.de/25565/1/MPRA_paper_25565.pdf).

50. Imtiaz Gul, *Terror, Crime and the Tardy Justice System*, EXPRESS TRIB. (July 1, 2014), <http://www.tribune.com.pk/story/729778/terror-crime-and-the-tardy-justice-system/>; see also Sabir Shah, *Judiciary and Prosecution in India and Pakistan*, NEWS INT’L (Dec. 12, 2013), <http://www.thenews.com.pk/Todays-News-13-27236-Judiciary-and-prosecution-in-India-and-Pakistan>.

51. Created by General Zia-ul-Haq, the Federal Shariat Court theoretically falls within the purview of the Supreme Court but amounts to a parallel Islamic judicial system. It has the power to review laws for repugnancy to Islam and serves as an appellate court in *Hudood* criminal cases heard in the sessions courts. See *infra* Part X.

52. Gul, *supra* note 50; Shah, *supra* note 50.

53. All courts have a woefully insufficient number of judges. In the lower courts of Lahore, for example, there are only thirty-four district and sessions judges. See LAHORE DIST. & SESSIONS CTS., <http://lahore.dc.lhc.gov.pk/> (last visited Nov. 18, 2014). Although the Lahore High Court is allotted sixty-two judges, currently there are only forty-nine sitting judges. LAHORE HIGH CT., <http://lhc.gov.pk/> (last visited Nov. 18, 2014).

54. *Asia Report N°196*, *supra* note 12, at 12.

55. Gul, *supra* note 50; Shah, *supra* note 50.

Prisons are overcrowded, with more and more prisoners being crammed into the existing facilities.<sup>56</sup> Kot Lakhpat Jail, for example, where Davis was held, houses more than four times its four-thousand-prisoner capacity.<sup>57</sup> A clear majority of the prison population in the country is comprised of under-trial prisoners.<sup>58</sup> With no speedy trial law in effect, it can take up to several years for a case to get to trial. Even when a case finally is set for trial, the trial itself may consist of numerous short hearings spanning months or even years.<sup>59</sup> The Pakistani Criminal Procedure Code does not contain a provision recognizing, let alone authorizing, plea bargaining. Despite the fact that the courts and prisons are overburdened with piled-up criminal cases threatening the foundations of the system, this measure for accelerating caseload disposition is not being considered due to criticism of plea bargaining's perceived negative ethical and legal connotations.<sup>60</sup>

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56. *State of Human Rights in 2013*, HUMAN RIGHTS COMM'N OF PAK. (March 2014), <http://www.hrcp-web.org/hrcpweb/report14/AR2013.pdf>. According to a recent survey, Pakistan has 97 prisons with a combined prisoner population of 75,568. Shazia Hasan, *Bursting at the Seams*, DAWN (Sept. 7, 2014), <http://www.dawn.com/news/1130026> ("The population in our prisons is almost five times more than the capacity with the prisoners in the barracks in the evenings at closing time not being able to turn if they lie alongside each other in the tight space. So most just sit or squat on the floor until they can be let out in the morning to carry out their chores.").

57. *State of Human Rights in 2013*, *supra* note 56, at 61. There have been numerous instances in the past of prisoners being attacked and even killed within Kot Lakhpat. *Id.* at 66; *see also Sarabjit Singh Second Indian To Die in Pakistan's Kot Lakhpat Jail*, PRESS TRUST INDIA (May 2, 2013), <http://www.ndtv.com/article/india/sarabjit-singh-second-indian-to-die-in-pakistan-s-kot-lakhpat-jail-361808>.

58. At least 64% (48,360) are on physical custody remand awaiting trial or verdict. *State of Human Rights in 2013*, *supra* note 56, at 60-61; *see also Asia Report N°196*, *supra* note 12, at 8.

59. USAID, *supra* note 43, at 16.

60. *See* Nasir Jamal, Pak. Nat'l Accountability Bureau, *The Plea-Bargain*, ICAC, <http://www.icac.org.hk/news/issue14eng/button3.htm> (last visited Nov. 19, 2014). Critics charge that plea bargaining is a triumph of administrative and organizational interests over justice that will result *inter alia* in granting undue leniency to the guilty while penalizing many innocent people who will plead guilty to avoid the risk of severe punishment. *See, e.g.*, K.V.K. Santhy, *Plea Bargaining in US and Indian Criminal Law, Confessions for Concessions*, 7 NALSAR L. REV. 84, 101 (2013), *available at* [http://www.nalsar.ac.in/pdf/Journals/NLR\\_2013\\_Final.pdf](http://www.nalsar.ac.in/pdf/Journals/NLR_2013_Final.pdf). India faces similar problems of severe docket overload and low conviction rate. Accordingly, under the Criminal Law (Amendment) Act, 2005, the Indian legislature authorized plea bargaining in criminal cases where the statutory maximum punishment is no more than seven years. The logic for implementation was propounded by Indian jurist Nani Palkhivala: "[T]he greatest drawback of the administration of justice in India today is because of delay of cases . . . [.] The law may or may not be an ass, but in India, it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in the community of snails. Justice has to be blind but I see no reason why it should be lame. Here it just hobbles along, barely able to work." *Id.* at 84.

Due to a lack of prison vans, prisoners are seldom transported to court on the day of their hearing.<sup>61</sup> Daily court dockets often contain hundreds of cases, making it impossible for parties to know which matters will actually proceed on any given day.<sup>62</sup> Since lawyers are unable to prepare adequately, they routinely move to postpone their cases for little or no reason.<sup>63</sup> It is quite simple for defense counsel, in order to ensure an acquittal of a client, to delay the case until the evidence is lost or the witnesses become unavailable.<sup>64</sup> The judges acquiesce, and it is thereby the lawyers who effectively have control of the courts' calendars.<sup>65</sup> Thus, trials routinely take years to complete.<sup>66</sup>

Adding to the problem, militants and other major criminals who can afford to hire first- or second-tier attorneys are regularly released on bail or their trials continue for years even as they apparently plan operations from prison.<sup>67</sup> It is estimated that suicide attacks and bomb blasts have

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61. Individual courts' dockets average more than 100 cases a day. Around 1,200 prisoners should be delivered daily to the courts in Lahore and likewise in Karachi, but there are only enough vehicles and holding cells in each city's district court complex for 500 prisoners. LIEVEN, *supra* note 44, at 108; *see also* Hasan, *supra* note 56.

62. United Nations Office on Drugs and Crime (UNODC), *Reforming the Prosecution System in Pakistan to Enhance Criminal Justice*, at 25 (May 25, 2010) (on file with author).

63. *See, e.g., Pakistani Judicial System Groans Under Corruption, Volume of Cases*, PUB. RADIO INT'L (Feb. 3, 2012), <http://www.pri.org/stories/2012-02-03/pakistani-judicial-system-groans-under-corruption-volume-cases>. In an interview with a defense attorney in Rawalpindi, Punjab, the attorney referenced

one of his clients, charged with murder more than two years ago and still far from knowing when he will have his trial. [The attorney listed] an endless string of reasons the case keeps being continued. 'One day one advocate is not present, the other day the other opponent advocate counsel is not present. One day the police did not bring the accused from the jail. One day we learned the judge has been on leave.' The attorney said he could go on and on.

*Id.*; *see also* SIDDIQUE, *supra* note 43, at 116 ("As long as you can pay bribes, you can delay a case forever." (quoting a litigant in a Punjab district court)).

64. UNODC, *supra* note 62, at 25.

65. *See, e.g.,* LIEVEN, *supra* note 44, at 108-09 ("It doesn't do for a judge to be too hard with the lawyers. We all know each other and there is a sort of family feeling in the legal profession. And a judge who makes himself really unpopular with the lawyers will find his promotion blocked by rumors and whispers, or may even be accused of corruption. So many judges take a live-and-let live attitude when they really ought to be pulling a lot of lawyers up very hard indeed, especially when it comes to non-attendance and requests for adjournments for specious reasons . . . Though it is also true that the system is so terribly overloaded that it simply couldn't work properly even if everyone did their duty.").

66. *See, e.g.,* UNODC, *supra* note 62, at 25.

67. Sitwat Waqar Bokhari, *Pakistan's Challenges in Anti-Terror Legislation*, CENTER FOR RES. & SEC. STUD. (Oct. 30, 2013), <http://crss.pk/wp-content/uploads/2013/11/Pakistan-Challenges-in-Anti-Terror-Legislation.pdf> ("[D]espite continuous domestic security threats and hundreds of terrorist attacks claiming thousands of lives, Pakistan . . . does not have a single federal high security prison. A high security prison would not only keep the most dangerous terrorist inmates segregated from other petty criminals but it would keep suspected terrorists

killed more than 40,000 people between 2003 and 2012.<sup>68</sup> Although a special court system for antiterrorism cases has been established in each province, those courts' dockets are similarly overloaded and suffer from the same institutional problems as the regular sessions courts.<sup>69</sup>

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under high security and constant observation, which is much needed to avoid any future jailbreaks. . . . A lack of segregation between ordinary criminals and dangerous militant inmates also means that there is a high likelihood that the former can become susceptible to indoctrination by the latter. . . . As mobile phones are easily available in jails, mobile phone calls are frequently made by jailed militants to their associates outside to plan their next move.”). Many inmates are hired for robbery or murder jobs, which they accomplish by bribing guards with a share of their earnings. As one inmate explained, there is greater advantage in committing crime this way: on paper, they are physically in prison and cannot possibly have committed the crime in question.

The entire jail knows what robbery or killing will be committed in the city the next day. Once, an inmate committed a robbery and returned back to jail by evening. But a few weeks later, a newbie was brought to the jail. When he told us what he had been charged with, we all laughed: it was the same robbery that our fellow inmate had committed. The newbie had been framed.

Ahmed Yusef, *When the Jailbirds Sing*, DAWN (Sept. 7, 2014), <http://www.dawn.com/news/1130263>.

68. See Zulfiqar Hameed, *Anti-terrorism law in Pakistan*, 37 (2013), available at [http://www.academia.edu/2603436/Anti-terrorism\\_law\\_in\\_Pakistan](http://www.academia.edu/2603436/Anti-terrorism_law_in_Pakistan). The U.S. State Department's travel advisory warning for Pakistan, which is posted on the embassy and consulates websites, states:

There have been many terrorist attacks in recent years targeting civilians and security personnel. On June 24 [2014], gunmen fired on an international flight during landing at Peshawar's International Airport, killing one passenger and injuring two flight attendants. On June 8, a terrorist attack over the course of nearly two days on Karachi's Jinnah International Airport killed 19 people. On April 9, a bomb detonated at a fruit and vegetable market in Islamabad, killing 24 people and injuring 116. On March 3, a bomb and firearm attack on a courthouse in Islamabad killed 11 people. In 2013, there were 355 distinct terror incidents throughout Pakistan. On September 22, 2013, a suicide bomb attack outside of a Peshawar church killed 119 people. On July 6, 2013, a bomb exploded in a restaurant in a business district of Lahore, killing at least five people and injuring nearly 50. On June 23, 2013, 11 foreign nationals, including one U.S. citizen, were murdered in an attack on a Nanga Parbat mountain base camp in the northern area of Gilgit-Baltistan.

*Pakistan Travel Warning*, U.S. DEP'T ST. (Aug. 8, 2014), <http://travel.state.gov/content/passports/english/alertswarnings/pakistan-travel-warning.html>.

69. Pakistan's Anti-Terrorism Court (ATC) infrastructure, a parallel legal system established in 1997 under the Anti-Terrorism Act, was initially designed to dispense quick justice for those charged with terrorist activities. Although these are regular sessions courts federally designated to handle only terrorism cases, these courts nationwide have been facing significant dockets due to the additional types of cases covered by the Act. Various amendments have gradually increased the range of crimes covered to extend beyond pure terrorism to also include arms trafficking, kidnapping, hijacking, extortion, sectarian violence, targeted political killings, and until recently, gang rape. The backlog is worsened by the fact that these courts, as with the Pakistani legal system at large, are severely understaffed and lack basic resources. Moreover, since the prosecutors employed by ATCs work for a parallel system, they cannot even utilize whatever resources are available to the regular session courts. As a result, ATCs are backlogged and no better than the regular sessions courts in delivering a speedy trial. See Bokhari, *supra* note 67, at 37; see also Huma Yusuf, *Pakistan's Anti-Terrorism Courts*, COMBATTING TERRORISM

The conviction rate is low; at best no more than 26% of all criminal suspects, including terrorists, are ever convicted.<sup>70</sup> A variety of factors combines and contributes to the low conviction rate:

- (1) the sheer volume of cases,<sup>71</sup>
- (2) an endemic filing, and apparent acceptance by the police and courts, of false complaints,<sup>72</sup>
- (3) the alleged corruption and incompetence of some police, prosecutors, and judges,<sup>73</sup>

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CENTER AT W. POINT (Mar. 3, 2010), <http://www.ctc.usma.edu/posts/pakistan%E2%80%99s-anti-terrorism-courts>.

70. See Aatekah Mir-Khan & Asad Kharal, *Prosecuting Terrorists: Out of 559 Cases in 2012, Suspects Acquitted in 414*, EXPRESS TRIB. (Apr. 1, 2013), <http://tribune.com.pk/story/529353/prosecuting-terrorists-out-of-559-cases-in-2012-suspects-acquitted-in-414/>. For an insightful discussion on the many factors behind the low conviction rate, see Umer Farooq, *Prosecutors in the Dock*, HERALD MAG. (Karachi), July 2010, at 24 (on file with author); see also Umer Farooq, *Judgment on Errors*, HERALD MAG. (Karachi), July 2010, at 29 (on file with author); *Why Is It So Difficult To Convict Accused?*, DAWN (Feb. 20, 2011), <http://www.dawn.com/news/607486/why-is-it-so-difficult-to-convict-accused>. Conviction statistics vary from district to district and from year to year, and have been reported to be as low as 5-10%. See Zofeen T. Ebrahim, *Poor Security for Witnesses Means Low Conviction Rate*, DAWN (Dec. 6, 2012), <http://www.dawn.com/news/769312/poor-security-for-witnesses-means-low-conviction-rate>; *Low Conviction Rate*, DAWN (Apr. 21, 2010), <http://www.dawn.com/news/531633/low-conviction-rate>.

71. Countrywide statistics for cases registered by the police in 2013 include over 14,000 murders, 10,000 attempted murders, 3,000 armed robberies (*dacoity*), 3,000 rapes/gang rapes, 1,500 kidnappings, and 28,000 vehicle thefts. Additionally, there were over 50,000 cases of possessing illegal weapons and 3,000 miscellaneous cases of violence such as acid burning, burning, domestic violence, honor (*karo-kari*) killings (870 women were murdered in so-called honor killings carried out by husbands or relatives as punishment for alleged adultery or other illicit sexual behavior), sexual assault/harassment, violence against children, women and minorities, missing persons, sectarian violence, and police-related and prison-related violations. *State of Human Rights in 2013*, *supra* note 56, at 45-46; see also *Over 8,500 Human Rights Violations Reported in 20 Months*, DAWN (Sept. 30, 2013), <http://www.dawn.com/news/1046467/over-8500-human-rights-violations-reported-in-20-months>; *Pakistan: Heinous Crimes in July 2014*, CTR. FOR RESEARCH & SEC. STUDIES (Aug. 13, 2014), <http://crss.pk/story/pakistan-heinous-crimes-in-july-2014/> (“35 crimes that feature remarkably gruesome odious circumstances that take one’s breath away”).

72. See, e.g., LIEVEN, *supra* note 44, at 102-103. A Punjab police officer stated:

Family and clans here stick together, so if you really want to arrest one person here and prosecute him successfully, you may need to arrest ten, or threaten to arrest them—the original suspect plus three for perjury, three for bribing the police and judges, and three for intimidating witnesses. And if the family has any influence, the only result will be to get yourself transferred to another district. So I’m afraid that it is often much easier just not to arrest anyone . . . . The police and courts have to judge between them on the basis of evidence, every bit of which is probably false in one direction or another. So either the case goes on forever, or it is resolved in favor of which side has more power and influence. If it is an especially bad case and you are sure of what happened, you may be able to bargain with the family or with local politicians to give you the man you want. But then of course you will have to give them something in return, or let one of their members off in some other case. That is typical give and take.

Id.

- (4) the inability of prosecutors to coordinate with the police, analyze the cases, and effectively advocate in court,<sup>74</sup>
- (5) contaminated crime scenes and the absence of scientific evidence collection methods,<sup>75</sup>
- (6) coerced confessions,<sup>76</sup>
- (7) a lack of admissible evidence in the many cases wherein intelligence agencies allegedly illegally detain suspects before handing them over to the police,<sup>77</sup> and

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73. According to the annual Transparency International (TI) National Corruption Perception Surveys, Pakistan's police and lower courts continuously rank among the most corrupt institutions in the country. *Global Corruption Barometer 2013*, TRANSPARENCY INT'L, <http://www.transparency.org/gcb2013/country?country=Pakistan> (last visited Nov. 18, 2014); see also *Pakistan Country Profile*, BUS. ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/south-asia/pakistan/corruption-levels/judicial-system.aspx> (last visited Nov. 18, 2014); *Pakistani Judicial System Groans Under Corruption, Volume of Cases*, *supra* note 63 ("Then there's the court that deals only with anti-corruption cases. He said he can't get anything done there without paying bribes. 'This is disastrous for our lower courts. Corruption is at peak in that court.'" (quoting a defense attorney in Rawalpindi)). Beyond corruption, the incompetence of the lower judiciary is often cited. The recent naming of a nine-month-old boy as an accused in a First Information Report (FIR) for attempted murder and attacking a police raiding team, after the boy allegedly picked up a stone and threw it at police, provoked widespread ridicule and focused attention on the utter lack of efficiency and competence of both the police and the lower judiciary. The magistrate, rather than dismissing the FIR, granted bail. *Case Against Nine-Month-Old Quashed*, DAWN (Apr. 12, 2014), <http://www.dawn.com/news/1099386/case-against-nine-month-old-quashed>; see also LIEVEN, *supra* note 44, at 109-10 ("One key aspect of both of the incompetence of the judiciary and the alienation of the mass of the population from the judicial system is that, owing . . . to the British Raj, the [court] system is conducted mainly in English. . . . [T]he overwhelming majority of the population [does] not understand English . . . . [N]either do many of the system's staff.").

74. See *infra* Part VI.

75. See Hameed, *supra* note 68, at 37 ("Pakistan's police force is under resourced, poorly trained, badly paid, low in morale, and viewed with suspicion by the courts and society because of its poor human rights record. Most police are regarded as corrupt, inefficient, and unprofessional. There are minimal forensic facilities or modern equipment to assist them in doing their job."). Police training in evidence collection is negligible. *Id.*

76. See, e.g., LIEVEN, *supra* note 44, at 106 ("I am trying to introduce finger printing, forensic examination, and so on, but there is a cultural problem. The response of the ordinary [station house officer] is, 'Oh, this is just another hobby-horse of our over-educated senior officers. I prefer the reliable method: put the suspect on the mat and give him a good kicking. Then he'll tell us everything.'" (quoting a Punjab Senior Police Officer)).

77. Bokhari, *supra* note 67, at 31-32. "[W]hen the suspected militants are removed from the scene of the crime . . . since the police were not the ones who captured the terrorists they do not get to inspect the scene of the crime, recover weapons[,] or prepare the traditional recovery memo. Their only source of evidence becomes the eyewitness accounts of the military personnel who captured them and any evidence provided by them." *Id.* at 32. This negatively affects the sufficiency of the evidence to such a severe degree that any competent defense attorney can use these weaknesses to successfully argue for bail, dismissal of the charges, or a mild sentence. "The whole process of capturing a militant by the Armed Forces then becomes useless." *Id.* The acquittals worry the Pakistani army, which has lost thousands of men in its battle against militants. Its solution has been to simply hold, without trial, the militants who were captured during the 2009 operations in the Swat Valley. See *id.* at 14-15. Further, the army reportedly systematically engages in the human rights violation of "enforced disappearances." Currently,

- (8) the lack of credible witness protection programs, resulting in witnesses refusing to testify or suddenly withdrawing their testimony.<sup>78</sup>

These factors are deeply rooted in the judicial system.<sup>79</sup> But, as will be discussed, many district prosecutors today are taking a more active role in working with the police in an attempt to produce higher quality investigations that are conducted within the rule of law.<sup>80</sup> It is axiomatic

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there are around 1,000 persons missing from Khyber Pakhtunkhwa (KPK) province and 2,500 missing from Balochistan, both bordering Afghanistan. Most of those missing persons allegedly were arrested in Pakistan by the security forces for abetting Taliban/al-Qaeda fighters or providing logistical help. *Pakistan: The Country Has Turned into a Killing Field*, ASIAN HUM. RTS. COMMISSION 15-17, 20 (Dec. 9, 2013), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-230-2013http://reliefweb.int/sites/reliefweb.int/files/resources/AHRC-SPR-005-2013-HRRpt-Pakistan.pdf>; see also *State of Human Rights in 2013*, *supra* note 56, at 70-72; *Analysis: Pakistan's Judges and Military Clash over Rule of Law*, DAWN (Dec. 9, 2013), <http://www.irinnews.org/report/99293/analysis-pakistan-s-judges-and-military-clash-over-rule-of-law>.

78. Bokhari, *supra* note 67, at 36 (“A prominent case to mention here is the murder of the GEO TV reporter Wali Khan Babar in January 2011. The investigators of this case felt immensely threatened and four of the victims linked to this case, who could provide credible testimony, were murdered. Over the course of the court proceedings, all the witnesses for the case were killed and the reason was that the Sindh government had not formulated the witness protection program demanded by the Supreme Court long ago.”); see also Ebrahim, *supra* note 70 (“Haider Ali . . . was killed by assailants who had barged into his house in Soldier Bazaar area. ‘The suspects brought a box of sweets to the victim’s house. When his wife opened the door they barged in and shot Ali twice in the head.’ [He was] the sixth and last witness to the murder of journalist Wali Khan Babar.”).

79. See Jim Lobe, *Rule of Law Prospers Most in Sweden, Least in Pakistan*, TRUTHOUT ARCHIVES (Oct. 15, 2010), <http://www.truth-out.org/archive/item/92338-rule-of-law-prospers-most-in-sweden-least-in-pakistan>; see also *The Country Has Turned into a Killing Field*, *supra* note 77 (“Pakistan’s criminal justice system is deeply flawed, inefficient, and corrupt. It is not independent, and investigators and prosecutors lack the resources, training, and security for successful prosecutions. Every time the criminal justice system is circumvented, it becomes weaker and irrelevant, and the culture of impunity that thrives in its place fuels further cycles of consequence-free violence and crime. Law-enforcement agencies are not equipped to gather forensics and other evidence, while intimidation and political intervention make guilty verdicts a rarity. As a result of this ineffective criminal justice system’s failure to end the culture of impunity, Pakistanis remain at the mercy of those state and non-state actors who resort to violence as a means to secure power.”).

80. For the police to deliver a high quality investigation within the rule of law is indeed a challenge. As noted by Columbia University Professor Hassan Abbas in his papers on the subject of Pakistani police reform, Pakistan’s police system suffers severe deficiencies in a number of areas, including equipment, technology, personnel, training, and intelligence capability. The police allegedly regularly use torture to elicit confessions because they lack other more sophisticated means of investigation. Pakistan’s forensics capabilities for the most part are rudimentary, at best. In the rural areas of Pakistan, the police allegedly register false cases in return for money. Similarly, the police allegedly will accept bribes from influential members of society not to lodge FIRs. The political will needed to address these issues is largely missing. Besides a poor public image (the average Pakistani citizen does not trust the police), both the police leadership and the rank and file appear to lack a sense of accountability to the public they are meant to serve. Critics contend that command-level officers are often chosen on the basis of

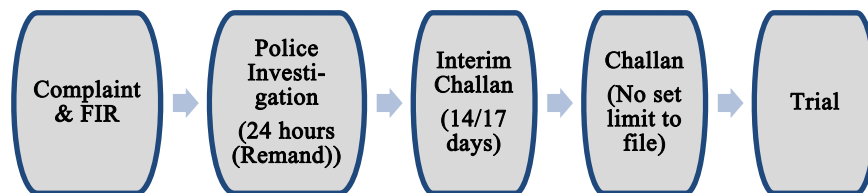


that as prosecutorial intervention with the police occurs with more frequency, the conviction rate rises.<sup>81</sup>

The institutional delays and low conviction rate caused by an overburdened system would be of no help in the Davis matter, however. The Justice Ministry set up a special sessions court inside Kot Lakhpat Jail.<sup>82</sup> The judge appointed to the case ruled that the time limits of the Pakistani Criminal Procedure Code (CrPC) would be strictly followed. No postponements or adjournments would be tolerated.<sup>83</sup> To understand the uniqueness of this ruling, a synopsis of the Pakistani investigative and court process follows.

#### V. THE POLICE INVESTIGATIVE AND COURT PROCESS—THE CRPC

The flow chart outlines the process laid out by the Code of Criminal Procedure (Act V of 1898), as amended.<sup>84</sup>



- *Complaint:* Anyone, including a police officer, who knows about the commission of a “cognizable offense,”<sup>85</sup> can make an oral or

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their willingness to comply with illegal orders, flout the law, or harass political opponents. The harsh treatment meted out to lower-ranking police officers by supervisors and, conversely, the lack of punitive action against higher-ranked officers is likewise demoralizing. Moreover, observers contend, the system simply is not structured to reward good behavior, as merit-based opportunities for professional advancement are scarce, low pay is the norm, and a lack of support and resources compels even many well-intentioned officers to misuse their authority in order to survive. See Hassan Abbas, *Executive Summary and Report Findings, in Stabilizing Pakistan Through Police Reform*, ASIA SOCIETY 12 (Hassan Abbas ed., July 2012), [http://asiasociety.org/files/pdf/as\\_pakistan\\_police\\_reform.pdf](http://asiasociety.org/files/pdf/as_pakistan_police_reform.pdf); Afzal Ali Shigri, *Police Corruption and Accountability, in Stabilizing Pakistan Through Police Reform, supra*, at 24-25. An analysis conducted by some pro-reform police officers concluded that nothing short of a “cultural transformation” in the police institutions would bear any fruit. Hassan Abbas, *Special Report: Reforming Pakistan’s Police and Law Enforcement Infrastructure: Is It Too Flawed to Fix?*, U.S. INST. PEACE 6-9 (Feb. 2011), <http://www.usip.org/sites/default/files/resources/sr266.pdf>.

81. See, e.g., *Prosecutors Told To Improve Efficiency*, DAWN (July 26, 2013), <http://www.dawn.com/news/1031971/prosecutors-told-to-improve-efficiency>.

82. See *Court Rejects Davis’s Plea for Immunity; Trial To Go Ahead*, DAWN (Mar. 3, 2011), <http://www.dawn.com/news/610528/court-rejects-daviss-plea-for-immunity-trial-to-go-ahead>.

83. *Id.*

84. UNODC, *supra* note 62, at 23; see also PAK. CODE CRIM. PROC.

written complaint at a police station. Because anyone with “knowledge” can make the complaint, this has led to an epidemic of false oaths to carry out personal vendettas and family feuds, which has contributed to clogging the court system.<sup>86</sup>

- *First Information Report (FIR)*: The police are required by the CrPC to write the particulars of the complaint into an official document called the First Information Report, which is filed with the magistrate.<sup>87</sup> The recorded FIR then automatically sets the process of criminal justice in motion.<sup>88</sup>
- *Remand (pretrial confinement)*: If the accused has been arrested and detained, which can be done at any time after the filing of the FIR, s/he must be brought before a magistrate within twenty-four hours to determine whether, prima facie, there are grounds for a case.<sup>89</sup> This process is more often than not honored in the breach. Magistrates commonly order a physical custody remand to a jail without even seeing the accused.<sup>90</sup> After a *challan* (see below) is filed, the accused is transferred to a prison under judicial remand, and is again eligible for bail (unless it is a nonbailable offense), which is likewise seldom granted.<sup>91</sup>
- *Police Investigation*: Upon the filing of the FIR, the investigative branch of the police begins the police investigation.<sup>92</sup> The poor quality of police investigations, due both to a lack of police training and the unwillingness of witnesses and even victims to become involved, are major factors contributing to defective *challans*.<sup>93</sup>

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85. A cognizable offence is one in which the police may arrest a person without a warrant. The police are authorized to start an investigation into a cognizable case on their own and without a court order. PAK. CODE CRIM. PROC. §§ 4(f), 156.

86. LIEVEN, *supra* note 44, at 89. Lieven explains: “[Perjuring oneself] to help or avenge . . . kinsmen . . . is not seen as immoral, or . . . illegal. On the contrary, it takes place in accordance with an overriding moral imperative and ancient moral ‘law,’ that of loyalty to kin.” *Id.* Courts do not swear witnesses on the Koran when giving evidence. By making the oath civil in nature, religion cannot be brought into disrepute when witnesses lie. *Id.* at 103.

87. *Asia Report N°196, supra* note 12, at 11.

88. PAK. CODE CRIM. PROC. § 154.

89. *Id.* § 61.

90. *Asia Report N°196, supra* note 12, at 11.

91. *Id.*

92. *Id.* at 14.

93. USAID, *supra* note 43, at 26. The mid-level police investigators who conduct the investigations make up only 13% of the force, are usually overworked, and often lack investigative skills. In Lahore, an overall case load of 3,000 investigations per month is common, typically divided between no more than ten investigators. Investigating officers seldom write their own investigation reports; generally, a constable prepares them by hand. The report is based on the IO’s notes although the constable rarely accompanies the IO to the crime scene or other locations where evidence is collected and statements recorded. Unqualified translators record witness

Although the officer-in-charge of the relevant police station has the discretion to close a file without ever sending it to court if it appears that the case is weak or flawed,<sup>94</sup> this is rarely done. Under President Bhutto's 1972 law reforms, private parties can go straight to the courts to register a case if the police fail to file a *challan*.<sup>95</sup> CrPC section 173 states that the police investigation "shall be completed without unnecessary delay," a period contemplated by section 173 to be fourteen days from the filing of the FIR. At the fourteen-day mark, section 173 requires the police to file a *challan* with the magistrate.<sup>96</sup>

- *Challan*: The *challan* is the indictment, a case brief that includes both the investigative report and a charge sheet that identifies the parties and witnesses, the nature of the offenses, and information relating to the accused.<sup>97</sup> Of note, the *challan* is to be sent to the court "through the Public prosecutor".<sup>98</sup> But if the investigation is not completed within the mandated fourteen days, the police have three days to forward an interim *challan* to the court.<sup>99</sup> The final *challan* is then to be filed once the investigation is complete.<sup>100</sup> In practice, the phrase "unnecessary delay" has lost all meaning. The police investigations often take months or even years to complete.<sup>101</sup> And, more often than not, the filing of the final *challan* does not even happen in practice, resulting in interim *challans* that are left pending before the courts.<sup>102</sup> But, even when the final *challans* are filed, many are still of insufficient quality to serve as the basis for a case.<sup>103</sup> Meanwhile, throughout this lengthy process, the accused languish in overcrowded prisons.<sup>104</sup>

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testimonies in two languages. This produces confusing and inaccurate reports, with many criminal lawyers and prosecutors claiming that they can seldom follow the logic of charge sheets. *Id.* Because in many cases the police will indeed submit a (usually flawed) *challan* within the fourteen days, "it's always a rushed job." *Asia Report N°196*, *supra* note 12, at 14.

94. PAK. CODE CRIM. PROC. § 169.

95. This naturally has led to further abuse in the registering of false cases and the turning of private disputes into criminal matters. *Asia Report N°196*, *supra* note 12, at 11-12.

96. PAK. CODE CRIM. PROC. § 173 (emphasis added).

97. UNODC, *supra* note 62, at 23.

98. PAK. CODE CRIM. PROC. § 173.

99. *Id.*

100. UNODC, *supra* note 62, at 23.

101. *Id.*

102. *Id.*

103. USAID, *supra* note 43, at 26; *Asia Report N°196*, *supra* note 12, at 14-15.

104. *State of Human Rights in 2013*, *supra* note 56, at 60-61.

- *Trial*: Upon receipt of the final *challan*, the relevant court takes cognizance of the case and initiates trial proceedings.<sup>105</sup> Trials held in the sessions court must be conducted by a public prosecutor.<sup>106</sup> Prior to the “framing” of the charges (arraignment), the court will entertain dismissal motions and will on its own accord dismiss a case if there are not sufficient grounds to proceed.<sup>107</sup> Absent dismissal, the court will summons the accused for the framing. An accused can plead guilty or not guilty.<sup>108</sup> If the accused wishes to proceed to trial, it will take place in a series of truncated hearings easily lasting a year or more.<sup>109</sup> In 2009, the Supreme Court instituted a “National Judicial Policy,” which required trials to be completed within one year. Although the National Judicial Policy has had some effect, it has fallen short of expectations.<sup>110</sup> The sheer volume of cases, the attorney-requested continuances, and administrative delays—such as the failure to bring prisoners to court on trial dates have derailed the goal of speedy trial.<sup>111</sup> Regardless, the court may acquit an accused at any stage.<sup>112</sup>

But the Davis case would be the rare case that would indeed proceed “without unnecessary delay.” The Punjab police hierarchy decreed that the *challan* would be submitted within the fourteen-day mark.<sup>113</sup> The judge set March 16, 2011, as the day for the framing of the charges—two days after the Zardari government had been ordered to certify whether Davis had full diplomatic immunity. If the Davis matter were not to be dismissed on diplomatic immunity or other legal grounds, the trial would commence with the framing on March 16 and would be completed thereafter as soon as practicable.<sup>114</sup>

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105. PAK. CODE CRIM. PROC. §§ 190-194.

106. *Id.* § 265A.

107. *Id.* § 203.

108. *Id.* §§ 204, 242, 265(4).

109. UNODC, *supra* note 62, at 25.

110. SIDDIQUE, *supra* note 43, at 344 (the Judicial Policy has been constrained by the various limitations of its overbroad rhetoric).

111. UNODC, *supra* note 62, at 24-25.

112. PAK. CODE CRIM. PROC. § 494.

113. *Davis on 14-Day Judicial Remand*, NEWS INT'L (Feb. 18, 2011), <http://www.thenews.com.pk/Todays-News-5-31642-Davis-on-14-day-judicial-remand>.

114. *Trial To Go Ahead*, *supra* note 82.

## VI. THE WEAKNESS OF THE CRIMINAL JUSTICE SYSTEM—THE PROSECUTORS

Summing up the hopelessness, he added: “The prosecutor’s office works like a post office.”<sup>115</sup>

—Antiterrorism prosecutor in Rawalpindi (Punjab)

Until 2002, the prosecution services were part of the police forces and came under the provincial Home Departments.<sup>116</sup> Each provincial force maintained its own prosecution wing, comprised of uniformed police officers with law degrees.<sup>117</sup> By 2006, however, the Pakistani provinces had each passed their own version of a “Criminal Prosecution Service Act” to establish “an independent, effective, and efficient service for prosecution of criminal cases.”<sup>118</sup> But, while working for the police has somewhat of an aura of prestige in Pakistan, working for the fledgling prosecutorial services traditionally has not.<sup>119</sup> Prosecutors in some districts must function without access to any kind of office. Libraries, filing systems, administrative support, and computer access are effectively nonexistent.<sup>120</sup> The money available to pay salaries or allowances to prosecutors has been insufficient to ensure the interest of

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115. *Acquittals in Terrorism Cases: Prosecuting in Fear*, DAWN (Aug. 14, 2011), <http://www.dawn.com/news/651796/acquittals-in-terrorism-cases-prosecuting-in-fear> (quote attributed to a Punjab prosecutor).

116. Today, the Prosecution Services in Punjab and Sindh fall under the Ministry of Law; in Balochistan, the Prosecution Service falls under its own Ministry, the Ministry of Prosecutions. However, the Khyber Pakhtunkhwa’s (KPK) Prosecution Service, although no longer a part of the police forces, is still under the Home Department. The KPK Act is clear that the Prosecution Service is under the “administrative control of Government,” namely the Home and Tribal Affairs Department. The Service is headed not by a Prosecutor General, as in the other three provinces, but by a Director General of Prosecution. In contrast to the appointment procedures in the other provinces, the KPK Director General of Prosecution is promoted from amongst the prosecutors or transferred from other justice-related offices. See The North-West Frontier Province Prosecution Service (Constitution, Functions and Powers) Act, 2005, arts. 2(e)-(f), 3(3), r. 5 (2005), available at [http://issuu.com/qazihussainahmad/docs/khyber\\_pakhtunkhwa\\_province\\_prosecution\\_act/1](http://issuu.com/qazihussainahmad/docs/khyber_pakhtunkhwa_province_prosecution_act/1).

117. *Asia Report N°196*, *supra* note 12, at 17.

118. See, e.g., The Punjab Criminal Prosecution Service (Constitution, Functions, and Powers) Act 2006, No. 3 of 2006, GAZETTE PAK. EXTRAORDINARY, Apr. 8, 2006, available at <http://punjablaws.gov.pk/laws/483.html>.

119. *Acquittals in Terrorism Cases*, *supra* note 115 (“They work in fear, without adequate administrative support, and wistfully look at the defense lawyers facing them who are making millions and becoming media savvy.”); see also Waris Husain, *The Power of Prosecution*, DAWN (Nov. 14, 2011), <http://www.dawn.com/news/673176/the-power-of-prosecution>.

120. *Acquittals in Terrorism Cases*, *supra* note 115; Husain, *supra* note 119 (“The problem of under-funded and ill-equipped prosecutors has been developing for several generations.”).

the highest quality of lawyers.<sup>121</sup> A custodian at the high court draws a larger salary than a district prosecutor.<sup>122</sup>

Although no longer under the Home Departments (except in Khyber Pakhtunkhwa), and thus effectively independent of the police, these new prosecutors have found it difficult to achieve the level of *gravitas* needed to assert the authority that prosecutors take as a matter of course elsewhere in the world.<sup>123</sup> The interpretation of the term “through” in CrPC section 173 (stating that the *challan* is to be forwarded to the court “through the public prosecutor”) soon became, and still is today, the subject of disagreement. The police, who did not want to lose their historical control, maintain that this “forwarding through” mandate is merely for informational purposes.<sup>124</sup> The judges—who want to ease the docket overloading caused by flawed cases in the system—have tried to impress upon the prosecutors that the term means that the prosecutors have the discretion to analyze and reject weak cases.<sup>125</sup>

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121. *Acquittals in Terrorism Cases*, *supra* note 115; Husain, *supra* note 119 (“Without proper incentives, the prosecutorial offices have not attracted the highest caliber of lawyers which has been one of many reasons for a lack of convictions.”).

122. *See Refresher Course: Govt Urged To Increase Prosecutors’ Salary*, EXPRESS TRIB. (July 16, 2013), <http://tribune.com.pk/story/577465/refresher-course-govt-urged-to-increase-prosecutors-salary/> (As stated by the Punjab Prosecutor General: “I propose that the salaries of prosecutors be brought on par with those of High Court employees . . . . It is lamentable that the role of prosecutors in our criminal justice system is akin to the role of a postman. In countries where prosecutors are provided with necessary facilities, conviction rates are much higher.”). Under the Punjab Public Service Commission’s 2011 pay scales, which are still currently in effect, a district prosecutor is ranked at a level of BS-17, which pays a starting salary of \$165 per month and is capped at a lifetime maximum of \$410 per month. Prosecutors are also given \$50-\$75 per month in allowances towards housing and medical expenses. Supervisors and high court advocates are ranked at the next level, BS-18, which pays a monthly salary range of \$205-\$510. The Prosecutor General is a BS-19, which pays \$315-\$642. The Prosecutor Generals are political appointees and view their role as a public service commitment of normally three years away from the private practice of law. They will subsist not off their salary, but rather off personal wealth or accumulated prior income. The highest possible civil service rank is BS-22, which pays \$440-\$875. Office Memorandum from Fin. Div., Gov’t of Pak., MINISTRY OF FIN., GOV’T OF PAK. 8 (July 4, 2011), [http://www.finance.gov.pk/circulars/revised\\_pay\\_scale\\_2011.pdf](http://www.finance.gov.pk/circulars/revised_pay_scale_2011.pdf).

123. *Acquittals in Terrorism Cases*, *supra* note 115; Husain, *supra* note 119; *see also Asia Report N°196*, *supra* note 12, at 18.

124. *DPO, District Prosecutor Lock Horns over Disposal of Cases*, DAWN (July 6, 2009), <http://www.dawn.com/news/948745/dpo-district-prosecutor-lock-horns-over-disposal-of-cases>; *see also* Farooq, *supra* note 70; Alex Rodriguez, *Pakistani Criminal Justice System Proves No Match for Terrorism Cases*, L.A. TIMES, Oct. 28, 2010, *available at* <http://articles.latimes.com/2010/oct/28/world/la-fg-pakistan-acquittals-20101028> (describing the “antiquated judicial procedures that don’t allow prosecutors to reject flimsy, poorly investigated cases”); Mohib Asad, *The Criminal Justice System, in Stabilizing Pakistan Through Police Reform*, *supra* note 80, at 22 (“The situation is indicative of a turf war between the prosecution and the police.”).

125. *See DPO, District Prosecutor Lock Horns over Disposal of Cases*, *supra* note 124. Even before the decisions from the High Court of Sindh and the Supreme Court of Pakistan were rendered, *infra* notes 135 and 136, high court judges urged prosecutors to stand up to the police

Either as a result of inability, unwillingness, or both, the prosecutors have found it difficult to assert their authority and to compel the police to collect further evidence in the ubiquitous weak cases.<sup>126</sup> As stated by the antiterrorism prosecutor in Rawalpindi, “the prosecutor’s office works like a post office,” which meant that prosecutors simply delivered *challans* to court without ever having reviewed the attached investigative reports.<sup>127</sup> Although prosecutors now had the statutory power to reject cases for factual and legal flaws, their institutional mindset told them that doing so would subject them to criticism.<sup>128</sup> A self-defeating pattern of conduct took root and became an ever-vicious circle: with highly flawed investigations clogging the judicial system, prosecutors were so busy that they rarely spoke to witnesses until the case came to court. In turn, that undermined the prosecutors’ effectiveness against the defense.<sup>129</sup> The result was a low conviction rate that undermined the prosecutors’ self-confidence and made them more dependent on the police.<sup>130</sup>

The Prosecutor Generals who head the provinces’ prosecution systems are internationally educated defense attorneys and/or former high court judges. Their rank-and-file prosecutors may not always be from the first rank of lawyers, but they themselves are.<sup>131</sup> The Prosecutor Generals have endeavored over the past few years to change the services’ institutional outlook, in part by having their prosecutors attend international prosecutorial training programs.<sup>132</sup> And indeed, once the

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and scrutinize case files so that factual and legal lacunae would be addressed before the cases were filed in court. See, e.g., *Special Prosecutor To Assist Investigators*, PAK. GENDER NEWS (Feb. 22, 2007), <http://www.pakistangendernews.org/special-prosecutor-to-assist-investigators/>.

126. Farooq, *supra* note 70.

127. *Acquittals in Terrorism Cases*, *supra* note 115.

128. *Asia Report N°196*, *supra* note 12, at 18.

129. See, e.g., UNODC, *supra* note 62, at 51.

130. See *Acquittals in Terrorism Cases*, *supra* note 115; see also Rodriguez, *Pakistani Criminal Justice System*, *supra* note 124.

131. See Intikhab Hanif, *Still No Prosecutor General in Punjab*, DAWN (Jan. 3, 2014), <http://www.dawn.com/news/1078096>.

132. Pakistan was the largest recipient of British bilateral aid in 2013, which is administered by the UK Department for International Development (DfID). *Statistics on International Development*, DEP’T FOR INT’L DEV. (Oct. 2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368798/SID-2014a.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368798/SID-2014a.pdf). The government of Germany’s *Gesellschaft für Internationale Zusammenarbeit* (German Agency for International Technical Cooperation) (GIZ) has maintained a country office in Pakistan since 1990. At present, there are around 40 international and more than 300 national staff working for GIZ in Pakistan. *Pakistan*, GIZ, <http://www.giz.de/en/worldwide/362.html> (last visited Nov. 18, 2014). The U.S. State Department’s Bureau for International Narcotics and Law Enforcement (S/INL) administers an extensive train and equip program for law enforcement. This includes a rule of law component to improve the professional capacity of prosecutors through case analysis and trial skills training, promote police and prosecutor collaboration, strengthen judicial reforms, and strengthen counterterrorism efforts. These programs focus on international legal standards, drawing on,

prosecutors became imbued with international views on prosecutorial discretion,<sup>133</sup> some districts started challenging the police by either sending back *challans* under CrPC section 173 or refusing to prosecute the cases at trial under section 494.<sup>134</sup>

Naturally, the police fought back. In Karachi, upon a district prosecutor's refusal to proceed to trial with a flawed case, the police filed a writ of mandamus to force the Sindh Prosecutor General to prosecute the case.<sup>135</sup> But the High Court of Sindh ruled against the police, holding that CrPC sections 173 and 494 gave the prosecutor the discretion to scrutinize case files and reject flawed cases. To no avail, the police appealed to the Supreme Court; it affirmed the high court.<sup>136</sup>

Although the Supreme Court's *Sindh* decision was revolutionary, ingrained practices are not easily erased. The concept of prosecutorial deference to the police is still deeply entrenched and continues to stymie the potential effectiveness of the prosecution services.<sup>137</sup> As such, at the time, there was no question that Davis would indeed be charged in a filed *challan*.<sup>138</sup>

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among other sources, the U.N. conventions on transnational crime and terrorism. *Pakistan Rule of Law*, U.S. DEP'T ST. (Nov. 23, 2011), <http://www.state.gov/j/inl/rls/fs/177705.htm>.

133. Imtiaz Gul, *Burden of Proof*, FRIDAY TIMES (Jan. 17, 2014), <http://www.thefridaytimes.com/tft/burden-of-proof/> ("The first major step of a new counterterrorism strategy should be an independent, well-prepared and matter-of-fact prosecution. Several foreign donors have ventured into improving policing and prosecution services . . . carrying out professional trainings and exposure trips based on the primary assumption that only effective, informed and independent prosecution can take a breach of law to its logical conclusion."). *But see* Ansar Abbasi, *Shahbaz Again Rejects US Aid Till Drones Stop*, NEWS INT'L (Nov. 25, 2013), <http://www.thenews.com.pk/Todays-News-13-26868-Shahbaz-again-rejects-US-aid-till-drones-stop> ("[W]e have been refusing to accept U.S. aid of hundreds of millions of dollars for the last two and half years and would continue to do so to register our protest against Washington's drone policy").

134. With the consent of the court, a district prosecutor may withdraw from the prosecution at any point before the judgment is pronounced. If that is done before the charge has been framed, the accused will be discharged; if it is done after the charge has been framed, then the accused is acquitted. PAK. CODE CRIM. PROC. § 494; *see Directive Issued To Streamline Prosecution of Militants*, DAWN (Oct. 18, 2011), <http://www.dawn.com/news/667094/directive-issued-to-streamline-prosecution-of-militants-2> ("All the police stations have to submit [the FIRs] and the prosecutors have to examine the same and inform the police about any deficiency").

135. *Junejo v. State*, (2010) SBLR (HC Sindh) 306 (Pak.).

136. *Province of Sindh through Secretary of Sindh v. Prosecutor General of Sindh*, (2012) 45 SCMR (SC) 307 (Pak.).

137. Intikhab Hanif, *Promotion Anomalies Dispirit Prosecutors*, DAWN (Jan. 13, 2014), <http://www.dawn.com/news/1080208/promotion-anomalies-dispirit-prosecutors> ("Punjab demands high rate of conviction from its team of prosecutors but they are so dissatisfied with their defective service structure that many are leaving. The lack of power to supervise the investigation of cases and to reject those not worthy of going to trial is a second major problem. They pursue cases that they know they will lose, wasting their and the court's time, besides the taxpayers' money").

138. *See* Gul, *supra* note 4.



VII. THE WEAKNESS OF THE CRIMINAL JUSTICE SYSTEM—THE ATTORNEYS

What distinguished the onslaught from the everyday assault and battery in this chaotic city [Lahore] of 10 million was what the [attackers] were wearing: black suits, white button-down shirts and black ties. They were lawyers, meting out the kind of street justice you'd expect to see in a barrio back alley.<sup>139</sup>

—*Los Angeles Times*

There are a number of high-quality law schools in Pakistan.<sup>140</sup> In other law schools, however, most law courses consist of a lecturer presenting the relevant codes and students committing them to memory.<sup>141</sup> Legal skills—analytical reasoning, critical thinking, research and writing, and advocacy—are not incorporated into the curriculum.<sup>142</sup> As a result, graduates of those schools—both lawyers and judges—enter their respective professions with a low knowledge base, little understanding of specialized areas of the law, and virtually no practical skills.<sup>143</sup>

Professor Siddique notes that, in many countries, professional pride, commitment to high professional and ethical standards, and a desire to restrict the number of practicing attorneys all ensure that bar entry standards are high. But, he argues, this is not so in Pakistan.<sup>144</sup> Rather, he asserts, the governing councils of the various Pakistani bars have historically acted as political party strongholds or platforms for personal career advancement.<sup>145</sup> Election to bar offices is sought for purposes of political leverage and public perception of influence.<sup>146</sup> Professor

139. Alex Rodriguez, *No Joke, These Pakistani Lawyers Are Thugs*, L.A. TIMES (Sept. 8, 2009), <http://articles.latimes.com/2009/sep/08/world/fg-thug-lawyers8>.

140. USAID, *supra* note 43, at 29. There are private law colleges in Lahore that are working admirably on bridging the gap between an international and local legal education. Of particular note are the Pakistan College of Law, the Quaid-e-Azam Law College, and the LUMS Shaikh Ahmad Hassan School of Law. See PAK. COLL. L., <http://www.pcl.edu.pk/> (last visited Nov. 18, 2014); QUAID-E-AZAM LAW COLL., <http://qlc.edu.pk/> (last visited Nov. 18, 2014); LUMS SHAIKH AHMAD HASSAN SCH. L., <http://lums.edu.pk/sahsol/index.php> (last visited Nov. 18, 2014).

141. USAID, *supra* note 43, at 27.

142. *Id.* at 28.

143. *Id.*; see also Maira Sheikh, *Evolving Law and Lawyer*, DAWN (Nov. 4, 2013), <http://www.dawn.com/news/1053974/evolving-law-and-lawyer> (“While a burgeoning legal community is something of which to be proud, the uninterrupted production of hastily educated and ill-prepared lawyers is increasingly problematic.”).

144. Osama Siddique, *Legal Education in Pakistan: The Domination of Practitioners and the “Critically Endangered” Academic*, 63 SW. U. J. LEGAL EDUC. 499, 504-05 (2014), available at <http://www.swlaw.edu/pdfs/jle/jle633siddique.pdf>.

145. *Id.* at 504.

146. *Id.*

Siddique observes that in order to maintain a ready pool of retainers willing to turn out on the street to beat journalists, police, and even district court judges,<sup>147</sup> the bar councils have purposefully kept both professional entrance standards and ethical regulations at a low level.<sup>148</sup> Correspondingly, the increasing supply of poorly trained law graduates has reinforced a lack of interest in, if not defiance to, raising standards.<sup>149</sup> To this day, there are no credible bar examinations, no continuing legal education or professional development programs, and no internal disciplinary mechanisms.<sup>150</sup>

To be sure, there are a small number of highly respected and sought-after lawyers, but they almost invariably have had international training or experience and work in firms.<sup>151</sup> These lawyers frequently complain that they must educate the judges, prosecutors, and other members of the bar on basic areas of the law.<sup>152</sup> In any given large district, there are five to ten leading trial lawyers. Defendants who can afford to, or who have been accused of serious crimes, will seek to engage them.<sup>153</sup>

#### VIII. THE WEAKNESS OF THE CRIMINAL JUSTICE SYSTEM—SECURITY

Our lives are at stake.<sup>154</sup>

—Antiterrorism prosecutor in Karachi

The Anti-Terrorism Act passed in 1997 states that the government has to provide security to judges, prosecutors, lawyers, and witnesses.<sup>155</sup> In practice, none is provided.<sup>156</sup> Terrorists have not hesitated to launch

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147. Attorneys will barricade the courthouse and battle the police. *See, e.g., Lawyers, Police Thrash Each Other in Front of Supreme Court*, PAKTRIBUNE (Nov. 27, 2013), <http://paktribune.com/news/Lawyers-police-thrash-each-other-in-front-of-SC-264842.html>; *see also* Rodriguez, *No Joke*, *supra* note 139; *Lawyers Thrash Policeman*, DAWN (April 13, 2014), <http://www.dawn.com/news/1099512/lawyers-thrash-policeman>; *Lawyers Thrash Policeman in Court in Pakistan*, HINDUSTAN TIMES (Mar. 30, 2012), <http://www.hindustantimes.com/world-news/lawyers-thrash-policeman-in-court-in-pakistan/article1-832909.aspx>.

148. Siddique, *supra* note 144, at 504.

149. *Id.*

150. *Id.*

151. *Id.* at 505-06; USAID, *supra* note 43, at 28.

152. USAID, *supra* note 43, at 28.

153. *Asia Report N°196*, *supra* note 12, at 9.

154. Rania Abouzeid, *Pakistan Terror Prosecutors Beg for Defense*, TIME (Nov. 30, 2010), <http://content.time.com/time/world/article/0,8599,2033594,00.html> (quote attributed to a Sindh prosecutor).

155. The Anti-Terrorism (Amendment) Ordinance, No. 21 of 2009, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 1, 2009.

156. Koster, *supra* note 10; *see, e.g., Drive-By: District Judge Escapes Attempt on Life*, EXPRESS TRIB. (Sept. 30, 2014), <http://tribune.com.pk/story/769021/drive-by-district-judge->

assaults on the courts, as seen most recently with the March 3, 2014, suicide bomb and firearm attack at the district court complex in Islamabad that resulted in eleven deaths and the wounding of twenty-eight other people.<sup>157</sup> Critically, those who testify against powerful criminals and militants in courts receive no security.<sup>158</sup> In dozens of cases, police officers investigating militants have been gunned down.<sup>159</sup>

It is important to recognize, despite the criticisms that have been leveled by many against the Pakistani criminal justice system, a number of police, prosecutors, and judges have acted with great courage, oftentimes at grave personal risk. The prosecutor investigating the separate cases of the Benazir Bhutto murder and the seven members of the Pakistani Taliban suspected of planning and executing the 2008 attacks in Mumbai, India, was shot and killed last year on his way to work in Islamabad.<sup>160</sup> But the general lack of security opens the way for the accused and their supporters to intimidate prosecutors, lawyers, and judges. In two high-profile cases, prosecutors in Karachi refused to present their case against militants because they were threatened.<sup>161</sup>

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escapes-attempt-on-life/ (describing two unidentified motorcycles opening fire on the judge's car and the judge narrowly escaping).

157. Tahir Khan & Waqas Naeem, *Mayhem in the Capital: Gun-and-Suicide Attack Kills 11 at District Courts*, EXPRESS TRIB. (Mar. 4, 2014), <http://tribune.com.pk/story/678653/mayhem-in-the-capital-gun-and-suicide-attack-kills-11-at-district-courts/>.

158. Abbas, *supra* note 80, at 12.

159. *Id.*; see also *Pakistan's Judicial Discrepancies*, TACTICAL KNOWLEDGE FOR STRATEGIC DEV. (TACSTRAT) (Nov. 4, 2013), <http://tacstrat.com/content/index.php/2013/11/04/pakistans-judicial-discrepancies/> ("The fact that witnesses, policemen, and even judges can be killed by assassins and terrorists makes it difficult if not impossible to implement the process of justice in an equitable and fearless manner . . . . [A] large number of policemen in Karachi, Peshawar, and all over Pakistan in fact, have been killed: for instance, almost all policemen involved in the investigation of the journalist Wali Babar murder case were themselves systematically assassinated . . . . While policemen and soldiers are unsafe, witnesses are not secure either. . . . [A]nd effective witness protection is still a dream rather than a reality in Pakistan . . . . [E]ven senior members of the judiciary do not feel safe, especially when prosecuting terrorists, religious extremists, and known right-wing radicals and conservative icons of Pakistani society.")

160. *BB Murder Case Prosecutor Shot Dead in Islamabad*, DAWN (May 3, 2013), <http://www.dawn.com/news/795313/bb-murder-case-prosecutor-shot-dead-in-islamabad>.

161. See Abouzeid, *supra* note 154. Of the two cases, one involved alleged members of the Taliban who attacked a police investigator; the other involved suspected al-Qaeda sympathizers implicated in the kidnapping and murder of a man who ran a fuel-tanker service for NATO forces in Afghanistan. Both trials were permanently adjourned as a result. The two prosecutors had been verbally and physically threatened in court by the defendants. The two prosecutors routinely received death threats on their cell phones and warnings not to produce evidence against certain defendants. A defendant told one of the prosecutors that he knew how many windows there were in his apartment and how many children he had. The Sindh Prosecutor General agreed that the prosecutors' demands for security were justified, but the police simply did not have the manpower to protect them. Even the judge, who was provided with an armed escort when he traveled to and from court, said he did not feel safe. *Id.*

Courtrooms and the chambers of judges who issue unpopular opinions are often ransacked by disgruntled attorneys.<sup>162</sup> Physical assaults by attorneys on judges, particularly in Punjab, occur with distressing regularity.<sup>163</sup> Defense attorneys have actively assisted their clients in escaping from custody during hearings at the courthouse.<sup>164</sup> Consequently, some judges, concerned for their own safety, will simply just acquit the accused.<sup>165</sup>

#### IX. DEFENSE DISMISSAL MOTION

As previously noted, the sessions court set the Davis case for hearing on March 16. That day, barring certification of diplomatic immunity from Islamabad, the charges would be framed and the case would proceed directly to trial, either with a retained lawyer or state-appointed counsel.<sup>166</sup> As a result of death threats issued by Islamic extremists to anyone helping Davis, apparently lawyers from the first- or second-tier were hesitant to take on Davis' case.<sup>167</sup> The assassination of attorneys who defend unpopular defendants is all too common an occurrence in Pakistan.<sup>168</sup> But a few members of the Lahore High Court Bar Association were not intimidated.<sup>169</sup> A former Prosecutor General of one of the provinces eventually enrolled as counsel of record.<sup>170</sup> He filed several motions with the sessions court to dismiss the *challan*.<sup>171</sup> The

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162. *Lawyers' Behaviour in Courts*, DAWN (Apr. 4, 2012), <http://www.dawn.com/news/708054/lawyers-behaviour-in-courts>; *Pakistani Judge Flees Country After Receiving Death Threat*, DEUTSCHE WELLE (Oct. 26, 2011), <http://www.dw.de/pakistani-judge-flees-country-after-receiving-death-threats/a-6646576>.

163. *Lawyers' Behaviour in Courts*, *supra* note 162; *see also Civil Judge Assaulted by Lawyer in Courtroom*, DAWN (Mar. 19, 2012), <http://www.dawn.com/news/704057/civil-judge-assaulted-by-lawyer-in-courtroom>.

164. *Lawyers Thrash Police at Lahore High Court, Free Fraud Suspect*, DAWN (June 10, 2014), <http://www.dawn.com/news/1111732>; *see also Lawyers Help Suspect Flee*, DAWN (June 26, 2014), <http://www.dawn.com/news/1115144>; *Lawyers Help Eight Suspects Flee Court*, DAWN (Feb. 11, 2014), <http://www.dawn.com/news/1086261>.

165. Bokhari, *supra* note 67, at 36; Koster, *supra* note 10.

166. *Court Rejects Davis's Plea for Immunity; Trial To Go Ahead*, *supra* note 82.

167. *See Money Is Thicker Than Blood*, *supra* note 7 ("Some extremists said they would kill anyone who took the Americans' money?").

168. *See, e.g., Rights Advocate Rashid Rehman Khan Gunned Down in Multan*, DAWN (May 8, 2014), <http://www.dawn.com/news/1104788/rights-advocate-rashid-rehman-khan-gunned-down-in-multan>.

169. The Lahore High Court Bar Association proudly proclaims that it "can look back with satisfaction and pride over its struggle for rule of law, independence of judiciary, and promotion of human rights and civil liberties." *Bar History*, LAHORE HIGH CT. B. ASS'N, <http://www.lhcbar.com/AboutUs/AboutUsOverview/BarHistory.aspx> (last visited Nov. 18, 2014).

170. *Court Rejects Davis's Plea for Immunity; Trial To Go Ahead*, *supra* note 82.

171. *See The Raymond Davis Case: Blood for Money for Blood*, *supra* note 13. According to a Lahore High Court Advocate who was present at the proceedings, one of the

motions, however, were denied.<sup>172</sup> As matters then stood, short of trial, the only legal remedy available to Davis was “*diyat*”—the payment of compensation to victims.<sup>173</sup>

#### X. THE LEGAL FRAMEWORK—INFLUENCES OF COLONIAL BRITAIN AND ISLAM

The generals who had called Zia a mullah behind his back felt ashamed at having underestimated him: not only was he a mullah, he was a mullah whose understanding of religion didn’t go beyond parroting what he had heard from the next mullah. A mullah without a beard, a mullah in a four-star general’s uniform.

—*A Case of Exploding Mangoes*<sup>174</sup>

The Constitution of Pakistan states that “Islam shall be the State religion of Pakistan.”<sup>175</sup> Despite this, the legal system of Pakistan has remained mostly secular.<sup>176</sup> The cornerstones of the criminal justice system, the Pakistan Penal Code, and the Code of Criminal Procedure (CrPC) date back to colonial times. Except for some amendments by military regimes, those laws have been largely untouched since independence in 1947.<sup>177</sup> As a result, the legal system, codes, and procedures are mostly outdated and, arguably, have only added to the various problems plaguing the criminal justice system. Due to their origins, the codes are based in the common law legal tradition.<sup>178</sup> As previously noted, the CrPC reflects an adversarial system, but with trials heard by a judge, not a jury.<sup>179</sup> As with other English codes of the era, the

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defense challenges against the *challan* was that it suppressed exculpatory information, namely that the two victims allegedly had a criminal history and that they had just robbed at gunpoint two other motorists. Telephone Interview with Lahore High Court Advocate (Oct. 2014).

172. See Yasir Habib, *Complicity in Raymond Davis Case—“Prove Me Guilty and I’ll Resign,”* PAK. TODAY (Mar. 29, 2011), <http://www.pakistantoday.com.pk/2011/03/29/national/complicity-in-raymond-davis-case-prove-me-guilty-and-ill-resign/> (“Law Minister Sanaullah said six objections were raised in the *challan* against Raymond Davis, but the court turned them down.”).

173. See *Pakistan Court Avoids Immunity Ruling*, *supra* note 41 (“There has been a suggestion from Pakistani Prime Minister Yousuf Raza Gilani that it could help if compensation was paid to them.”).

174. MOHAMMED HANIF, *A CASE OF EXPLODING MANGOES* 40 (2009) (a satiric novel about the Zia era that won numerous international and Pakistani book awards).

175. PAK. CONST. art. 2.

176. See Martin Lau, *Twenty-Five Years of Hudood Ordinances—A Review*, 64 WASH. & LEE L. REV. 1291, 1294 (2007).

177. *Asia Report N°196*, *supra* note 12, at 2.

178. USAID, *supra* note 43, at 7.

179. PAK. CODE CRIM. PROC. § 28.

role of the police and the judge or magistrate is emphasized over the role of the prosecutor.<sup>180</sup>

The purely secular nature of the system was changed in the 1980s under the regime of General Zia-ul-Haq.<sup>181</sup> Some argue that Zia's attempt to make the legal system of Pakistan more Islamic was based largely on political motives.<sup>182</sup> The enforcement of Sharia became the means by which his military regime could obtain legitimacy and some level of popular support.<sup>183</sup> Scholars and nongovernmental organization (NGO) observers have generally concluded that General Zia-ul-Haq's Islamization of the constitution and laws during the 1980s altered the basic structure of parliamentary democracy and introduced religious, sectarian, and gender biases into law.<sup>184</sup>

The impetus behind Islamization was powered through the Shariat courts, which were created by an amendment to the constitution in exercise of Zia's emergency powers.<sup>185</sup> Those appellate courts consisted of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. They were empowered to review any law for conformity with "the injunctions of Islam" and to declare any offending law,

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180. PAK. PENAL CODE (Act XLV of 1860), as amended; PAK. CODE CRIM. PROC. (Act V of 1898), as amended. Major pieces of colonial legislation, including the Penal Code, the Police Act (1861), and the first Code of Criminal Procedure (1861) were enacted immediately after the Mutiny or the Great Rebellion, as the British described it, but what was a War of Independence for the Indians. These laws were designed to strengthen state control, maintain law and order, and avoid another such uprising. The evolution of the British common law system was thus linked in the public perception to the colonial efforts—continued by subsequent military governments—to maintain control and power. As a result, much of the population, especially the rural poor, perceive the state and its laws to be of "alien" origin, to be abided by only to the extent that the coercive power of the state compels such obedience. USAID, *supra* note 43, at 7. Professor Siddique calls Pakistan's largely inherited laws from its colonial legacy the "hegemony of heritage." SIDDIQUE, *supra* note 43, at 41.

181. Hamida Ghafour, *Zia ul-Haq's Legacy in Pakistan "Enduring and Toxic,"* STAR (Aug. 26, 2013), [http://www.thestar.com/news/world/2013/08/26/zia\\_ulhaqs\\_legacy\\_in\\_pakistan\\_enduring\\_and\\_toxic.html](http://www.thestar.com/news/world/2013/08/26/zia_ulhaqs_legacy_in_pakistan_enduring_and_toxic.html). Muhammad Zia-ul-Haq was the sixth President of Pakistan from 1978 until his death in 1988. Prime Minister Zulfikar Ali Bhutto approved Zia's appointment to four-star tier, as Chief of Army Staff in 1976, over several senior officers. Following increasing civil disorder, Zia deposed Bhutto and declared martial law over the country in 1977. Bhutto was controversially tried and executed less than two years later, for allegedly authorizing the murder of a political opponent. Zia is a polarizing figure in Pakistan, credited by some for preventing wider Soviet incursions into the region as well as economic prosperity, but decried by others for weakening democratic institutions and passing laws encouraging Islamic fundamentalism. In August 1988, Zia was killed along with several of his top generals and two American diplomats in a suspicious air crash. *Id.*

182. Zia's motives were in large part to justify his coup against and execution of former Prime Minister Bhutto. *See* Lau, *supra* note 176, at 1293.

183. USAID, *supra* note 43, at 6.

184. *Asia Report N°196*, *supra* note 12, at i.

185. Lau, *supra* note 176, at 1294; USAID, *supra* note 43, at 6.

including parliamentary legislation, to be null and void.<sup>186</sup> In reality, the Shariat courts could exercise these powers in such a manner as to dictate to the legislature which Islamic law provisions would replace the voided legal provisions.<sup>187</sup>

Zia's Islamization is most closely associated with the implementation of "*Hudood*" (Islamic criminal) laws.<sup>188</sup> Although these offenses were to be tried in the sessions courts, appellate review was given to the newly created Federal Shariat Court.<sup>189</sup> The *Hudood* laws were the subject of much controversy as being misogynistic and discriminatory towards religious minorities.<sup>190</sup> Much of the Federal Shariat Court's scope of review, however, was curtailed by the Protection of Women (Criminal Laws Amendment) Act, passed in 2006. This law returned all sexual offences—with the exception of adultery—to the Penal Code, and thus to high court review.<sup>191</sup>

Critics note that Zia's blasphemy laws, which carry a mandatory death penalty (and thus are reviewed by the High Court, not the Federal Shariat Court), are used as a weapon to settle personal scores and persecute religious minorities in the country.<sup>192</sup> Many of those accused never make it to trial and are instead killed by vigilantes.<sup>193</sup>

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186. Lau, *supra* note 176, at 1294-95; USAID, *supra* note 43, at 6.

187. USAID, *supra* note 43, at 6.

188. The *Hudood* laws are five presidential ordinances that introduced new sexual and property offenses, maintained the prohibition on the consumption of alcohol, and provided for exemplary Islamic punishments such as stoning to death (for adultery), whipping (for fornication) and amputation (for theft). While the harshest penalties were never carried out, with the return of the offenses to the Penal Code, the laws to which they apply nonetheless continue to be used. Ironically, due to the significant evidentiary requirements under the *Hudood* ordinances, which *inter alia* require the evidence of two or four Muslim male eye-witnesses, convictions for these offenses are infrequent. Lau, *supra* note 176, at 1294; USAID, *supra* note 43, at 6.

189. Lau, *supra* note 176, at 1296; USAID, *supra* note 43, at 6.

190. Perry S. Smith, Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence, 11 TUL. J. INT'L & COMP. L. 21, 47-49 (2003).

191. Lau, *supra* note 176, at 1308.

192. See Mohammad Nafees, *Blasphemy Laws in Pakistan, A Historical Overview*, CTR. FOR RESEARCH & SEC. STUDIES 51-57 (April 2013), <http://crss.pk/wp-content/uploads/2010/07/Report-on-Blasphemy-Laws-.pdf>. An estimated 1,300 people have been charged under the stringent blasphemy laws. See *Timeline: Accused under the Blasphemy Law*, DAWN (Aug. 18, 2013), <http://www.dawn.com/news/750512/timeline-accused-under-the-blasphemy-law> (a sampling of cases between 1990 and 2013).

193. See Iqbal Mirza, *Mob Attack over Alleged Blasphemy: Three Ahmadis Killed in Gujranwala*, DAWN (July 28, 2014), <http://www.dawn.com/news/1122143/mob-attack-over-alleged-blasphemy-four-ahmadis-killed-in-gujranwala>. Recently, after a year-long trial, a Christian street sweeper was convicted and sentenced to death for uttering derogatory remarks against the Prophet Mohammed during a property dispute with a Muslim acquaintance. When the allegations initially surfaced, hundreds of Muslims attacked Lahore's Christian colony and torched 200 homes. *Blasphemy: Christian Sentenced to Death in Joseph Colony Case*, DAWN

In 1990, on the order of the Shariat Appellate Bench, those sections of the Pakistan Penal Code that related to the offenses of murder and manslaughter (sections 309 and 310) were replaced by the “*Qisas and Diyat Ordinance*.”<sup>194</sup> The law now redefined these offenses and their punishment in Islamic terms. Crimes affecting the human body were no longer considered offenses against society or the state; rather, they were now considered offenses against the individual.<sup>195</sup> Under Islamic law, the punishment for murder or infliction of injury can be either in the form of *qisas* (equal punishment for the crime committed) or *diyat* (compensation payable to the victims or their legal heirs).<sup>196</sup> Over the past twenty-four years, these laws have provided legal protection for honor killings and have enabled murder cases to be settled out of court.<sup>197</sup> Because Islam recommends reconciliation “so that peace and tranquility ultimately emerges,” *diyat* always takes preference over *qisas*.<sup>198</sup>

#### XI. *DIYAT* APPEARS TO PREVAIL

It was apparent that the *Davis* case needed to be resolved before the diplomatic immunity issue was adjudicated or the charges were framed, i.e., by March 16, 2011. According to one version of events—offered by

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(Mar. 28, 2014), <http://www.dawn.com/news/1095974/christian-man-awarded-death-penalty-in-joseph-colony-case>.

194. Waseem Ahmad Shah, *Pros and Cons of Qisas and Diyat Law*, DAWN (Sept. 16, 2013), <http://www.dawn.com/news/1043236/pros-and-cons-of-qisas-and-diyat-law>.

195. *Id.*

196. *Id.*

197. *Id.*; see also Moeen H. Cheema, *Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law*, 60 AM. J. COMP. L. 875, 893 (2012) (“[T]he Qisas & Diyat laws appeared to transfer decision-making from the prosecutors and judges to the victims or their heirs.”). But, one important protection in the law is the principle of *fasad-fil-arz* (mischief on earth). It empowers the judge—keeping in view the facts and circumstances of the case—to convict an accused regardless of a *diyat* compromise and sentence him/her up to 14 years of imprisonment. PAK. PENAL CODE § 311. For example, in honor killings, usually the women’s killers are her family. The family members will often nominate someone to carry out the murder, then forgive him. But if the alleged killer is charged in a *challan*, then *fasad-fil-arz* can legally trump any *diyat* compromise. But the reality is that few cases ever come to court and those that do, of course, take years to be heard. Further, there is no tracking system in place evidencing whether courts have exercised their discretion under *fasad-fil-arz* to ensure that the cases proceed and are successfully prosecuted. See, e.g., *Woman Stoned to Death Outside Lahore High Court*, DAWN (May 27, 2014), <http://www.dawn.com/news/1108900/woman-stoned-to-death-outside-lahore-high-court>; see also *Family Slits Throats of Young Couple over Love Marriage*, EXPRESS TRIB. (June 28, 2014), <http://tribune.com.pk/story/728299/family-slits-throats-of-young-couple-over-love-marriage/>.

198. Abdul Latif Khan, *123rd International Senior Seminar Participants' Papers: Country Report, Pakistan*, U.N. ASIA & FAR EAST INST. FOR PREVENTION CRIME & TREATMENT OFFENDERS (UNAFEI) 137 (July 2004), [http://www.unafei.or.jp/english/pdf/RS\\_No63/No63\\_19PA\\_Khan.pdf](http://www.unafei.or.jp/english/pdf/RS_No63/No63_19PA_Khan.pdf); see also *Roundtable Discussion on 'Qisas' and 'Diyat' Law Within the Criminal Justice System*, SCH. L. (Sept. 21, 2013), <http://sol.org.pk/wp-content/uploads/2013/10/RTC-Report.pdf>.



a retired Pakistani Brigadier General—the Pakistani military offered to use its influence to settle the case quietly under *diyat*—with the money to be paid by the Pakistani federal government—and Davis would be released from jail.<sup>199</sup>

According to some media accounts, ISI operatives in Lahore were involved in the settlement negotiation with the families of the two victims.<sup>200</sup> But, allegedly fortified by their radical Islamic attorney, several of the eighteen relatives resisted the overtures.<sup>201</sup> Instead of letting the talks collapse, however, the Pakistani authorities forcibly detained the attorney.<sup>202</sup> On the evening of March 15, with the family's attorney out of the picture, the relatives, through a new, government-supplied attorney, reportedly agreed to accept compensation and to offer “forgiveness” to Raymond Davis.<sup>203</sup>

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199. *Selected Articles*, SHAUKAT QUADIR, <http://shaukatqadir.info/articles.html> (last visited Nov. 18, 2014); Asad Kharal, *Davis Acquittal: A Release Three Weeks in the Making*, EXPRESS TRIB. (Mar. 17, 2014), <http://www.tribune.com.pk/story/133738/behind-the-scenes-a-release-three-weeks-in-the-making/> (“The Punjab government, meanwhile, used police and other officials to put pressure on the heirs of the deceased to accept payment of blood money in return for pardoning Davis . . .”); *Raymond Case—‘Diyat Money Was Paid from National Kitty,’* PAK. TODAY (Apr. 7, 2011), <http://www.pakistantoday.com.pk/2011/04/07/city/lahore/raymond-case-diyat-money-was-paid-from-national-kitty/>; see also Huma Imtiaz, *Behind the Scenes of Raymond Davis’s Release*, FOREIGN POLICY (Mar. 16, 2011), [http://southasia.foreignpolicy.com/posts/2011/03/16/behind\\_the\\_scenes\\_of\\_raymond\\_davis\\_release?wp\\_login\\_redirect=0](http://southasia.foreignpolicy.com/posts/2011/03/16/behind_the_scenes_of_raymond_davis_release?wp_login_redirect=0) (“It’s a good development, it demonstrates that both have come to an understanding about how they will operate with each other and co-operate . . .” (quoting Lieutenant General Talat Masood (retired))).

200. *Selected Articles*, *supra* note 199; Kharal, *supra* note 199.

201. Omar Waraich, *Pakistan: How Shari’a Freed American Ray Davis*, TIME (Mar. 16, 2011), <http://content.time.com/time/world/article/0,8599,2059330,00.html> (“The victims’ families were pressured into accepting the blood money. (Some originally refused.)”); *Pakistan Families Accept ‘Blood Money’—Despite Vowing Revenge*, NBC NEWS (Mar. 16, 2011), [http://worldblog.nbcnews.com/\\_news/2011/03/16/6283136-pakistan-families-accept-blood-money-despite-vowing-revenge?lite](http://worldblog.nbcnews.com/_news/2011/03/16/6283136-pakistan-families-accept-blood-money-despite-vowing-revenge?lite) (“Another lawyer representing the families, said his clients were forced to take the money and sign the pardon papers. ‘They were taken to the jail last night and forced to sign,’ he said.”).

202. Rana Tanveer, *Diplomat or Not, Davis Departs*, EXPRESS TRIB. (Mar. 17, 2011), <http://tribune.com.pk/story/133324/raymond-davis-indicted-in-double-murder-case/> (“I was not allowed to participate in the proceedings of the case . . . and could not see or approach my clients,” the BBC quoted [the former attorney] as saying. ‘I and my associate were kept under forced detention for four hours. If my clients have indeed signed a blood money deal, then this has been done behind my back and I don’t know anything about it . . .”).

203. *Id.* (“There were a number of new twists and turns which resulted in the surprise release of Davis. A new counsel appeared on behalf of the complainants and requested the court to summon his clients, saying the heirs have arrived at a compromise with the accused, and have no objection over his release. In an interview later, [the counsel] said he had no dealings with American officials and that the Pakistani government had paid the compensation of Rs 200 million to the families in Lahore.”).

The next day, absent the diplomatic certification from Islamabad, the sessions judge opened the criminal proceedings by framing the charges and then proceeded as a Shariat court.<sup>204</sup> Accompanied by their new attorney, the eighteen relatives of the victims entered the courtroom. After each approached Davis and announced in Urdu that she or he forgave him, the judge called the case closed.<sup>205</sup> Davis was escorted out through a back entrance and within hours was onboard a flight out of the country.<sup>206</sup>

## XII. BEATING RETREAT—CHOREOGRAPHED ORDER OVER TURMOIL

Sip a latte and munch on a salad in an elegant Islamabad café, one equipped with wireless and a trendy clientele, browse the country's outspoken newspapers and websites, chat with its articulate analysts and professionals—and outsiders' talk of Pakistan as a state on the brink of collapse sounds outlandish. Yet the question persists.<sup>207</sup>

—*The Economist*

[R]eminders of why the country is a worry to its people, and to the wider world: natural disasters and entrenched insurgencies, abject poverty and feudal kleptocrats, and an economy near meltdown. . . . In a country forged on religion, Pakistanis are losing faith. People are desperate for change—for any improvement their proudly nuclear-armed government could make, yet has not. Chronic electricity shortages, up to 18 hours per day, have crippled industry and stoked public anger. The education and health systems are inadequate and in stark disrepair. The state airline, Pakistan International Airlines, which lost \$32 million last year, is listing badly. The police are underpaid and corrupt, and militancy is spreading. This failure is the legacy of decades of misadventure, misrule and misfortune under both civilian and military leaders. There is a disturbing sense of drift. [In the countryside,] feudal landlords live off the rents of

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204. *Id.*; *Court Releases Detailed Judgment in Davis Case*, *supra* note 16.

205. *News Live* (GEO TV television broadcast Mar. 16, 2011) (Islamabad, Pakistan); see also Imtiaz, *supra* note 199 (“Geo News channel said that 18 members of both families had announced in front of the judge in Kot Lakhpat jail that they had forgiven Raymond Davis.”); *Victims’ Heirs Not Pressurised To Accept Blood Money, Pardon Davis*, ZEE NEWS (Mar. 21, 2011), [http://zeenews.india.com/news/south-asia/victims-heirs-not-pressurised-to-accept-blood-money-pardon-davis\\_694574.html](http://zeenews.india.com/news/south-asia/victims-heirs-not-pressurised-to-accept-blood-money-pardon-davis_694574.html); *Court Releases Detailed Judgment in Davis Case*, *supra* note 16. The judge also fined Davis Rs 20,000 for carrying an unregistered firearm. Tanveer, *supra* note 202.

206. Tanveer, *supra* note 202.

207. *Pakistan’s State Stumbles*, ECONOMIST (Oct. 7, 2011), <http://www.economist.com/blogs/banyan/2011/10/pakistans-state-stumbles>.

poor peasants. [In the cities,] [p]olitical parties, mullahs, criminal gangs and Taliban militants all battle for land . . . .<sup>208</sup>

— *The New York Times*

Pakistan is “the most misunderstood country in the world” and the prevalence of terrorism and religious extremism, arguably, is a major factor in distorting its image.<sup>209</sup> But to explain Pakistan, one need look no further than the “beating retreat” ceremony held daily on the Wagah border station, halfway between Lahore and Amritsar, India.<sup>210</sup> At sunset, Pakistani and Indian guards face off in a militaristic flag-lowering exercise that is a choreographed ritual of mutual hatred.<sup>211</sup> A depiction of this exercise is described by one visitor: “After the flag lowering, the gates are shut with a loud clang, as if to signify that each country will remain shut to the other.”<sup>212</sup> Metaphors abound, but the lasting

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208. Declan Walsh, *After Decades of Neglect, Pakistan Rusts in Its Tracks*, N.Y. TIMES (May 18, 2013), <http://www.nytimes.com/2013/05/19/world/asia/pakistans-railroads-sum-up-nations-woes.html>.

209. Malik Muhammad Ashraf, *Changing Perceptions About Pakistan*, NATION (Jan. 31, 2012), <http://nation.com.pk/columns/31-Jan-2012/changing-perceptions-about-pakistan>; *see also Pakistan: A Great Deal of Ruin in a Nation*, ECONOMIST (Mar. 31, 2011), <http://www.economist.com/node/18488344> (“Some 30,000 people have been killed in the past four years in terrorism, sectarianism, and army attacks on the terrorists. The number of attacks in Pakistan’s heartland is on the rise, and Pakistani terrorists have gone global in their ambitions. This year there have been unprecedented displays of fundamentalist religious and anti-Western feeling. All this might be expected in Somalia or Yemen, but not in a country of great sophistication which boasts an elite educated at Oxbridge and the Ivy League, which produces brilliant novelists, artists and scientists, and is armed with nuclear weapons.”).

210. Wagah is the only road border crossing between Pakistan and India. It lies on the Grand Trunk Road between the cities of Lahore and Amritsar, Punjab, India. The border is located 22 kms (approximately 14 miles) from Lahore and 20 kms (approximately 12.5 miles) from Amritsar. *Wagah Border*, MAPS INDIA, <http://www.mapsofindia.com/Amritsar/wagah-border.html> (last visited Nov. 18, 2014).

211. Daljit Singh, *The Wagah Border: From Division To Bridge*, ACAD. PUNJAB IN N. AM. (Sept. 2011), <http://www.apnaorg.com/articles/wahga/> (“As the guards muster on each side [of the border gates] and the crowds on both sides wave their respective flags, the air resonates with nationalistic slogans . . . . On the Pakistani side, there is also the intermittent playing of Koranic verses . . . . [A]t the appointed time, both gates are thrown open, the border troops take giant exaggerated steps towards the flag posts and stamp the ground vigorously with their boots. Their demeanor and facial expressions signify . . . defiance [and] hostility.”).

212. *Id.* The two countries have engaged in three wars, a game of proxies inside Afghanistan, a series of Pakistani militant attacks inside India such as the 2008 Mumbai attack, a nuclear arms race, and a smattering of disputes over territory, water, and trade. Shamila N. Chaudhary, *Why India and Pakistan Hate Each Other*, FOREIGN POL’Y (Feb. 4, 2014), [http://southasia.foreignpolicy.com/posts/2014/02/04/why\\_india\\_and\\_pakistan\\_hate\\_each\\_other](http://southasia.foreignpolicy.com/posts/2014/02/04/why_india_and_pakistan_hate_each_other); *see also* William Dalrymple, *A Deadly Triangle: Afghanistan, Pakistan and India*, BROOKINGS INST. (June 25, 2013), <http://www.brookings.edu/research/essays/2013/deadly-triangle-afghanistan-pakistan-india-c#>.

impression is one of a false sense of order superimposed over conflict and turmoil.<sup>213</sup>

Arguably, like the Wagah ceremony, the Davis case had been choreographed from beginning to end, first by the Punjab government, then by the Punjab courts, and finally, reportedly by the ISI and military. And, in the end, the gates of the prison courthouse, like the gates at the border ceremony, clanged shut, with both sides walking away from the preceding turmoil. The official stance that the Pakistani government took was that the case was to be decided by the courts and, to that extent, President Zardari stood vindicated; it was the court that released Davis.<sup>214</sup> As observed by *The Economist*, the irony that Davis' freedom may have been bought using Islamic law was not lost on the radical *mullahs* and their supporters. Dispirited, they did not join the massive, week-long protests held on the streets of Pakistan.<sup>215</sup> As several commentators wryly stated at the time, "In a Lahore courtroom, the laws of God trumped the laws of man."<sup>216</sup>

### XIII. CONCLUSION

Outdated laws, cumbersome procedure, rapacious lawyers, corrupt and inefficient police investigation, and illiterate and gullible litigants have collectively contributed to excessive and delayed litigation and ultimately a crumbling justice system.<sup>217</sup>

—Punjab District and Sessions Judge

At a full court session marking the beginning of the 2014 judicial year, retiring Supreme Court Chief Justice Iftikhar Muhammad Chaudhry recapped the seemingly unsolvable problem: "Due to defective and careless investigation and weak prosecution, a large number of terrorists and criminals get released by courts, which is not

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213. On November 2, 2014, approximately 60 people were killed and at least 110 people were injured in a suicide attack on the Pakistan side of the Wagah border just as the ceremony was ending. Not about to bow to terrorism and suspend a ceremony that has been held daily for over fifty years, "[w]ith chants of 'Pakistan Zindabad' and 'Allahu Akbar' in the background, people came to attend the ceremony in large numbers, leaving a clear and sound message to the attackers that the country was standing tall and brave and could by no means be weakened." *Despite Threats, Pakistan Goes on with Ceremony at Wagah*, DAWN (Nov. 3, 2014), <http://www.dawn.com/news/1142204/despite-threats-pakistan-goes-on-with-ceremony-at-wagah>.

214. See Raza Rumi, *Raymond Davis and Our National Honour*, EXPRESS TRIB. (Mar. 17, 2011), <http://tribune.com.pk/story/134003/raymond-davis-and-our-national-honour/>; *Selected Articles*, *supra* note 199.

215. *The Raymond Davis Case: Blood for Money for Blood*, *supra* note 13; see also *Thousands of Pakistanis Rally Against US*, EXPRESS TRIB. (Mar. 18, 2011), <http://tribune.com.pk/story/134419/political-parties-civil-society-hold-protests-against-govt/>.

216. *Witness with Quatrina* (Express 24/7 television broadcast Mar. 21-24, 2011).

217. Quoted in SIDDIQUE, *supra* note 43, at 382.

only lowering the image of judiciary but also encouraging the criminals.”<sup>218</sup>

With the criminal justice process failing to convict culprits, extrajudicial killings amid a law and order crisis might otherwise seem an attractive alternative.<sup>219</sup> A former Punjab police inspector general analyzed the problem concisely: “The criminal doesn’t fear arrest; he fears death, so he has to be armed and he has to come out shooting.”<sup>220</sup> The Pakistanis recognize that shooting suspects on sight only breeds more violence.<sup>221</sup> Nonetheless, in order to increase the number of convictions of terror suspects, the government of Pakistan recently strengthened its antiterror laws with an antiterrorism measure that the government says is needed to combat the Taliban, but that rights activists warned could result in state-sponsored human rights violations.<sup>222</sup>

The Protection of Pakistan Bill 2014 allows the security forces for the next two years to shoot terrorist suspects on sight (but only as a “last resort”), arrest suspects without a warrant (provided they justify their actions to a special judicial magistrate within two days), and withhold information about the location of and charges against detainees.<sup>223</sup> The bill legalizes the prolonged detention of terror suspects (including, retroactively, those detained in the Swat Valley) and authorizes

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218. *Struggle for Justice: Terrorists Taking Advantage of Weak Prosecution, Says CJ*, EXPRESS TRIB. (Oct. 21, 2013), <http://tribune.com.pk/story/620191/struggle-for-justice-terrorists-taking-advantage-of-weak-prosecution-says-cj/>.

219. *Asia Report N°255*, *supra* note 5, at 33.

220. *Id.*

221. *Id.* In September 2013, the federal cabinet in Islamabad approved a proposal to give the Pakistan Rangers (paramilitary forces under the Ministry of Interior) in Karachi shoot-to-kill powers against suspected terrorists, with few constraints. The Criminal Procedure Code only allows the police to fire on suspects if they face an armed threat. Rangers patrol Karachi and its surroundings to combat routine ethnic, political and extremist violence in the city. Human rights activists complain that the Rangers force, established for combat and border duty, is neither equipped nor trained for civilian areas. The activists worry that giving the Rangers unbridled powers is worrisome, let alone dangerous, as Rangers have abused their authority on previous occasions. In June 2011, a mobile phone camera captured footage of Rangers shooting an unarmed man in a Karachi public park. An Anti-Terrorism Court sentenced one of the Rangers to death (the prosecutors in the case were the same two prosecutors referenced in Abouzeid, *supra* note 154). In July 2013, a Ranger fatally shot a taxi driver who failed to stop when ordered. After massive street protests, the Supreme Court took *suo moto* notice and ruled that the four Rangers present should be put on trial under the Anti-Terrorism Act. Murder charges were framed in January 2014. *Id.* at 32.

222. *President Signs Protection of Pakistan Bill into Law*, PAK. TODAY (July 11, 2014), <http://www.pakistantoday.com.pk/2014/07/11/national/presidents-signs-protection-of-pakistan-bill-in-to-a-law/>.

223. Salman Masood & Saba Imtiaz, *Pakistan Approves Sweeping Antiterror Bill, Prompting Warnings from Rights Groups*, N.Y. TIMES (July 2, 2014), <http://www.nytimes.com/2014/07/03/world/asia/pakistan-approves-sweeping-antiterror-bill-prompting-warnings-from-rights-groups.html>.

convictions in terrorism trials solely on email, phone, and other electronic evidence.<sup>224</sup>

For all the Protection of Pakistan Bill's stringent powers, the question remains whether the country's weak judicial system can enforce its provisions.<sup>225</sup> For better or worse, the criminal justice system in Pakistan places great reliance on the role of the judges to steer the process.<sup>226</sup> Largely due to a traditional lack of trust in the police, the criminal process is essentially turned over to the judges when the *challan* is filed fourteen days after the start of the investigation.<sup>227</sup> The judiciary is assigned the responsibility of exercising its discretion to review cases and dismiss those that are frivolous, without foundation, or excessively delayed.<sup>228</sup> However, due to the judiciary's unmanageable workload from the pending backlog of cases, the individual magistrates and judges are similarly overwhelmed in trying to carry out this responsibility.<sup>229</sup> And as previously noted, the criminal defense attorneys, by repeatedly filing for continuances, have turned the courts' workload to their clients' advantage, thereby leaving the cases moribund.<sup>230</sup>

In fighting this downward spiral, the National Judicial Policy set out an ambitious goal to clear the huge backlog by including obligations to respect targeted time limits for pending cases and setting strict time tables for new cases.<sup>231</sup> Moving from policy to implementation, of

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224. *Id.*; see also *State of Human Rights in 2013*, *supra* note 56, at 36-37; Tim Craig, *Pakistan Creates Its Own Patriot Act To Deal with Terrorists; Human Rights Groups Worried*, WASH. POST (Nov. 8, 2013), [http://www.washingtonpost.com/world/pakistan-creates-its-own-patriot-act-to-deal-with-terrorists-human-rights-groups-worried/2013/11/08/67ed58ca-4071-11e3-a751-f032898f2dbc\\_story.html](http://www.washingtonpost.com/world/pakistan-creates-its-own-patriot-act-to-deal-with-terrorists-human-rights-groups-worried/2013/11/08/67ed58ca-4071-11e3-a751-f032898f2dbc_story.html).

225. Critics charge, *inter alia*:

[S]uccessive governments seem to think that the way to dealing with the breakdown of law and order is through giving law-enforcement agencies sweeping powers; instead of the nitty-gritty of having people properly trained in forensics, having proper prosecutors, a witness protection program, not allowing people to use prisons for operations. In a way, [the Protection of Pakistan Bill] takes the pressure off the state to address these issues.

Saba Imtiaz, *Analysis: Another Repressive Law*, DAWN (July 3, 2014), <http://www.dawn.com/news/1116722>.

226. UNODC, *supra* note 62, at 54.

227. *Id.*

228. *Id.*

229. *Id.*

230. See SIDDIQUE, *supra* note 43, at 380 (“[Any efforts to expeditiously dispose of the cases were] aggressively thwarted by the lawyers. . . . [They] had developed a very hostile attitude towards any judicial steps that promoted the maintenance of any merit and standards. . . . Thus, many . . . cases enjoyed a long and resource-draining existence in the court system.” (quoting a Punjab district judge)).

231. About 1.75 million cases were pending before the lower and superior judiciary in June 2009. Despite the submission of 3.2 million new cases since then, the total figure was

course, takes time. Although backlogs have been dramatically reduced in certain districts, case backlogs generally still remain at high levels.<sup>232</sup> Regardless, some progress has been made with the selective fast tracking in new criminal cases, with disposal either within six months (for lesser crimes punishable by no more than seven years of imprisonment) or within one year (for more serious matters).<sup>233</sup> Judges who have been slow in meeting their targets have been replaced.<sup>234</sup> In order to deflate the burgeoning case list at the Supreme Court, the Chief Justice recently constituted a bench to hear only criminal cases.<sup>235</sup>

There is a worldwide tendency towards the increased use of plea bargaining—with the resulting substantial reduction of the burden placed on courts and prisons.<sup>236</sup> Yet, Pakistan has not, except under limited

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reduced to fewer than 1.5 million by the end of November 2013. See Shah, *supra* note 50. With international donor support, the judiciary has undertaken a series of measures towards clearing the backlog by strengthening court administration and case management systems. This includes an increase in allocations, both in real terms and as a percentage of the budgets, to the courts for salaries and budget, and computerized case tracking systems. See *Country Notes: Pakistan (Governing Justly and Democratically)*, ARMY LOGISTICS UNIV. (Feb. 19, 2013), [http://www.alu.army.mil/ALU\\_INTERNAT/CountryNotes/CENTCOM/PAKISTAN.pdf](http://www.alu.army.mil/ALU_INTERNAT/CountryNotes/CENTCOM/PAKISTAN.pdf).

232. *Freedom in the World 2014: Pakistan*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/2014/pakistan-0#.U79oV-pOXmQ> (last visited Nov. 18, 2014). Of course, all statistics are relative. India has a backlog of 31-million pending cases, which, given the population difference, would be the equivalent of roughly five-million cases pending in Pakistan. See *Judicial Backlog of 31m Cases Worries Indian President*, WORLD NEWS (Feb. 9, 2014), [http://article.wn.com/view/2014/02/09/Judicial\\_backlog\\_of\\_31m\\_cases\\_worries\\_Indian\\_president/](http://article.wn.com/view/2014/02/09/Judicial_backlog_of_31m_cases_worries_Indian_president/).

233. “Speedy justice” has its share of critics. As stated by a former Supreme Court Bar Association President: “The trend now [after the NJP] is to dispose of a case rather than properly decide it, so you will try to find some loophole rather than adhere to the spirit of the case and of justice.” *Asia Report N°196*, *supra* note 12, at 13; see also Osama Siddique, *Approaches to Legal and Judicial Reform in Pakistan: Post-Colonial Inertia and the Paucity of Imagination in Times of Turmoil and Change*, LUMS DEV. POL’Y RES. CENTER 14 (2011), <http://lums.edu.pk/docs/dprc/DPRC-WP4-Siddique.pdf> (“One therefore, wonders whether an over-emphasis on ‘speed’ can both lead to a fatal ignorance of the need for, as well as an adverse effect on the actual ‘quality’ of judicial output.”).

234. Rana Yasif, *11 Monitoring Cell Judges Replaced*, EXPRESS TRIB. (Apr. 20, 2013), <http://tribune.com.pk/story/537961/11-monitoring-cell-judges-replaced/>.

235. Hasnaat Malik, *Chief Justice Jilani Bows Out This Week*, EXPRESS TRIB. (June 30, 2014), <http://tribune.com.pk/story/728986/chief-justice-jilani-bows-out-this-week/>.

236. STEPHEN THAMAN, WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL, at xvii, xviii (2010) (“The ‘full-blown’ trial with ‘all the guarantees’ is no longer affordable. With the rise in crime and the more cost-, and labor-intensive procedures required by modern notions of due process, legislatures and courts are gradually giving priority to the principle of procedural economy and introducing forms of consensual and abbreviated criminal procedure to deal with overloaded dockets. . . . ‘Consensual’ procedural forms are an integral part of criminal procedure worldwide and are aimed at avoiding either an exhaustive and cumbersome preliminary investigation or the public, oral trial with its due process guarantees, or both. In the traditionally inquisitorial civil law realm (most notably on the European continent and in Latin America), the preliminary investigation . . . was

circumstances, availed itself of that trend.<sup>237</sup> Inasmuch as the *Sindh* decision affirmed the prosecutor's authority to drop a case or charges in a case, some prosecutors have entered into the practice of dropping charges in return for a defendant pleading guilty to a lesser charge(s).<sup>238</sup> Alternative resolution mechanisms in petty criminal cases are being tried. Former Prime Minister Yusuf Raza Gilani lent his full support to these efforts, as he concluded that 50% of the cases would go away if the police simply diverted the minor offenses out of the court process.<sup>239</sup>

Arguably, even if the courts are presided over by the most efficient and capable judges, it will be of little use if the police are not conducting investigations properly, prisons are not producing the accused, and the prosecutors are not scrutinizing the *challans*.<sup>240</sup> Even though the Pakistani government continuously pledges to "reform and transform the police into a superior service with operational autonomy, free from all

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the centerpiece of criminal procedure and required the most resources and time. In traditionally adversarial countries such as the U.S., the U.K[.], . . . it is the adversarial trial (usually by jury) which has become more costly and time-consuming."); see also RICHARD VOGLER, A WORLD VIEW OF CRIMINAL JUSTICE (2005).

237. Jamal, *supra* note 60.

238. The only statutory acceptance of plea bargaining, however, is found in the prosecution of corruption cases under the "National Accountability Ordinance," whereby if an accused returns the proceeds of corruption, he or she will stand convicted but will not be sentenced. See *Legislative Brief No. 15: National Accountability Commission Bill, 2012*, PAK. INST. LEGIS. DEV. & TRANSPARENCY (PILDAT) (Oct. 2012), [http://www.pildat.org/Publications/publication/LB/PILDATLegislativeBrief15\\_TheNationalAccountabilityCommissionBill\\_2012.pdf](http://www.pildat.org/Publications/publication/LB/PILDATLegislativeBrief15_TheNationalAccountabilityCommissionBill_2012.pdf).

239. *Asia Report N°196*, *supra* note 12, at 9-10 ("Police have experimented with alternative mechanisms at the level of the police station such as peace committees comprising respected members of the community to adjudicate petty crimes and minor civil disputes. [Since this is extra-legal,] the parties involved would sign an agreement that either side could take the matter to the regular courts if it believed the judgment to be unfair.") In a novel project, the High Court in Khyber-Pakhtunkhwa set up Pakistan's first mobile court, a \$98,000 bus funded by the UNDP (United Nations Development Program). Handling up to 30 cases a day, the bus operates in the villages and suburbs outside Peshawar. It is staffed by a rotating team of eight specially trained judges and eighteen lawyers, alongside a registrar and stenographer. The mandate is to quickly resolve land (the mediators will personally inspect the land), family, and other small civil disputes, as well as minor criminal cases and juvenile matters. The KPK government hopes with funding from the United Nations to launch 11 more buses and to operate them in remote areas of the province where there is strong support for the Taliban. See Hasham Ahmed, *Khyber Pakhtunkhwa's Courtroom-on-Wheels Is Cutting Down the Backlog of Cases in the Face of Multiple Challenges*, NEWSWEEK (Aug. 29, 2013), <http://www.pk.undp.org/content/dam/pakistan/docs/UNDP%20in%20the%20News/August%202013/Newsweek.pdf>.

240. *But see Approaches to Legal and Judicial Reform*, *supra* note 233, at 27 (stating that there are legal commentators who "argue that even better trained and equity-minded judges can achieve little in a society deeply constrained by poverty, disempowerment, land ownership based hierarchies and hegemonies, income disparity, illiteracy, and the civil-military imbalance"); cf. LIEVEN, *supra* note 44, at 109 ("[T]he system is so terribly overloaded that it simply couldn't work properly even if everyone did their duty." (quoting Punjab judge)).



financial and administrative pressures,” to date this has not happened.<sup>241</sup> The situation is not much better with the prosecutorial services.<sup>242</sup>

But recent years have seen some improved internal institutional development in the prosecutorial services. The Prosecutor Generals are committed to organizational reform and comprehensive, multitiered capacity building programs.<sup>243</sup> As the prosecutors’ working conditions improve with the provision of modern equipment, their pride and effort has equally improved.<sup>244</sup> Despite the continued prospect of low pay,<sup>245</sup> institutional pride and prestige has set in and it is no longer considered such a badge of inferiority to be a prosecutor.<sup>246</sup>

The key to unlocking the solution to the overburdened criminal justice system lies with the prosecutors.<sup>247</sup> The cascade of critical articles in *Dawn* and other local media have impressed upon the prosecutors how crucial it is for them to start working with the police at the very inception of a case.<sup>248</sup> The prosecutors are beginning to understand and see

241. Bokhari, *supra* note 67, at 33.

242. See Imtiaz Gul, *Prosecution and the Rule of Law*, EXPRESS TRIB. (Feb. 5, 2014), <http://tribune.com.pk/story/667507/prosecution-and-the-rule-of-law/> (quoting Rana Maqbool, Special Assistant to the Chief Minister of Punjab, former Punjab Prosecution Secretary, and former Sindh Police Inspector General as saying that the prosecution services still suffer from “deficient intellectual capacity, poor training and insufficient monetary incentives”).

243. *Id.* In commenting on the current difficulties facing the prosecution services, Rana Maqbool said that current prosecutorial reform efforts were geared towards “improving efficiency and enforcing discipline.” Maqbool noted that over the past year, GIZ has “offered intensive training to improve the methodology employed by prosecutors.” He added that a state-of-the-art forensic science laboratory and a prosecutors’ training school in Lahore were some of the steps being taken to improve the prosecution services. *Id.*

244. See, e.g., *Computerization of Prosecution Department Approved*, PAK. TODAY (Feb. 28, 2014), <http://www.pakistantoday.com.pk/2014/02/28/city/lahore/computerisation-of-prosecution-department-approved/>; see also Imran Ayub, *Sindh Govt To Hire 200 Inspectors for Investigation*, DAWN (Mar. 10, 2014), <http://www.dawn.com/news/1092107/sindh-govt-to-hire-200-inspectors-for-investigation>; Amar Guriro, *Sindh Prosecutors Get a \$150,000 US Boost*, PAK. TODAY (Nov. 4, 2011), <http://www.pakistantoday.com.pk/2011/11/04/city/karachi/sindh-prosecutors-get-a-150000-us-boost/>.

245. See *Budget 2014-15: No Increase in Pension, Salary for Govt Employees*, PAK. NEWS TODAY (Mar. 26, 2014), <http://pakistannewstoday.com.co/tag/salary/>.

246. See *Prosecutors ‘Pillar of the Criminal Justice System’: Awan*, PAK. TODAY (July 20, 2013), <http://www.pakistantoday.com.pk/2013/07/20/city/islamabad/prosecutors-pillar-of-the-criminal-justice-system-awan/>.

247. See, e.g., Sajid Zia, *Prosecutor General Vows Speedy Disposal of Cases*, NATION (Oct. 25, 2011), <http://www.nation.com.pk/Lahore/25-Oct-2011/Prosecutor-General-vows-speedy-disposal-of-cases>.

248. See, e.g., *Justice: Police-Prosecution Cooperation Crucial for Convictions*, EXPRESS TRIB. (Mar. 3, 2014), <http://tribune.com.pk/story/678109/justice-police-prosecution-cooperation-crucial-for-convictions/>. Punjab has formally institutionalized police-prosecutor cooperation into written policy. See *Standard Operating Procedures: Effective Police Prosecutor Co-Operation in the Province of Punjab*, PUB. PROSECUTION DEP’T, GOV’T PUNJAB (Dec. 14, 2011), <http://prosecution.punjab.gov.pk/?q=system/files/Police+Prosecution+Cooperation.pdf>.

firsthand how scientific evidence helps them win their cases at trial.<sup>249</sup> In an encouraging trend, many prosecutors today are insisting that the police provide forensic or other corroboration to oral testimony and confessions.<sup>250</sup>

Over the past few years, a variety of international aid groups have presented a plethora of recommendations and reforms, but given the sociopolitical and cultural environment of Pakistan, the feasibility and viability of implementation has been problematic.<sup>251</sup> In the author's opinion, the best, albeit drastic solution—short of amending the CrPC to make arrests conditional upon approval by the prosecutor's office and/or conditional upon completion of an investigation—is for Pakistani prosecutors to apply a legal version of triage<sup>252</sup> and prioritize incoming *challans*.

As matters stand now, the only survivors are the rare cases won at trial.<sup>253</sup> Today, however, with the *Sindh* Supreme Court decision affirming prosecutors' independence and discretion under the CrPC, and international training increasing their analytic ability, many prosecutors

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249. The GIZ recently funded and produced a documentary film that highlights the role and challenges facing public prosecutors in Pakistan. The film revolves around a murder case in which the district prosecutor successfully uses scientific evidence to corroborate both the witnesses and police officers to convict the accused. The film includes shots from the crime scene, police station, prosecutors' office, and courtroom. It is being exhibited in prosecution training venues, law colleges, and media all over Pakistan. *See Quest for Justice—First Documentary on Prosecution System in Pakistan*, CTR. FOR RESEARCH & SEC. STUDIES (Mar. 16, 2014), <http://crss.pk/story/5491/quest-for-justice-first-documentary-on-prosecution-system-in-pakistan/>.

250. *See* Asad Kharal, *Shades of Grey*, EXPRESS TRIB. (Aug. 5, 2012), <http://tribune.com.pk/story/415931/shades-of-grey/> (“Prosecutors should be involved in the case right from the beginning, starting with the registration of the case. A crime scene investigation unit should be established that consists of prosecutors, medical and forensic experts as well as the police. Because most evidence is circumstantial, the role of forensic evidence as well as intelligence is most important to ensure convictions in terrorism cases.” (quoting the chief prosecutor in Lahore)).

251. *See* Hamza Hameed & Mohammad Jamshed, *A Study of the Criminal Law and Prosecution System in Pakistan*, MANZIL PAK. 26-29 (Oct. 2013), <http://www.manzilpakistan.org/wp-content/uploads/2014/01/Law-and-Justice-Study-on-Criminal-Prosecution.pdf> (a comparative analysis of the different international reports).

252. From French *triage*, from *trier* (to sort), triage is the process of sorting victims, as of a battle or disaster, to determine medical priority in order to increase the number of survivors. Those responsible for the removal of the wounded from a battlefield or their care afterwards would divide the victims into three categories: (1) those who were likely to live, regardless of what care they received; (2) those who were likely to die, regardless of what care they received; and (3) those for whom immediate care might make a positive difference in outcome. *Definition of Triage*, MED. NET, <http://www.medicinenet.com/script/main/art.asp?articlekey=16736> (last visited Nov. 20, 2014).

253. *See, e.g.*, Rodriguez, *supra* note 124. Rodriguez references an antiterrorism prosecutor who “confess[es] that he isn’t at all proud of his track record. He has handled 45 cases in the last year. He has won just four.” *Id.*

are finally gaining the fortitude to reject the obviously fabricated and the weak cases.<sup>254</sup> It has become clear that only in the districts where prosecutorial screening, analysis, and discretion are implemented to cut through the sheer volume of cases, does the conviction rate ever increase.<sup>255</sup> In recognition of this fact, the Khyber Pakhtunkhwa Director of Prosecutions granted prosecutors the authority to reject any incoming cases without fear of recrimination.<sup>256</sup> The prosecutors need merely articulate on a *pro forma* sheet their reasons either for rejecting a case entirely or sending it back for further investigation.<sup>257</sup>

Over the past year, in several districts of the Khyber Pakhtunkhwa Province, prosecutors have sent back for further investigation up to 50% of the *challans* forwarded to them, and their trial conviction rates correspondingly rose from 8% to over 30%.<sup>258</sup> Previously, such relatively high conviction statistics would have been unimaginable.<sup>259</sup>

The exercise of prosecutorial discretion obviously is not a cure-all to the many factors contributing to the low conviction rate and certainly does not help the victim's family whose case is not pursued. But the prosecutor is responsible for representing the interests of society at large, not just the victim's. It is thus important that these recent efforts to proceed with only meritorious cases continue in a nationwide, strategic, and coordinated manner in order to reduce the crisis that currently exists within the criminal justice system in Pakistan. If nothing else, this methodology should create self-reflection on the role of the prosecution within the Pakistani criminal justice system and provide a unique opportunity for Pakistani prosecutors to "put their house in order."

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254. See Mian Saifur Rehman, *Conviction Comes with Conviction*, NEWS INT'L (June 29, 2014), <http://www.thenews.com.pk/Todays-News-6-258793-Conviction-comes-with-conviction> ("The post office work that the prosecutors would do in the past has been replaced with intelligent application of technical know-how and mind by the prosecutors.").

255. *Id.*

256. *Prosecutors Told To Improve Efficiency*, *supra* note 81.

257. *Directive Issued To Streamline Prosecution of Militants*, *supra* note 134.

258. Javed Aziz Khan, *Khyber Pakhtunkhwa Reports Increase in Criminal Convictions*, CENT. ASIA ONLINE (May 30, 2014), [http://centralasiaonline.com/en\\_GB/articles/caii/features/pakistan/main/2014/05/30/feature-01](http://centralasiaonline.com/en_GB/articles/caii/features/pakistan/main/2014/05/30/feature-01); see also *Peshawar: Conviction Rate in Terrorism Cases Climbs*, NEWS INT'L (Apr. 20, 2014), <http://www.thenews.com.pk/Todays-News-7-245277-Conviction-rate-in-terrorism-cases-climbs>.

259. Khan, *supra* note 258 ("The difference between 8% convictions in January 2013 and more than 30% one year later is 'huge.'" (quoting KPK Assistant Superintendent of Police)).