The Anti-Terrorism Legal Regime of Pakistan and the Global Paradigm of Security: A Genealogical and Comparative Analysis

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Introduction

In his article *The Creation and Development of Pakistan's Anti-terrorism Regime, 1997-2002* Charles H. Kennedy critiques Pakistan's anti-terrorism legal regime. The subject matter of his critique revolves around two juridical derogations: a) suspension of the rule of law by way of enacting anti-terrorism laws and allowing for preventive detention, b) suspension of regular courts of judicature by way of setting up special courts, for instance anti-terrorism and martial courts, and allowing for the practice of speedy justice, which here stands for extraordinary procedure and summary execution. It should be noticed that the two juridical derogations constitute a state of affairs, which in critical legal studies, is termed state of exception. After highlighting the fallouts of Pakistan's anti-terrorism legal regime, Kennedy concludes his article with a counterintuitive piece of advice for the West: "The tortured history of Pakistan's anti-terrorism regime should give pause to prospective latecomers to the process (e.g., the United States, Britain, EU, Australia)".[1] The advice, benign on the face of it, is however quite provocative. It at once begs the questions: Is the West really a latecomer in introducing an anti-terrorism legal regime?

Apparently, the answer is yes. Because one of the major Pakistani anti-terrorism laws was passed on August 14, 2001, about a month before the terrorist attacks of 9/11, while in the US and the UK some of the major anti-terrorism laws were passed after 9/11, Kennedy's advice makes good chronological sense.[2] But inasmuch as

[1] Charles H. Kennedy, "The Creation and Development of Pakistan's Anti-terrorism Regime, 1997-2002," in *RELIGIOUS RADICALISM AND SECURITY IN SOUTH ASIA*, ed. Satu P. LIMAYE, Mohan Malik, and Robert G. Wirsing (Honolulu: ASIA-PACIFIC CENTER FOR SECURITY STUDIES, 2004), 411.

[2] On August 14, 2001, President General Pervaiz Musharraf issued Anti-Terrorism (Amendment) Ordinance. This ordinance amended the Anti-Terrorism Act of 1997, which is the first detailed anti-

Kennedy's advice calls forth the chronology, it hardly goes without provoking questions relating to the underlying genealogy. The task I take up in this article is to trace the genealogy of Pakistan's anti-terrorism legal regime all the way back to early 19th century colonial India. In so doing, I demonstrate how during this early phase of colonization, with the passage of certain colonial regulations, the legal substance and form of the present anti-terrorism regime, or the early form of the current state of exception, were introduced. Traversing through several epochs of colonial and post-colonial governance, the colonial state of exception, which was British in its origin, not only survived, but also confirmed and countenanced the state of exception at home (Britain) and has only recently come a full circle.

Before we dig into the Western and colonial legal genealogies, let us place in our perspective another crucial aspect of the debate relating to anti-terrorism legal regimes, i.e., governments' inability to provide a viable legal basis for the regime. In more technical terms, they are unable to settle the locus of state of exception in the constitutional order. Interestingly, when Pakistan, or for that matter other post-colonial states, are blamed for their oppressive anti-terrorism legal regimes, they point the finger (back) at the West, the liberal West. For instance, a Pakistani law minister would typically and/or eventually answer to all questions relating to the anti-terrorism legal in the following way:

> David Montero (PBS Correspondent):…if the government of Pakistan is violating the constitution by secretly detaining the suspects?
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> Wasi Zafar (Law Minister, 2007): It's not necessary that family should contact to a terrorist…[at this point as Montero wants to add a question, Zafar senses the difficulty to answer it, and therefore, goes on].…And in your countries, even in America, in Europe, everywhere…if one is a terrorist, he loses many rights, many

terrorism law in Pakistan. In the UK the Anti-Terrorism, Crime and Security Act, (ACS) 2001 was introduced in the parliament two months after 9/11. It received royal assent on December 14, 2001. However, before the ACS 2001 the Anti-Terrorism Act 2000 was in force in the country. In the US, on October 26, 2001, two months after 9/11, the USA PATRIOT Act was passed. Next month on November 13, 2001 the President issued the Authorization of Use of Military Force (AUMF) 2001.

> constitutional rights he loses…when a person who is indulged in an anti-state activity, when he has nothing to do with the state, when he has become state enemy, he loses many rights.
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> Montero: So a person who is booked on [the] Pakistan Security Act, they can be denied of their rights, cannot contact their family?
>
> Zafar (somewhat acerbically): As in your country…
>
> Montero (tries to quickly add): …but I am taking about Pakistan…
>
> Zafar: No…no…I am talking about whole of the world… (Montero insists on Pakistan again, but Zafar goes:) No I will talk about whole of the world…as is the case in whole of the world so is the case in Pakistan…[3]

The inability to provide a viable justification for the anti-terrorism legal regime, and the state of exception it has come to enforce, more often than not ends up in contrapuntal blaming. In Pakistan the state of exception is quite evident, but in the West it only remains unnoticed, especially by many citizens, and some sections of media and scholars. However, it is, in fact, as Giorgio Agamben argues, "perfectly known to the jurists and politicians."[4] In this contrapuntal blaming, what Western governments and media can do at best is to justify their own state of exception as legal, or within the boundaries of law, only by pointing to the crude regimes in the East and using them as the touchstone for such a justification. For many such a justification would do, but then such a justification cannot escape the long history of collusion (on practical implementation levels), countenance (in legal language, contents and form), and simultaneity (the understanding

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[3] David Montero, *Pakistan: Disappeared, One Woman's Search Rouses a Nation*, Documentary (PBS, 2007), http://www.pbs.org/frontlineworld/rough/2007/09/pakistan_the_di.html.
[4] Giorgio Agamben, *State of Exception*, trans. Kevin Attel (Chicago: University of Chicago Press, 2005), 18.

that the other will always follow suit in introducing similar laws) between the Western and Eastern regimes.

I

From the State of Exception to the Global Paradigm of Security in the West:

Just as the War on Terror increased the number of security laws in the US and later in several other European countries, the academic interest in the politico-legal state of affairs they created also increased. In critical IR and Critical Legal Studies, the concept of state of exception found renewed interest. A number of books and research articles were written soon afterward, and the one that stands out above all is Giorgio Agamben's *State of Exception*. I turn to this path-breaking short treatise especially because it makes part of the task at hand—relating to genealogy of anti-terrorism legal regime in the West—easier. According to Agamben, "The state of exception is not a special kind of law (like the law of war) […but] it is a suspension of the juridical order itself, [and] it defines law's threshold or limit concept."[5] The historical construction of the state of exception occurred with, on the one hand, "[...] the extension of the military authority's wartime powers into the civil sphere, and on the other a suspension of the constitution (or of those constitutional norms that protect individual liberties), in time the two models end up merging into a single juridical phenomenon that we call the state of exception."[6]

The analysis of the history of state of exception in the West, Agamben writes, shows that the various countries can be divided into two groups. One group, to which belong France and Germany, regulate "the state of exception in the text of the constitution or by a law" and the second, to which belong Italy, Switzerland, England, and the United States, "prefer not to regulate the problem explicitly."[7] Despite the superficial difference of explicit versus implicit way of regulating the problem, Agamben notes: "[…] something like a state of exception exists in all the above-mentioned orders, and the history of the

[5] Ibid., 4.
[6] Ibid., 5.
[7] Ibid., 10.

institution, at least since World War One, shows that its development is independent of its constitutional or legislative formalization."[8]

In France the genealogy of state of exception goes all the way back to the French Constituent Assembly's decree of July 8, 1791, which mentioned and defined three states of political affairs—*the state of peace*, *the state of war*, and *the state of siege*. In the first, civil and military authorities worked in their own jurisdictional spheres. In the second, the former acted in concert with the latter. In the third, the former lost its authority especially of maintaining order and internal policing, which is assumed by the latter. Later, by Napoleon's decree of December 24, 1811, the state of siege transforms into *political or fictitious state of siege*. Now the emperor could exercise the power a) to decide whether or not a city was under attacked or threatened by enemy forces, and b) to place it under the *state of siege* without formally declaring it.[9] Then in the constitution of December 13, 1799, the idea of a suspension of the constitution was introduced. In Article 92 the constitution provided: "In the case of armed revolt or disturbances that would threaten the security of the State, the law can, in the places and for the time that it determines, suspend the rule of the constitution."[10]

In Germany the legal bases of the state of exception go back to the Weimar Constitution of 1919. Article 48 of the constitution clearly provided: "If security and public order are seriously [*erheblich*] disturbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights…" Under this article the governments of the new republic issued "emergency decrees on more than two hundred and fifty occasions; among other things, they employed it to imprison thousands of communist militants and to set up special tribunals authorized to pronounce capital sentences."[11] But the legacy of state of exception does not end with the end of Nazism. In 1968 in the constitution of Federal

[8] Ibid.
[9] Ibid., 4–5.
[10] Quoted in ibid., 5.
[11] Ibid., 15.

Republic an amendment was introduced to make provision for the "state of internal necessity." Accordingly, the state of exception survived not only to take care of public order and security, but this time also for defending the "liberal-democratic constitution."[12]

In some of the second group of countries, for instance Italy, the UK and the US the genealogy of state of exception goes further back WWI. In Italy it can be traced back to 1860s when the kingdom was faced with violent disturbances in some of its provinces. However, it is during the interwar period that Italy experiences the *political state of exception*. Legislation by emergency executive decrees becomes common place rather becomes a new art of government. And "since then the practice of executive [*governamentale*] legislation by law-decrees has become the rule in Italy."[13] In the US, the state of exception goes back to Abraham Lincoln's presidency during the Civil War of early 1860s. Lincoln imposes censorpship on mail and authorizes "the arrest and detention in military prisons of persons suspect of 'disloyal and treasonable practices.'"[14] During the WWI certain acts like Espionage Act 1917 and Overman Act 1918 gave the government power to check disloyal activities. Then during the Great Depression President Franklin Roosevelt declared that in case of a national emergency, should Congress fail, he would "not evade the clear course of duty." Finally, during the WWII, on February 19, 1942, American government set up internment camps and put in them more than seventy thousand of its citizens of Japanese descent.[15] In England, according to Agamben, the genealogy of the state of exception goes back to the Mutiny Acts. The Acts gave the Crown authority to declare martial law during times of war. Later, during the WWI, the passage of the Defence of the Realm Act (1914) DORA, British government put considerable limitations on the fundamental rights of the citizens. The Act also granted for military tribunals that exercised jurisdiction over civilians. At the end of the War, the Emergency Powers Act (1920) was passed that allowed government to declare state of emergency and set up special courts.

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[12] Ibid., 15–16.
[13] Ibid., 17.
[14] Ibid., 20.
[15] Ibid., 21–22.

On the basis of genealogical reading, Agamben arrives at certain conclusive observations. First he observes that there is an increasing tendency since WWI of the state of exception becoming the dominant paradigm and normal technique of government.[16] Second, echoing Gilles Deleuze's essay on "control societies", Agamben observes that the state of exception today is no more formally declared, but is enforced by way of "an unprecedented generalization of the paradigm of security."[17] Third, due to such transformations "the entire politico-constitutional life of Western societies began gradually to assume a new form, which has perhaps only today reached its full development."[18] Finally, Agamben laments: "At the very moment when it would like to give lessons in democracy to different traditions and cultures, the political culture of the West does not realize that it has entirely lost its canon."[19]

Agamben, and the authors he builds on, do a remarkable job in tracing the genealogies of the state of exception in the West. However, its vast contours are far from been fully mapped yet. I especially want to point to two gaps their study. First, they do not attend to the colonial history of the state of exception and the way it countenances the western one. Second, Agamben traces the state of exception in England to the Mutiny Acts, but misses to notice another yet more relevant legal precursor—the law of high treason.

II

The English Law of High Treason and the Colonial Paradigm of Security

(Note: From here on the essay is in its first descriptive stage)

At the beginning of 19th century, the scope and application of the English law of high treason was at decline in America and England. Courts, rather than legislatures,

[16] Ibid., 2,14.
[17] Ibid., 14.
[18] Ibid., 13.
[19] Ibid., 18.

were instrumental in bringing about this decline by strengthening the procedural safeguards. In America, during the revolutionary war between the colonies and the British forces, the courts of colonies approached the law of high treason with restrictive construction. For instance, in *Respublica v. Malin*[20] the Pennsylvania court stressed upon "treasonous intent" for proving the charges of high treason. The accused claimed that he had mistaken the British troops for the American ones, and the court accepted his defense. Moreover, regarding his treasonable words the court observed that mere words fall within the principle of freedom of expression, a principle that was originally defended by English judges, notably Edward Coke, in similar cases. Accordingly, the court held that mere words could not qualify for treason unless they tend toward the overt act.[21] In *Ex parte* Bollman,[22] Chief Justice John Marshall restrictively interprets the act of assemblage of men for levying war. He observes: "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose."[23] On the other hand, he notes: "the actual enlistment of men to serve against the government does not amount to levying of war."[24] Similarly, in a subsequent case, the Supreme Court declares that an attack by armed men upon United States border guards did not constitute levying war. After the War of 1812 the courts make certain careful decisions. For instance, it is held that the sale of foodstuff to the British amounts to high treason,[25] but should someone go along with the enemy to purchase supplies does not constitute treason.[26] On the whole, the courts do not embark upon the path of declaring treason by construction or broadly interpreting the provisions of the constitution. Rather they emphasize on strict adherence to the cumbersome procedure of treason trial—especially the requirements of evidence.

In England, around the same time, the law of high treason and treason trials provoke hot public debates. For instance, the treason trials that arise in the wake of

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[20] *Respublica v. Malin* [1778] 1 Dall. 34
[21] In some other cases the court ruled that taking a commission or persuading someone to enlist in the British Army constituted treason. *Respublica v. Abraham Carlisle* [1778] 1 US 35.
[22] *Ex Parte Bollman* [1807] 8 US 75
[23] Ibid 232
[24] Ibid 231
[25] *United States v. Lee* [1804] 26 Fed. Cas. No.15, 584
[26] *United States v. Pryor* [1814] 3 Wash. Cir. Ct. Rep. 234

the Spa Fields riots (1817),[27] the Pentridge rebellion (1817),[28] and Cato Street Conspiracy (1820)[29] cause considerable public debate and consternation. However, "[a]fter 1820 the use of treason law and the horrible sentence it imposed subsid[e]."[30] Moreover, two subsequent statutes—the *Treason Act* 1842 and *An Act for the Better Security of the Crown and Government of the United Kingdom* 1848—distinguish between the personal safety of the King from the security of the State. Then on, high treason consists in hostile acts directed against the "general safety of the state."[31]

Just as the law of high treason was at decline in the Anglo-American criminal jurisprudence and legal regime of state security, the colonial administration of the British East India Company, on the pretext of providing for the security of the fledging state in Bengal, modifies and adapts the same law in the form of Regulation X of 1804. Before we go on to see how Regulation X stands at the origin of the colonial security regime in India, let us first uncover the juridical kinship between the English Statute of high treason and the Regulation X. This we can do by a simple juxtaposition of the two texts. The "certain offences against the state" stipulated by the Regulation X are strikingly analogous to certain "offences" that the English statute of 25 Edward III (1351) stipulates.[32] The Regulation X reads:

> Whereas, during wars…certain persons owing allegiance to the British Government have borne arms in open hostility to the authority of the same, and have abetted and aided the enemy, and have committed acts of violence and outrage against the lives and properties of the subjects of the said Government…

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[27] Four Spencean Philanthropists were brought to treason trial for exciting rebellion and war against the king. The jury however, held that the acts of rioting did not constitute levying of war. See, Lisa Steffen, *Defining a British state: treason and national identity, 1608-1820* (Palgrave 2001) 145–147
[28] ibid. 147–150
[29] ibid. 150–155
[30] ibid. 7
[31] ibid. 160–161
[32] The phrase is used in the explanatory title of the Regulation, which reads: "…to provide for the immediate Punishment of certain Offences against the State…" While the explanatory title of the 25 Edward III reads: "Declaration of what offenses shall be adjudged treason." Also compare the treason act of the First Congress Session of the United States, which reads: "…for the punishment of certain crimes against the United States…" 11 Ch. 9 Sec. 1, 1 Stat. 112 (1790).

On the other hand, the English statute reads:

> …compass or imagine the death of our lord the King…do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere…

The object of the two laws is a sovereign power—king or the state. The subject of the two laws is expressed in analogous phrases—levying war, aiding and abetting the enemy, and rebellion. It is worth noticing that "violence and outrage against the lives and properties of the subjects" provided in the Regulation used to be part of the Common Law of treason. The basis of this type of treason was allegiance-protection relationship between the King and his subjects.[33] Both laws also provided a similar explanatory basis i.e., the bond of allegiance. Finally, there is the subject of "compassing" the offence of treason, which is explicitly provided in the English statute. In the colonial regulation it is only implied. However, it becomes explicit in a subsequent regulation, the Regulation III of 1818, which provides for the preventive detention in order to cope with the compassing of offence.[34]

There are four key juridical dynamics of the colonial paradigm of security, which are traceable to the above-mentioned two colonial regulations—the Regulation X of 1804 and the Regulation III of 1818. These juridical dynamics are as follows: a) the state of war, b) Offences against the State, c) suspension of courts, d) preventive detention.

A. THE STATE OF WAR

Just as the Anglo-American law of high treason follows from and deals with the state of war, the Regulation X also follows from and deals with a state of war. The British East

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[33] For instance the offence of assaulting and forcibly detaining a subject of the King for ransom was considered treason in *Knight of Hertfordshire*. Richard Z Steinhaus, 'Treason, a Brief History with Some Modern Applications' (1955) 22 Brooklyn Law Review 254

[34] The statute also points toward the scope of territorial jurisdiction. The two phrases "in his realm" and "elsewhere" point to the local and global jurisdiction of the current anti-terrorism regimes in the US, the UK, and Pakistan.

India Company was faced with a protracted state of war with Mughal kings and various other local princes. Interestingly, the state of protracted warfare was in its nature and scope small, irregular and spontaneous. Therefore, the British military classified the state of war as the "small war," "savage war," or "uncivilized war."[35] It is in the backdrop of small, irregular, and protracted state of war that the Regulation X is introduced. Part of the reason for its introduction, was to establish a legal regime to discipline and punish defection from the assumed and forced allegiance to the colonial state. Similarly, in medieval England, the high treason statutes were introduced in face of a state of warfare between the king and his nobles or estates. The medieval state of warfare, in its nature and scope was also protracted, small and irregular. Interestingly, today many military strategists and historians classify the War on Terror as small and irregular warfare.[36]

B) OFFENCES AGAINST THE STATE

Let us recall the statement of Pakistan's Law Minister Zafar, when asked about the missing persons or the so-called suspected terrorists, he said: "when a person who is indulged in an anti-state activity, when he has nothing to do with the state, when he has become state enemy, he loses many rights." This statement allows us to figure the official understanding of which acts or activity consist in terrorism. These are in fact the anti-state activity. While terrorism is a relatively new category, the category of "anti-state activity" corresponds neatly with the older category of "offences against the state."

The Regulation X of 1804 for the first time effectively determines which acts would constitute as offences against the state. Those were 1) levying war, 2) aiding and abetting the enemy, 3) rebellion, and 4) violence against the subjects and their property. Once these offences are determined, they become standard criminal categories that are invoked in subsequent regulations, ordinances and statutes. The Regulation X itself remains in force for more than a century.

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[35] See in general, Capt. Charles Callwell, *Small Wars: Their Principles and Practices*, 1896

[36] See for instance, Mary Kaldor, *New and Old Wars* (Polity Press 1998); David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One* (Oxford University Press 2009); Roger W. Barnett, *Asymmetrical warfare: Today's Challenge to U.S. Military power* (Brassey's, Inc. 2003)

Let us trace the trajectory of these offences in the subsequent colonial regulations, ordinances and acts. In 1818 Regulation III is issued in order to introduce preventive detention. The regulation justifies preventive detention on the pretext of curbing the offences against the state. It reads:

> Whereas reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquility in the British dominions from foreign hostility and from internal commotion…

In 1860 several earlier regulations are consolidated into a comprehensive penal code. Chapter VI of the panel code is titled "Offences Against the State." Two subsequent chapters also contain offences, which directly or indirectly relate to offences against the state. Collectively, these chapters enumerate following offences: waging war, abetting the waging of war, concealing the design of war, collecting men, arms and ammunition, waging war against an ally, causing depredation on the territory of an ally, assaulting, restraining or trying to overawe authority, mutiny, and sedition.

In 20th century, WWI prompted the British government to introduce at home the Defence of the Realm Act, DORA, 1914. The DORA was meant to ensure "the public safety and the defence of the realm" as well as "to prevent assistance being given to the enemy or the successful prosecution of the war being endangered." It was in effect a newer version of the law of high treason. Same offences against the state, which could be tried under the law of treason were made subject to the new law for less cumbersome and speedy execution. The war ended in 1919 but the offences against the state remained the preoccupation of the British government. Accordingly, Emergency Act 1920 is introduced, which provided to deal with the following offences:

> …interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation declare that a state of emergency exists.

In colonial India DORA is adapted in the form of Defence of India Act 1915. The Act aimed to curb high treason and other state offences, which were expected to spread especially in the Punjab. Hence the act provided to "securing the public safety and the defence of British India" and to dealing with those who wage war against the King and assist the enemy.

The end of WWI brought Anarchical and Revolutionary Crimes Act 1919, popularly known as the "Rowlatt Act."[37] The Act provided government with the power to cope with "anarchical and revolutionary movements," a term that was not defined. In fact, the offences that were hitherto called as offences against the state were now termed as anarchical and revolutionary offences. Thus a schedule was attached to the act which declared following offences as anarchical and revolutionary offences: sedition, waging war against the government; attempting or conspiring to wage war; collecting arms with the intention of waging war; abetting mutiny; promoting enmity between different religious, racial or linguistic groups; and causing criminal intimidation. The government could also declare certain areas as "affected areas."

In order to meet the "grave emergency" of WWII facing India, the British Governor General enacted The Defence of India Act, 1939. The preamble of the Act read:

> Whereas an emergency has arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences.

In fact, the "certain offences" mentioned in the act consisted in those offences that were already provided in the earlier acts (of 1915 and 1919). The Act in Section 2 endowed upon the Central Government the power to make rules for the matters pertaining to

[37] See Muddiman, British India: Acts of the Indian Legislative Council, 3 J. Comp. Legisl. & Int'l L. 125, 126-128 (1919)

> defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

Finally, the Enemy Agents Ordinance 1943 shows a distinctive link with the Regulation X of 1804 and Regulation III of 1818. Certain juridical features of the English law of high treason that were adapted in those two regulations are once again provided in the Enemy Agents Ordinance. The Ordinance declared:

> Whoever is an enemy agent, or, with intent to aid the enemy, does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance too…the enemy or to impede…operations of His Majesty's Forces or to endanger life…shall be punishable with death.

When Pakistan adopted this law the words "His Majesty's Forces" are replaced with "the Armed Forces of Pakistan or the forces of a foreign power allied with Pakistan." These words assumed significance in wake of the War on Terror as Pakistan enters into alliances with the United States and NATO.

C) THE SUSPENSION OF COURTS

The most unusual aspect of the Regulation X of 1804, was a provision for the suspension of ordinary law and courts, and in their stead declaring martial law and setting up martial courts. The regulation said:

> The Governor-General in Council is hereby declared to be empowered to suspend, or to direct any public authority or officer to order the suspension of, wholly or particularly, the functions of the ordinary Criminal Courts of Judicature…and to establish martial law…and also to direct the immediate trial, by Courts martial.

This was the first effective provision in the colonial state of India for the suspension of law and the trial of the civilians by way of martial courts. The very provision amounted to introducing an exception to the rule of law. In 1840 the government passes Act V of

1841, which "authorized the Government to issue a commission for the trial of any such offences," i.e., the offences against the state. The Act V of 1840 becomes one of the earliest precursors of the post-colonial juridical apparatus of special courts and speedy justice in South Asia.[38]

The Defence of India Act 1915 provided for issuing commission for setting up special tribunals that would have the authority to award capital sentence. A Special Tribunal consisted of three commissioners, who had qualifications equivalent to sessions Judges or Additional sessions Judges. The Act demanded legal knowledge and experience from only two of the three commissioners. The Act declared in section 6 that the decision of Special Tribunal was to be "final and conclusive." Similarly, the Anarchical act 1919 provided for special courts and expedited procedures for trying the scheduled offences, which were believed to be *sufficiently prevalent*. Special courts were however set up at the direction of a High Court, if the High Court was satisfied about the strength of the charges gathered by the government.

The Defence of India Act 1939, in Chapter III provided for Special Tribunals. Provincial Government, under Governor, was given power to set up special tribunals, each consisting of three members, who qualified for the position of district magistrate or session judge, and at least one of the members should be qualified for the position of judge of High Court. Special Tribunals exercised jurisdiction over offences against the state prescribed in the Act or other acts. The tribunals were empowered to award punishments that included death sentence, transportation for life, and long-term imprisonment. The persons who were awarded capital sentences had

> a right to appeal to the High Court within whose jurisdiction the sentence has been passed, but save as aforesaid and notwithstanding the provisions of the Code…there shall be no appeal from any order or sentence of a Special Tribunal, and no Court shall have authority to revise such order or sentence, or to transfer any case from a Special Tribunal…

[38] Act V of 1841 was repealed by Act X of 1872, which consolidated the detailed Code of Criminal procedure.

Moreover, the government could "in any such order direct the transfer to the Special Tribunal of any particular case from any other Special Tribunal or any other Criminal Court not being a High Court."

The procedure of the Special Tribunals is worth noticing. In clause 1 Section 10, the Act provided: "A Special Tribunal may take cognizance of offences without the accused being committed to it for trial." And in clause 2, it provided:

> Save in cases of trials of offences punishable with death or transportation for life, it shall not be necessary in any trial for a Special Tribunal to take down the evidence at length in writing, but the Special Tribunal shall cause a memorandum of the substance of what each witness deposes to be taken down in the English language and such memorandum shall be signed by a member of the Special Tribunal and shall form part of the record.

Moreover, the procedure provided that a Special Tribunal would not be bound by ordinary legal procedure to adjourn any trial and to recall and rehear any witness. Rather the Special Tribunal could proceed on with the trial on the basis of already recorded evidence. A Special Tribunal could try an accused in his absence, inasmuch as he appeared once. A Special Tribunal could also

> order the exclusion of the public from any proceedings, if at any stage in the course of a trial of any person before a Special Tribunal application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the safety of the state…

Provincial Government was given the power to determine the time and place for sitting of the Special Tribunals.

The Enemy Agents Ordinance 1943 did away with the three-member composition of tribunals set up under the Defence of India Act 1939. Now under the Enemy Agents Ordinance, a special tribunal consisted of one judge, who was to be persona *designata* of

government. The tribunal tried persons accused of abetting and aiding the enemy. The qualifications of special judge were reduced so that a Session Judge or an Assistant Session Judge could be appointed as special judge. The government determined the time and place of the trial. Moreover, the government could also transfer cases from one special judge to another. On appeal against the decision of a special court, the case was to be reviewed by another special judge, who was chosen from the Judges of given High Court. The decision of the appeal's special judge was final. The higher courts were barred from exercising their administrative authority to transfer a case from special court to ordinary court.

The rights of accused were truncated. For instance, an accused was given the right to be defended by a legal pleader, but the Ordinance provided that "such pleader shall be a person whose name is entered in a list prepared in this behalf by the Government or who is otherwise approved by the Government." Similarly, the accused was given the right to receive a copy of decision and other documents relating to the case, but he must return it within ten days after the end of proceedings and must not disclose information to anyone regarding the entire trial. This procedural setup was not only allowed to retain in the Ordinance as it was adopted by Pakistan after independence in 1947, but it was also inscribed in the Army Act 1952 (amended in 1965 and 1967). Under the Army Act civilians can be tried in a martial court with the truncated rights provided in the colonial Enemy Agents Ordinance.

D. PREVENTIVE DETENTION:

At the turn of the 18th century, England's wars against revolutionary France provoked suspension of *habeas corpus* twice—May 1794 to July 1795 and April 1798 March 1801. After the end of war England faces economic depression, which provokes a proletariat movement for parliamentary reforms. By 1817 the reforms' movement grows violent.

When the Prince Regent's coach is attacked in January 1817, the parliament responds by passing Habeas Corpus Suspension Act 1817.[39]

Next year in colonial Bengal, somewhat similar provisions are introduced in the form of Regulation III of 1818—A Regulation for the Confinement of State Prisoners.[40] The Regulation declared:

> Whereas reasons of state…occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper.

A detainee under the Regulation III of 1818 was stripped of several rights normally enjoyed by a person upon arrest, for instance, the right to be presented before a magistrate, the right of legal counsel, right to be informed about the grounds of detention, and the right of fair trial. The officer under whose custody the detainee was placed prepared bi-annual reports "on the conduct, the health, and the comfort of such state prisoner, in order that the Governor-General in Council may determine whether the orders for his detention shall continue in force or shall be modified." Hence the law provided the basis for indefinite detention. The law remained in force until after independence of India in 1947.[41]

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[39] 57 Geo. III, c. 3. The act is repealed next year. Also note that the Prince Regent's father was also stoned/attacked previously in 1795. The attack had resulted in the passage of Treasonable and Seditious Practices Act 1795 (36 Geo. III, c.7).

[40] The genealogy of preventive detention in colonial India goes further back to the East India Company Act of 1793. However, according to Dilawar Mahmood there is "no evidence that this Act was ever enforced." The Act said:

> It shall and may be lawful for the Governor of Fort William aforesaid for the time being to issue his warrant under his hand and seal, directed to such peace officers and other persons as he shall think fit for securing and detaining in custody any person or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any of the British settlements or possessions in India with any of the Princes, Rajas or Zamindars…

See, M. Dilawar Mahmood, Preventive Detention (In the Sub-Continent), Kausar Brothers, Lahore, Pakistan 1988.

[41] Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller, and Jed S. Rakoff, 'COLONIAL CONTINUITIES: HUMAN RIGHTS, TERRORISM, AND SECURITY LAWS IN INDIA' (2006) 20 Columbia Journal of Asian Law 93, 123–124

In 1850, Act XXXIV, titled "An Act for the better Custody of State Prisoners" was passed. This particular act served two goals. It extended the Governor-General's territorial jurisdiction under the Regulation of 1818 from the Presidency of Fort William to all territories held by the East India Company by 1850. Second, it removed "doubts" of courts as to whether the state prisoners could be "lawfully detained in any fortress, gaol, or other place within the limits of the jurisdiction of any of the Supreme Courts of Judicature established by Royal Charter." In 1858 a similar act—Act III of 1858—provided for removal of doubts of courts in Madras and Bombay. The 1858 Act also empowered the governors to issue orders of preventive detention. Moreover, it provided new power to the Governor-General-in-Council to order the removal of any state prisoner from one place of confinement to another within territories of the East India Company. In 1872, Act IV is passed to enforce the Regulation III of 1818 in the province of Punjab, which after independence makes two provinces of Pakistan.

After the 1857 uprising the Indian Council Act of 1861 is passed. The Indian Council Act gives the Governor-General power to unilaterally issue ordinances to ensure "the peace and good government" in India. During emergency times, which the Governor-General himself decides, ordinances could be issued to authorize preventive detention and special tribunals.[42] It was the beginning of what half a century later British Prime Minister Ramsay MacDonald termed "government by ordinance."[43]

The 19th century colonial regulations in India had a visible impact on the British policy toward Ireland. In 1871, the British government introduced the Protection of Life and Property (Ireland) Act, which for the first time in Ireland allowed for detention without

[42] Indian Councils Act of 1861, 24 & 25 Victoria, c. 67, Sect. 23. Venkat Iyer notes that this ordinance-making power was used seven times before WWI and 27 times during the War, which included ordinance authorizing preventive detention. Venkat Iyer, *States of emergency: the Indian experience* (Butterworths India 2000) 68

[43] D.A Low, 'Civil Martial Law: The Government of India and the Civil Disobedience Movements, 1930-34' in D.A low (ed), *Congress and the Raj: Facets of the Indian Struggle* (Heinemann 1977) (quoting Macdonald) 190

trial. Accordingly, the experience of early 19th century Bengal regulations was transferred to Ireland in the later half of the century.[44]

In mainland Britain, WWI prompted the government to introduce preventive detention. The Regulation 14 (b) under the Defence of Realm Regulations 1914 conceded to the government the power to detain civilians. The regulation declared:

> Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the public safety of the defence of the realm it is expedient in view of the *hostile origin or associations* of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order… (Emphasis added)

The detention without trial was challenged in the British courts. However, the courts upheld the discretion of the government to detain anyone even on mere suspicion. In *Rex v. Halliday* 1917 and later in *Liversidge v. Anderson* 1942 the British judiciary laid down the principle of "subjective satisfactions," in contrast to "objective satisfaction," as sufficient criteria for the reasonableness of suspicion to detain.

In India the powers of detention without trial were granted under the Defence of India Rules 1915. Even as the war ended, the detention without trial powers of the government were incorporated in the Anarchical Act of 1919, which authorized the government to issue preventive detention orders and other types of orders to restrict the freedom of movement of an individual for up to two years. Although the act gave detainees the right to appear before an investigating authority and be informed about the grounds of their

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[44] A. W.B Simpson, 'Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights' (1995) 41 Loyola Law Review 629

detention, they were denied the right to be represented by counsel. Moreover, the government retained the discretion to withhold from detainees "any fact the communication of which might endanger the public safety or the safety of any individual."

In the Northern Ireland after the end of WWI, the British government in 1922 enacted the Civil Authorities (Special Powers) Act (Northern Ireland) allowing for detention without trial, as well as searching any home. Both in colonial India and in the Northern Ireland, detention without trial was a kind of "imprisonment at the arbitrary Diktat of the Executive Government."[45]

Again the outbreak of WWII in 1939 the British government in both Britain and India imposed restrictions on movement and provided for detention without trial. Accordingly, the rule 26 of the Defence of India Rules 1939 provided:

> So long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be detained in such place, and under such conditions…

Again the rule 129 provided that any police or other government officer so empowered might arrest any person without warrant "whom he reasonably suspects of having acted, of acting, or of being about to act" in such a way "to assist any State at war with His Majesty, or in a manner prejudicial to the public safety or to the efficient prosecution of war," "or to assist the promotion of rebellion."

III

Post Colonial Anti-Terrorism Legal Regime and Global Paradigm of Security

[45] Lord Diplock commented while suggesting reforms to law of detention in 1972. See, William E. Hellerstein et al., Criminal Justice and Human Rights in Northern Ireland: A Report to the Association of the Bar of the City of New York (1987) at 29; M O'Connor and Celia M Rumann, 'Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland' (2002) 24 Cardozo Law Review 1657, 1669

By classifying certain offences as offences against the state, making provisions for the suspension of law and courts, and legalizing detention without trial, the British colonial security regime prepared the juridical groundwork for the current global paradigm of security. Pakistan, India, and the British direct rule in Northern Ireland particularly edified from the colonial security regime.

In Pakistan the post-independence security regime consisted in two types of laws. Specific security of the state acts, which were passed in 1949, 1950, and 1952. The Security of Pakistan Act 1952 was originally enforced for only three years time period. However, it was extended from time to time, such that it is in force to this day. This act, like its predecessors, was based on the Defence of India Act 1939. The second type of security law consists in certain derogation provisions of the constitution, which provide for preventive detention in Pakistan. These derogation provisions are based on the India Act 1935.

In Northern Ireland, after the British government took over its direct control in 1972, emergency and anti-terrorism acts (NIEPA 1973 and PTA 1974) were introduced. The roots of these laws stretch back to the Special Powers Act 1922, but they also correlate to the British wartime legislation and the colonial security regime. At the outset of the 21st century, we see that the emergency and anti-terrorism laws of Northern Ireland are consolidated into the Anti-terrorism Act 2000, which is in force in whole of the UK.

The current anti-terrorism legal regime in Pakistan has two legal sources. Its immediate legal source is the British emergency and anti-terrorism laws enforced in Northern Ireland as well as in the UK. While its relatively distant legal source is the colonial regime of security in India.

A) STATE OF WAR:

Well before the beginning of the War on Terror, America, Britain and Pakistan were allied in the Afghan War or the Cold War of 1980s. The anti-terrorism legal regimes

in these allied states grew directly or indirectly from the Cold War, which had an existential state of war about it. The War on Terror also has an existential state of war about it. Whether or not an actual state of war exists today, the allied states believes that it does. Even after the killing of Osama bin Laden, the pulling out of troops from Iraq, the democratic spring in the Middle East, and the gradual withdrawal from Afghanistan, US strategists believe that the War on Terror will continue. Accordingly, Congress has been prodded to pass the NDAA 2011-2012 with certain provisions that codify into law the detention without trial. The statute would remind us of Agamben's assumption that the paradigm of security tends to outlive war.

B) OFFENCES AGAINST THE STATE AND TERRORISM

The defence acts and regulations passed during two World Wars become standard legal instruments for legislating security law in Pakistan as well as in the UK. Just as the wartime laws categorized certain offences as offences against the state the laws of post-wartime followed the course. The categorization of certain offences as offences against the state is further strengthened by the technique of providing for schedules. For instance, Anarchical Act 1919, which aimed to suppress anarchical and revolutionary activities came with a schedule, which included those offences against the state that could be tried under the penal code and various other laws. Similarly, the post-war emergency and anti-terrorism acts for Northern Ireland and anti-terrorism acts and ordinances of Pakistan included schedules with those offences that could be tried under penal codes or other laws.

The Security of Pakistan Act 1952, repeating the language of Defence Act 1939, provides "for special measures to deal with persons acting in a manner prejudicial to the defence, external affairs and security of Pakistan."[46] Since the early security statutes are challenged in the court, the legislators make provisions in the new constitution of

[46] *The Pakistan Code, with Chronological Table and Index*, vol. XI (Manager of Publications, Government of Pakistan 1967) 338. The Security Act 1952 replaced earlier security laws, Public Safety Ordinance (XIV) of 1949 and Public Safety Ordinance (VI) of 1952.

Pakistan 1956 for giving the security regime highest legal cover. The subsequent constitutions of Pakistan also allow for preventive detention for the offences against the state. It is worth noticing that all three constitutions of Pakistan are based on the 1935 India Act, which provided for the preventive detention. The Article 10 section 4 provides for detention without trial of

> …persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services.

At the end of Cold War, the frontline state of Pakistan, faced domestic violence and security breakdown. The crimes relating to violence and security breakdown could have been dealt with the panel code. However, a separate legal regime was instituted which redefined violence and security breakdowns as terrorism.

At this stage before looking at the acts, which were termed as terrorism in Pakistan, I want to recall Kennedy's conclusion that the West should learn a lesson from the tortured history of Pakistan's anti-terrorism legal regime and give a pause to similar regimes. It is interesting to notice that a detailed definition of terrorism in the Pakistani legal regime appears in the Anti-Terrorism Ordinance 2001. In the UK the definition of terrorism appears a year earlier. Let us compare the text of two definitions, which is strikingly similar. The Pakistani Ordinance 2001 reads:

> In this Act, "terrorism" means the use or threat of action where:
>
> (a) the action falls within the meaning of subsection (2), and
> (b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or
> (c) the use of threat is made for the purpose of advancing a religious, sectarian or ethnic cause.
>
> (2) An "action" shall fall within the meaning of subsection (1), if it:
> (a) involves the doing of anything that causes death;
> (b) involves grievous violence against a person or grievous bodily injury or harm to a person;

(c) involves grievous damage to property;
(d) involves the doing of anything that is likely to cause death or endangers a person's life...

(l) is designed to seriously interfere with or 'seriously disrupt a communications system or public utility service…

While the British Anti-Terrorism Act 2000 reads:

> In this Act "terrorism" means the use or threat of action where—
> (a) the action falls within subsection (2),
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
> (2) Action falls within this subsection if it—
> (a) involves serious violence against a person,
> (b) involves serious damage to property,
> (c) endangers a person's life, other than that of the person committing the action,
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

Pakistan's Anti-terrorism ordinance 2001 goes back to the 1997 Anti-terrorism Act. On the other hand, the British Anti-Terrorism Act 2000 goes back to the Prevention of Terrorism Act 1989, and further back to NIEPA 1973. Both PTA 1989 and NIEPA 1973 defined terrorism as "the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear."[47]

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[47] Sec 28 subsection 1, and Sec 20 subsection 1 respectively. Another aspect of comparison between the Pakistani and British anti-terrorism are provisions relating to proscribed organization. The British PTA 1989 provided:

> A person is guilty of an offence if he—
> (a) solicits or invites any other person to give, lend or otherwise make available, whether for consideration or not, any money or other property; or
> (b) receives or accepts from any other person, whether for consideration or not, any money or other property, intending that it shall be applied or used for the commission of, or in furtherance of or in connection with, acts of terrorism to which this section applies or having reasonable cause to suspect that it may be so used or applied.
> (2) A person is guilty of an offence if he—
> (a) gives, lends or otherwise makes available to any other person, whether for consideration or not, any money or other property; or
> (b) enters into or is otherwise concerned in an arrangement whereby money or other property is or is to be made available to another person, knowing or having reasonable cause to suspect that it will or may be applied or used as mentioned in subsection (1) above…

Furthermore, the technique of adding schedules for providing the offences has been consistently used in both the British and Pakistani laws. For instance, NIEPA provided for offences such as arson and riot from common law, setting fire to private or public buildings, or other forms of property and machinery drawn from the Malicious Damage Act 1861, causing grievous bodily harm drawn from the Person Act 1861, causing explosion likely to endanger life or damage property drawn from the Explosive Substance act 1883, possessing, carrying, using firearms, ammunition etc., without license under the Firearms Act (Northern Ireland) 1969, the Robbery and aggravated burglary drawn from the Theft Act (Northern Ireland) 1969. Similarly, Pakistan's Anti-Terrorism act 1997 as amended especially in 2001and 2004 provides for several scheduled offences, for instance, killing, waging war, abetting war, causing depredation, rape, which are drawn

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While Pakistan adopts these provisions ten years later in Anti-Terrorism (Amendment) Ordinance 2001:

> A person commits an offence if he--
> (a) invites another to provide money or other property, and
> (b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purpose of terrorism.
> (2) A person commits an offence if--
> (a) he receives money or other property, and
> (b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.
> (3) A person commits an offence if he--
> (a) provides money or other property; and
> (b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

A further point of comparison can be the provisions relating to dress and symbols of prospective terrorists. The British NIEPA 1973 provides:

Any person who in a public place—

> (a) wears any item of dress, or
> (b) wears, carries or displays any article,
> in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation, shall be liable on summary conviction… (Sec. 2,1)

This provision is repeated in the section 2(1) of the Prevention of Terrorism (Temporary Provisions) Act 1974 and 1989 Act. In Pakistan a similar section is introduced in the Anti-Terrorism Act 2001, which reads:

> A person commits an offence if he--
> (a) wears, carries or displays any article, symbol, or any flag or banner connected with or associated with any proscribed organization; or
> (b) carries, wears or displays any uniform item of clothing or dress in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization.

from the Penal Code, and several crimes relating to arms and ammunition drawn from Arms Ordinance 1965.[48]

In the United States, the Patriot Act redefined terrorism by making amendment in the United States Code, title 18, section 2331. Accordingly, the definition of terrorism corresponds to those offences that we find in the British and Pakistani acts. The Code says that terrorism consists in "activities that…involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State." Moreover, these acts "appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping…" Section 411 of the Patriot Act further encompasses in the definition of terrorism acts "indicating an intention to cause death or serious bodily injury," "to prepare or plan a terrorist activity," "to solicit funds or other things of value."

An interesting dimension of the American juridical and political discourse on the War on Terror is that terrorism and acts of war are often used interchangeably. For instance, in the above definitions, certain criminal offences are classified as terrorism. On the other hand, the same offences are categorized, as NDAA stipulates, as "hostilities against the United States or its coalition partners" (Section 1031).[49] More clearly, John McCain, one of the sponsors of NDAA, defending the statute says: "…those people who seek to wage war against the United States will be stopped and we will use all ethical, moral and legal methods to do so."[50] In other words, there is an interesting tendency in American juridical discourse that first elevates certain criminal offences to the status of acts of war and then on the reverse boils them down to acts of terrorism. In this way, the legal basis of the

[48] The 1992 Acts IX and X, which provided for creation of special courts, come with schedules of offences. The schedules included several criminal offences provided in the penal code and specifically other offences against the state provided in such acts and ordinance as the Arms Act, 1878, the Telegraph Act 1881, the Explosive Substances Act 1908, the Pakistan Arms Ordinance 1965, the Anti-National Activities Act, 1974, surrender of the Illicit Arms Act 1991.

[49] The phrase is also used in the Military Commissions Act 2005. The act relates to those persons who have either engaged in hostilities or have "purposefully and materially supported hostilities" against the United States and its allies.

[50] John McCain, 'REMARKS BY SENATOR JOHN McCAIN IN SUPPORT OF THE CONFERENCE REPORT OF THE NATIONAL DEFENSE AUTHORIZATION BILL', December 15, 2011

criminal offences and acts of war is destabilized, which in turn helps create a separate juridical regime—the paradigm of security.

B) SUSPENSION OF COURTS:

In 1992, Pakistan's government passed two remarkable acts—The Terrorist Affected Areas (Special Courts) Act X and The Special Courts for Speedy Trials Act IX. The aim of the acts, as declared in the preamble, was "to provide for the suppression of acts of terrorism, subversion and other heinous offences in the terrorist affected areas." The nature of offences is further defined in the Act IX: "in the opinion of Government, [are] gruesome, brutal and sensational in character or shocking to public morality or has led to public outrage or created panic or an atmosphere of fear or anxiety amongst the public or a section thereof." Chronologically, it is obvious that the legislation for establishing special courts in Pakistan comes after those of the British legislations for Northern Ireland (NIEPA 1973) and colonial India (1804-1939). Here I would like to highlight certain basic legal characteristics that the special courts of Pakistan draw on from their precursors.

The composition of special tribunals of Pakistan is drawn on the pattern of the colonial and Northern Ireland tribunals. The 1939 Act provided for three-member tribunals. This number is reduced to one-member for the tribunals set up under the Enemy Agents Act 1943. The NIEPA 1973 provides for one-member court. The special courts in Pakistan follow the one-member composition for anti-terrorism courts. Moreover, the 1939 Act provided that the members should be qualified for the position of high court judge, session court judge, additional session court judge, district or additional district magistrate. The 1992 Act and especially 1997 Act made similar qualification requirement.

The 1939 Act allowed the special courts to try all prescribed as well as other offences directed to them by the government. Similarly, NIEPA 1991 allowed the special courts to try both scheduled and non-scheduled offences directed to them by the government (Sec 10). It is worth noticing the Special Powers Act 1922 for

Northern Ireland had a clause that made all kinds of offences subject to special courts. In Section 2(4) the 1922 act had provided: "If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be guilty of an offence against those regulations." In Pakistan, the 1992 and 1997 acts gave the special courts power to try both scheduled and non-scheduled offences.[51]

Just as the 1939 Act gave its provisions an "overriding effect" on all other laws, including the penal code, the Pakistani anti-terrorism acts gave their provisions overriding effect. As a corollary to the overriding effect of law, the special courts set up under the 1939 Act enjoyed overriding effect or precedence over lower ordinary courts. Similarly, the Pakistani special courts were given precedence over lower ordinary courts.[52] Hence, a case proceeding in a special court against a person assumed precedence over any other case against the same person proceeding in any other lower court.[53] Moreover, following the section 9 of 1939 Act, the anti-terrorism acts of Pakistan empowered the government to "transfer" cases from lower ordinary courts to special courts.

The DORA and Defence of India Acts had allowed for summary trials and military courts. The summary trials could punish offenders for six months. The *Anti-terrorism Act* 1997 also allowed summary trials and the 1998 *Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance* allowed for setting up military courts with jurisdiction over civilians. In summary trials offenders could be punished with imprisonment for up to two years. The 1998 amendment for setting up military courts was however struck down by the Supreme Court in *Liaquat Hussain* (1999) as unconstitutional.

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[51] Section 11, Act X of 1992; Section 17 Act of 1997.
[52] Act IX Article 5 stipulates: "The Special Court shall have the exclusive jurisdiction to try a case…and no other Court shall have any jurisdiction or entertain any proceedings…"
[53] Act 1997, article 29.

Certain basic elements of the trial procedure of Pakistani special courts are drawn on the colonial Defence of India Act 1939 and Enemy Agents Act 1943. First, a trial can be carried out in camera. Accordingly, a judge can order for the exclusion of the public.[54] Second, an accused can be tried in his absence.[55] Third, the court need not adjourn the daily proceedings except in the exceptional circumstances and that only a couple of days.[56] Fourth, special court is not required to recall or re-hear witnesses on the account of change of composition of court or the transfer of case to another special court.[57] Sixth, offences against the state were generally unbailable in the penal code 1860. The NIEPA 1973 allowed for bail, but only by a High Court, thus making the procedure cumbersome. Similarly, in Pakistan only anti-terrorism court could grant bail, only after receiving guarantees that the detainee would not abscond. Seventh, appeals against the judgment of special court lie with high Court.[58] Eighth, the onus of proof in relation to proving oneself innocent lied on the accused. For instance, the section 25 of Act X 1992 provided that should any person be found in an affect area where firearms were being used or found in possession of firearms, "he shall be presumed to have committed the offence unless he can prove that he had not in fact committed the offence."[59]

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[54] Compare Sec. 11 of 1939 Act and sect 8 of Act IX 1992.

[55] Compare Sec 10(5) of 1939 Act and Sec. 13 of Act X of 1992. In *Mehram Ali* the Supreme Court held that the procedures of the special courts should follow the established criminal procedure in order to ensure justice. Hence, in 1998 an amendment removed this provision.

[56] This provision corresponds to section 10(3) of 1939 Act and Sec. 7 of the Enemy Agents Act 1943.

[57] This provision corresponds to section 10(4) of 1939 Act.

[58] Originally appeals went to an appellate tribunal whose decision was deemed final. But in *Mehram Ali* case the Supreme Court struck down that provision as constructing a parallel court system. The government amended the provision (Sec. 25 of 1997 Act) and allowed appeals to be made to High Courts. Compare with sec. 13 of 1939 Act, which allows appeals to High Courts.

[59] This section corresponds to section 7(1) in the NIEPA 1973: "Where a person is charged with possessing a proscribed article in such circumstances as to constitute an offence to which this section applies and it is proved that at the time of the alleged offence—(a) he and that article were both present in any premises; or (b) the article was in premises of which he was the occupier or which he habitually used otherwise than as a member of the public; the court may accept the fact proved as sufficient evidence of his possessing (and, if relevant, knowingly possessing) that article at that time unless it is further proved that he did not at that time know of its presence in the premises in question, or if he did know, that he had no control over it." In section 20(1) it was provided that the onus of proof that a person was not collecting information on the police or armed forces lied on the person.

In the United States, after 9/11, one of the first steps that the Bush administration took was setting up military tribunals. The November 13 Order, 2001, sanctioned special tribunals for the terrorists. The Secretary of Defense would appoint "one or more military commissions." The Secretary determined where the commissions might "sit at any time and any place" as well as designate attorneys for the conduct of prosecution. The tribunals were given "exclusive jurisdiction with respect to offenses by the individual" who would not be allowed to "seek any remedy" in any US or foreign court. The tribunals were given the authority to award punishments "including life imprisonment or death." After the commission had taken decision, the record had to be directed to the President or the Secretary of Defense "for review and final decision."[60]

However, the Supreme Court's decision in *Hamdan* struck a blow to the military tribunals.[61] The Supreme Court held that the rules and procedures of the tribunals violated the Uniform Code of Military Justice and the 1949 Geneva Convention. According to the Supreme Court the rules and procedures should be that of a court-martial "insofar as practicable." Justice Steven held that in Hamdan's case military tribunal violated Common Article 3 (CA3) of the Geneva Convention, which applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The article prohibits

> …the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

Invoking CA3 created a strange juridical situation. The Bush administration maintained that the conflict was an international one, although it was not between two states. Al Qaeda was not a contracting party. Did enemy combatants deserve judicial guarantees, which are recognized as indispensable by the civilized people? The court believed they did, but the administration did not.

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[60] Sec. 4(a)
[61] *Hamdan v. Rumsfeld* [2006] 548 U.S. 557

As a response to the decision in *Hamdan*, and in fact, the increased judicial reviews by the courts, the administration moved the Congress to pass the Military Commission Act 2005. The Act prohibited invocation of the Geneva Convention in American Courts and stripped the courts of jurisdiction to hear *habeas corpus* applications of the non-citizens in Guantanamo.[62] It is worth noticing that for aliens there is no right of *habeas corpus*, whether in Pakistan, the UK or the US.

D) PREVENTIVE DETENTION:

The history of preventive detention or detention without trial in the subcontinent, as I demonstrate above, stretches back to the Regulation III of 1818. In Northern Ireland (UK) it stretches back to the Protection of Life and Property Act 1871. In the UK, the history of detention without trial stretches back to WWI.

It is worth noticing that today in Pakistan (as well as in India) preventive detention is endowed with constitutional sanction. This constitutional sanction was first introduced in the 1935 India Act. As Pakistan (and India) adopted the 1935 India Act as their interim constitution and later on the same act serves as the basis of constitution-making, the constitutional provisions of preventive detention are carried forward.[63]

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[62] Section 7 of the MCA 2005 amended Section 2241 of 28 United States Code ousting the jurisdiction of courts "to hear or consider an application for a writ of habeas corpus" and to hear "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien." Also see Detainee Treatment Act of 2005, which also purportedly strips the jurisdiction of courts. The Patriot Act 2002 had originally restricted *habeas corpus* jurisdiction of courts in cases relating to non-citizens, however, on certain procedural requirements the courts exercised review. The Section 412 read:

> Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

[63] The 1956 Constitution provides for the right of habeas corpus in Article 7, which is part of Fundamental Rights. However, in the same Article habeas corpus is denied to a person "(a) who for the time being is an enemy alien; or (b) who is arrested or detained under any law providing for preventive detention." Such a person can be detained for three months unless an "appropriate Advisory Board" advises for ending or extending the detention for another three months. Moreover, the detaining authority is given discretion whether or not to disclose and communicate to detainee the grounds on which the order has been made. In the Fifth Schedule, the federal legislative list provided the federal government with the power to legislate

The constitution of Pakistan 1973 in Article 9 provides that, "No person shall be deprived of life or liberty save in accordance with law." If read carefully, the Article 9 also provides for exception or derogation principle, by providing the phrase "save." In Article 10, the constitution guarantees safeguards against arbitrary arrest and detention. Thus clause 1 of the Article 10 declares that the detainee has the right to be "informed, as soon as may be, of the grounds for such arrest" and "to consult and be defended by a legal practitioner of his choice." In clause 2 of the Article, it is provided that the detainee "shall be produced before a magistrate within a period of twenty-four hours." However, according to clause 3 these safeguards are not available to non-citizens and to those citizens held under a special class of detention called "preventive detention."

A person can be put under preventive detention for up to three months. Toward the end of three months an "appropriate Review board," consisting of judges of the superior courts, review the detention and decide on whether to release the detainee or extend the period to three more months. Again at the end of the extended period the procedure is repeated. With this procedure a detainee can be held for up to three years. Although the three-year period of time is long enough, however, clause 7 provided it does not apply to persons "employed by, or works for, or acts on instructions received from, the enemy." With this clause they virtually incorporated the Enemy Agent Act 1943 into the constitution. In February 1975, the Third Amendment added new categories of offences subject to indefinite detention. Accordingly, the Amendment stipulated indefinite detention for any person

> who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is

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on "Defence of Pakistan and of every part thereof, and all acts and measures connected therewith." In entry 18, the Schedule provided: "Central intelligence and investigating organization; preventive detention for reasons connected with defence, foreign affairs, or the security of Pakistan; persons subjected to such detention." The Fifth Schedule, in provincial list, provided the provincial government with the power to legislate on: Preventive detention for reasons connected with the maintenance of public order; person subjected to such detention." The second constitution of Pakistan, 1962, repeated word to word the preventive detention provisions of the first constitution in its Fundamental Rights chapter. Similarly, the Third Schedule in entries 33 and 34 repeated the provisions pertaining to intelligence agencies and preventive detention as provided by 1956 constitution.

a member of any association which has for its objects, or which indulges in, any such anti-national activity.

Just as the 1935 Act had provided for the subject of preventive detention in federal and provisional legislative lists, the constitution of Pakistan 1973 also made similar provisions. Recently, the Schedule 4 of the 18th amendment 2010 provided the provincial governments with power to legislate on "Preventive detention for reasons connected with the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention."[64] In this way, the colonial law relating to preventive detention is reinstituted in Pakistan.

Let us turn to Northern Ireland (UK). The NIEPA 1973 was one of the earliest preventive detention laws that the post-War British government enacted in Northern Ireland (Emergency Provisions). The subject of the Act was to deal with "certain offences, the detention of terrorists, the preservation of the peace…"[65] The Secretary of State could order to put a person in "interim custody" for a period of 28 days. Before the expiry of that period an appointed (quasi) judicial commission would decide on the release or further custody of the detainee on the basis of "the protection of the public."[66] Only seven days before a commissioner hears the case the detainee is served with a written statement regarding his/her terrorist activities.[67] The NIEPA 1973 was amended and reenacted in 1978, 1987, 1991 and 1996.

In the later acts, for instance those of 1991 and 1996, the period of "interim detention" is reduced to 14 days, and the Secretary of State could make "detention"—preventive

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[64] Before amendment both federal and provincial governments exercised the power to legislate on the subject of preventive detention. The 4th Schedule, modeled on the 1935 Act, provided the federal government with the authority to legislate on "preventive detention for reasons of State connected with defence, external affairs, or the security of Pakistan or any part thereof." (Federal Legislative List Part I, Entry I)

[65] It is worth noticing that these offences which are classified as scheduled offences were given priority or overriding effect over non-scheduled offences, just as anti-terrorism laws and trials enjoy overriding effect over other laws and trials. (Sec 2,3 read: "Where an indictment contains a count alleging a scheduled offence and another count alleging an offence which at the time the indictment is presented is not a scheduled offence, the other count shall be disregarded.")

[66] Schedule 1 part II entry 11 sub-entry 3.

[67] Sch 1 Part II Entry 13.

detention—order only after receiving report from a judicial Advisor. However, the procedure for preventive detention is interesting to note, partly because it is reminiscent of the procedure laid down in 1818 regulation. After a person is arrested and detained for the interim period, the case is referred to an Advisor within 14 days. Under 1818 regulation the officer in charge of custody used to be both a custody officer and Adviser. After referral to the Adviser, the detainee is served with a written statement regarding the nature of his suspected activities. The detainee may send written representations to the Secretary of State and a request that he/she wants to see the Adviser in person. The Adviser prepares a report, taking into consideration representations made by the detainee. The report is then sent to the Secretary of State who makes the decision on (further) detention. After making the detaining orders, he can at any time again refer the case to an Adviser. The detainee can also request for reconsideration of the order, but only after one year. The detention may go on for virtually indefinite time period.

The Anti-Terrorism, Crime and Security Act, 2001 (ACS), provided for indefinite detention of non-citizens. Under section 23 non-citizens could be indefinitely detained without trial. With a certificate of Home Secretary any non-citizen could become "a suspected international terrorist." The provision of indefinite detention was inconsistent with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), which protects the right to liberty and security of the person. Therefore, in December 2004, the House of Lords held in *A v. Secretary of State for the Home Department* that Section 23 was illegal on two grounds. First, it was a disproportionate response to what was "strictly required by the exigencies of the situation" and infringed Article 5 of the ECHR. Second, the Section 23 violated the right of all human beings to be free from discrimination enshrined in Article 14 of ECHR. Thus the Lords observed that the section clearly discriminated between citizens and non-citizens without a rational and objective justification.

The government responded by passing an amendment--the Prevention of Terrorism Act (PTA) 2005. The PTA 2005 provided for two types of "control order"—the derogating and non-derogating control orders. The derogating control orders can be issued to control individuals who pose serious risk to the public safety. By the order of a high court they

can be place under house arrest for six months unless renewed. The non-derogating control orders impose specific combination of restrictions for instance curfew, electronic tagging, restriction on association, searches of residence, restriction on use of telephone and Internet. These orders can extend up to twelve months unless renewed.

Apart from detention without trial and control orders, there is another type of detention allowed in the UK called "pre-charge detention." The Anti-Terrorism Act 2000 had provided for only forty-eight hours pre-charge detention. In 2003, the Criminal Justice Act increased pre-charge detention to fourteen days. In 2006, the Terrorism Act further increased pre-charge detention from fourteen days to twenty-eight days. The anti-terrorism legal regime in the UK provides for yet another type of detention for the purposes of questioning and searches of persons on borders, port, and airports. This type of detention, which is reminiscent of stop and search detention power under NIEPAs, is allowed for nine hours.

In the United States detention without trial is one of the legal instruments available to the executive to detain persons against whom there is lack of substantial evidence necessary for trial. Both citizens and non-citizens can be placed under preventive detention.[68] The detention without trial in the US is not constrained by the law, whether international or local, and judicial oversight. This style of detention, and for that purpose deployment of armed forces in civilian areas, resembles detention without trial and military deployment in Northern Ireland of 1970s (and even further back of 1920s). Just as detention system of Northern Ireland, the US detention system is also free from constraints of law and judicial oversight. Moreover, it is beyond the purview of the human rights law, as the Bush administration claimed that human rights law does not apply "to the conduct of hostilities or the capture and detention of enemy combatants" because such matters are "governed by the more specific laws of armed conflict."[69] In fact, it is regulated by the

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[68] In *Hamdi* the Supreme Court held that the AUMF conceded to the President power to detain US citizens captured on the battlefield. 542 *Hamdi* 507,517. The NDAA 2011-2012 has recently codified the detention without trial of American citizens apprehended anywhere in the world including the United States. Section 412 of the Patriot Act authorizes the Attorney General to detain foreign nationals he/she certifies as terrorist suspects without a hearing and without a showing that they pose a danger or a flight risk.

[69] *Response of the United States to Request for Precautionary Measures-Detainees in*

orders of the executive branch. Then-Deputy Assistant Attorney General John Yoo had remarked: "What the Administration is trying to do is create a new legal regime."[70]

At the outset of the War on Terror, the military order of Nov. 13, 2001 declared that citizens of the United States would not be subject to the Order. For United State citizens there existed another law—the Article III of the constitution. The subjects of the November military order were members of al-Qaeda or those who have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism." Although citizens of the United States were declared not to be the subject of the November Order, covertly they remained so. They could be detained, sent on rendition, or permanently incapacitated. Hamadi was detained for over three years before the Supreme Court took up his case. The prosecution did not charge him of "espionage, treason, or any other crime under domestic law."[71] Two judges, Stevens and Scalia, in the plurality decision, held that the U.S Constitution required that Hamadi is "entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus."[72] The criminal proceeding meant proceeding for high treason. On the other hand, Justice Thomas held that the president of the United States had the power to "unilaterally decide to detain an individual if the Executive deems this necessary for the public safety even if he [was] mistaken."[73] Although the plurality decision in Hamadi granted the right of *habeas corpus* to Hamadi,[74] the passage of NDAA 2011 has eventually withdrawn that right. Accordingly, those American citizens who are "covered persons" will be denied habeas corpus.[75]

Guantdnamo Bay, *Cuba*, July 2002, 41 I.L.M. 1015, 1020-21 (2002).

[70] Warren Richey, 'How Long Can Guantanamo Prisoners Be Held?', April 9, 2002 01

[71] Hamdi v. Rumsfeld, 542 U.S. 507, 540.

[72] Hamdi v. Rumsfeld, 542 U.S. at 573 (Scalia, J. & Stevens, J., dissenting). Article 1, section 9, clause 2 of the US constitution provides the Congress power to suspend the writ of habeas corpus in "times of Rebellion or Invasion."

[73] Hamdi v. Rumsfeld, 542 U.S. at 590 (Thmas, J., dissenting).

[74] Due process required the government to provide Hamdi notice of the factual basis for his detention and a meaningful opportunity to contest the government's allegations before an independent adjudicator. Id at 533.

[75] NDAA Section 1031. A covered person is one

Conclusion:

Undoubtedly the West can learn from the fallouts of the legal regime of anti-terrorism in Pakistan. However, Pakistan is not one of the first states to have introduced the legal regime of anti-terrorism. Before Pakistan, the UK had established a legal regime of anti-terrorism in the Northern Ireland in the 1970s. Later that anti-terrorism legal regime served as textual and substantive basis for the anti-terrorism acts of 2000 and 2001 in the UK. Interestingly, as I have demonstrated, Pakistan borrows both the textual and substantive content from the British anti-terrorism acts for its own anti-terrorism acts of 1997, 2001, and 2004. I also trace the genealogy of the anti-terrorism legal regime in Pakistan and the UK to the colonial regime of security in India. In the early 19th century, two regulations—the Regulation X of 1804 and Regulation III of 1818—initiated the colonial regime of security. The textual and substantive content of these regulations was strengthened, increased and carried forward by the subsequent colonial legislations. In the 20th century, the two World Wars impelled the British government to introduce a regime of security at home as well as in the Northern Ireland, which was not very different from the one established in colonial India. Accordingly, the Defence of the Realm Acts and Regulations were passed. These acts and regulations were adapted for India as the Defence of India Acts and Regulations (1919, 1939). After independence in 1947, the two post-colonies of India and Pakistan adopt the colonial regime of security. Due to domestic political problems as well as external wars, the colonial legal regime of security is adopted in both Pakistan and India. Recently, in the wake of the War on Terror, security laws have once again been enforced in Pakistan, but only with a new name, the anti-terrorism acts. However, the textual and substantive content the anti-terrorism acts is not very different from the old colonial security laws.

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(1)…who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2)…who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."