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Anti-Terror Laws in India and Pakistan: A Comparative Study

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“Terrorism must be outlawed by all civilized nations-not explained or rationalized, but fought and eradicated. Nothing can, nothing will justify the murder of innocent people and helpless children”. - Elie Wiesel

There is little doubting the fact that if there is one word which, quite ominously, has acquired the distinction of being a cult term in contemporary times, it is terrorism. A perverted, distorted even depraved agenda of snuffing life out of the innocent population in an attempt to avenge capriciously defined rationale is the only explanation that can be given for an act as inhumane and diabolical as terrorism. Indeed, measures seeking to deal with and defeat the objectives of such a dastardly act which poses an onerous challenge to humankind must receive an unequivocal sanction. Or else, Dante’s premonitive quote does stare one in the eye and quite justifiably so, for, “The darkest places in Hell are reserved for those who maintain their neutrality in times of a moral crisis.”

The Necessity of Extraordinary Anti-Terror Laws

Terrorism and India share a rather unfortunate relationship. India’s geostrategic coordinates force her to battle rather difficult circumstances. Externally fueled insurgencies and cross border terrorism pose a major threat to Indians they have in the past. Beginning with Pakistan organizing a terrorist invasion into the Kashmir Valley in October 1947, such ‘war by other means’ has assumed every contortionist form it could, ultimately degenerating into a sponsorship of or collusion with savage, endemic, unabated terrorism under a nuclear cloud. Every opportunity to destabilize the Indian state was sought to be exploited by its ill-wishing western neighbour: be it 1980’s Sikh militancy movement or the beginning of the rebellion in Kashmir towards the late 1980’s. East Punjab presented an interesting case for Pakistan. The emergence of the crisis coincided roughly with the rise of the Pakistan controlled and coordinated jihad against the Soviets in Afghanistan creating an endless supply chain of modern weapons and what came to be prominently identified as the ‘Kalashnikov Culture’. It is a well accepted argument that Pakistan’s Inter-Services Intelligence (ISI) experimented with its tricks in the Afghan laboratory and sought to replicate these in Punjab and subsequently in Kashmir, trying out the strategy of ‘bleeding by a thousand cuts’ on India.

The situation in Kashmir and Pakistan's unabashed training, logistical, doctrinal and financial support to the Kashmiri insurgents doesn't require much explanation given its global acknowledgement. The US State Department in a report on the 'Patterns of Global Terrorism' (April 2001) specifically identified Islamabad as the chief sponsor of militant groups fighting in the region. A similar conclusion was endorsed by a report by the National Commission on Terrorism, reflecting thus the current thinking in most US and Western policy-making and intelligence circles which supports the claim India has consistently been making against Pakistan. Sponsoring militancy in Kashmir was seen by Pakistan as an effective way to offset the existing power asymmetries, maintaining a so-called 'balance of power' in the region against an economically, militarily and demographically superior India, while creating a palisade of unrest and instability along the country's strategically significant northern and north-western borders.

The net result of these circumstances was the essentiality for India to graduate from the Criminal Procedure Code and The Indian Penal Code inherited from the Raj, towards something more substantial, which met the imperatives of the dynamic and increasingly threatening situation. Thus, the necessity of stringent laws to combat those who harm the sovereignty and integrity of India cannot, therefore, be overstated. When confronted with armed militancy, democracies face what is often known as the 'democratic dilemma'. For liberal democracies like India, the decision to put into place a set of extraordinary laws to curb activities which affect the stability and safety of its citizens, is indeed, exceptionally difficult. Even a cursory glance through the Constituent Assembly debates is enough to acquaint the reader of the priority given by the founding fathers of India to the protection of individual rights and accord citizen's freedom and liberty to lead their lives in an environment of peace and stability. Republicanism and national sovereignty need to and can coexist.

The Constitution is indeed the supreme law and fundamental rights granted there under to citizens as enshrined in Part III are inalienable. But, parallel to the sanctity accorded to individual rights is the priority which must be accorded to the security of the state. Extraordinary situations demand extraordinary laws which empower law enforcing agencies, and courts to bring perpetrators of terrorism to justice. The United States, for instance, has a great tradition of enforcing civil liberties. Numerous judicial pronouncements have upheld fundamental human rights. A State which proudly wears its badge of democracy and leaves no stone unturned to flaunt it, when faced with the threat of terrorism post 9/11, did not bat an eyelid in

enacting the PATRIOT Act, which though draconian, received bi-partisan support. Despite intense criticism by the international community, Guantanamo Bay continues to exist and 'enhanced investigation techniques' (a euphemism for torture) such as water boarding and electric-shock interrogation continue to be administered by a State which declares itself as the upholder of democratic values and human rights. Similar was the reaction of President Hollande post the Paris attacks in November 2015, evident through the official declaration of 'Emergency Procedures'.

In India too, the threat level has undisputedly risen. Mumbai, Delhi, Gurdaspur, Pathankot, Jaipur, Ahmedabad - the list of terror targets in the country is menacingly long. The specter of the abomination called the Islamic State looms large. Indeed, these are difficult, even desperate, times. However ironical it may seem, laws granting extraordinary powers to the security forces in the face of such extreme threats are necessary evils for the protection of rights that a democracy like India guarantees its citizens. The parliamentary debates post the 26/11 attacks put on record the rather fascinating and indeed compelling justification for the reason why India desperately needed to enact an anti-terror law which gave teeth to its law enforcement and security agencies in dealing with the pandemic threat of terrorism. The debate records an eminent member of the then opposition stating categorically that while it was true that the battle against terrorism cannot be fought in courts of law but requires an enhanced degree of coordination between the police force, armed forces, the intelligence agencies, the executive, legislature and the judicial system, it can still not be denied that a system to equip investigative agencies to use all justifiable means, with adequate safeguards, to book the culprits is unapologetically put into place. This mechanism is necessary to ensure imposition of a psychological deterrence against those who nurture nefarious objectives against the Indian state. To quote, "The preventive impact of this law (the debate was with reference to the Unlawful Activities (Prevention) Act) is that it reflects the determination of the Government and the Indian State in fighting terrorism, and the Indian State is then adequately equipped in terms of law, to investigate the crime and expeditiously punish those who are responsible for that crime". Hence, the use of special/security laws is justified on the grounds that the existing criminal laws are not adequate to deal with the militancy that is "well-armed, far more dangerous and modernized". Radicalization through modern means of communication across the globe poses a potent threat which the international community is struggling to combat. In this context, what is at stake is not just law and order but the very existence of state and society. There is therefore, a need to have special laws with

far higher deterrence value.

India has long tradition of special/security laws dating back to its pre-independence years. These laws have been enacted, repealed and re-enacted periodically since independence. Such special laws fall under four categories, as follows: -

1. Exclusive laws against terrorism like POTA.
2. Security forces empowerment laws that give immunity and additional special powers to the security forces like the Armed Forces Special Powers Act.
3. Laws of proscription that criminalize terrorist groups and a range of undesirable activities like the Unlawful Activities Prevention Act (UAPA).
4. Exclusive laws on control of finances, money laundering, drug-trafficking, and cyber warfare, and so on.

Pakistan's Perspective

Pakistan has never shied from accusing the Indian security establishment of gross human rights abuses against the civilian population particularly in the state of Jammu and Kashmir in the garb of its anti-terror laws, most notably AFSPA. While the voices which call for the revocation of this law have become louder over decades, the Indian army has repeatedly expressed the necessity of such a law given the strategically sensitive location of the state. The Pakistani rhetoric against India is clearly malicious, self-serving, and most of all, hypocritical.

In line with the 'feeding snakes in your backyard and expecting them to not bite you' theory, Pakistan, most certainly, has never been, nor shall ever be immune to the disastrous impact of terror. Extraordinary laws granting leverage to the security agencies in that State have traditionally been formulated keeping in view the threat Pakistan faces from its own 'non state actors'. Most recently, the Protection of Pakistan Act has re-ignited the debate surrounding the 'necessity' of such laws, both within Pakistan and in the international community. This law, like most others, has been described by its defenders as essential for 'granting necessary powers to investigating agencies to meet exceptional circumstances faced by Pakistan and to make necessary improvements in the legal system so that proper evidence is presented in courts'.

Pakistan: Protection of Pakistan Act, 2014

The Protection of Pakistan Act, 2014 (POPA) has been justified by Pakistan on grounds of national security and the need for a stricter law to counter terrorism across the country. The law, however, has received scathing criticism for its provisions which violate all known norms and standards of civil liberties. The POPA raises serious questions about the propaganda attack Pakistan launches against Indian anti-terror laws.

To begin with, Article 2 of the law, Clause (d) sub-clauses (a) and (b) define “enemy alien” as a militant “whose identity is unascertainable as a Pakistani, in a locality where he claims to be residing, whether by documentary or oral evidence; or has been deprived of his citizenship, under the Pakistani Citizenship Act, 1951 (II of 1951), acquired by naturalization”. The definition of a militant, apart from the rhetoric of an individual found guilty of waging a war or insurrection, or raising arms or taking up, advocating or encouraging or aiding or abetting the raising of arms, or waging a war or a violent struggle against Pakistan, its citizens, the armed forces or civil armed forces, contains a rather unsettling clause. Article 2, Clause (f) sub-clause (d) declares anyone who may ‘threaten’ or ‘attempt’ to act in a manner prejudicial to the security, integrity or defense of Pakistan to be a militant and sub-clause (e) sub-clause (ii) takes this further to include any person against whom there is ‘reasonable ground’ that he acts under the directions or in concert or conspiracy with or in furtherance of the designs of an enemy alien. Clearly, terms like ‘threaten’ or ‘attempt’ or ‘reasonable ground’ in the absence of further qualifications come across as vague, hollow and designed to suit the possibly nefarious objectives of the state as it may deem fit given the evolving circumstances. Clause 3 continues this trend. Under sub-clause 1, use of armed and civil armed forces is justified even under ‘reasonable apprehension’ of a scheduled offence. Same Article, Clause 3, sub clause (ii) under the explanation part allows causing death or grievous hurt on the “prior information but *without any clear identification* of individual(s) who may have been *or are going to be involved* in the planning, commission or financing of a scheduled offense... (sic)”. The code of Investigation under Clause 5 continues to reveal similar frightening provisions such that it mentions, “All scheduled offences shall be cognizable and non-bailable”, unlike Indian laws where provisions for bail exist but with caveats.

Clause 6 takes up the hugely controversial provision of preventive detention. Numerous independent analysts have highlighted the horrors allowed by the

presence of this clause in legal enforcement and labelled its existence as being contrary to the very essence of a democratic state. Article 10 of the Constitution of Pakistan provides the safeguards against arbitrary arrest and detention. The ninth clause of the Article however explicitly states that “Nothing in this article shall apply to any person who for the time being is an enemy alien”. And sub clause (1) of the preventive detention clause in the POPA 2014 mentions an enemy alien shall “be detained by the Government to prevent him from acting as aforesaid for such period as maybe determined by it from time to time in accordance with Article 10 of the Constitution”. Clearly, the provisions of the right to be informed of the grounds of arrest, or the right to be produced before a Magistrate within a period of twenty-four hours of such arrest and similar such clauses do not apply to those declared as enemy aliens by the state, thus granting a clear ground for exploitation to the state and those appointed by it. Clauses (2) and (4) of Article 6 of the Act bring in another hugely contested issue of “internment camps” where the requisitioned force may detain any enemy alien or militant after a notification of that act. Period of detention is clearly indefinite and reports of gross human rights violations abound.

This paper in the concluding paragraphs makes a mention of a ‘shroud of secrecy’ gradually enveloping the Pakistani society. The justification of this statement is provided through the ninth Article of the Act, Clause (2) sub-clauses (a)-which allows for withholding information regarding the location of the detainee or accused or internee or internment centre established or information with respect to any detainee or accused or internee or his whereabouts; and (b) which even allows the Government to not declare the ‘grounds for detention’ of a detainee, accused or internee who is an enemy alien or militant. The ‘exclusion of public from proceedings of Special Courts’ (Clause 10) further contributes to this environment of secrecy used in favor of the enforcement agencies. Clause 15, denies the presumption of innocence until proven guilty which turns on its head, the basic principle of the justice system as it exists in Pakistan.

Numerous reports thus suggest how the law enables Pakistani security establishment to engage in grave human rights violations, including enforced disappearances, torture and extrajudicial killings. Among its many provisions, the law, which, some say, empowers the security establishment to convert Pakistan into a replica of the Guantanamo Bay, also allows the security forces to detain a terrorism suspect for 90 days without presenting him before a court, and calls for treating terrorists “as enemy aliens” to be dealt with “strictly without any compunction”. This law stands in complete violation of the International Covenant

on Civil and Political Rights which Pakistan ratified in 2010. Quoting Article 20 of the law, “No member of the police, armed forces or the civilian armed forces acting in aid of civil authority, Prosecutor General, a prosecutor, Special Judicial Magistrates or the judge of a Special Court shall be liable to any action for the acts done in good faith during the performances of their duties”. It therefore grants Pakistan’s security forces and judicial officers acting under the law effective immunity ‘for the acts done in good faith during the performance of their duties’. This violates not only Article 2(3) of the international covenant, which requires governments to ensure that anyone whose rights or freedoms are violated ‘shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity’, but also the very Constitution of Pakistan. Such immunity from prosecution to state agencies has been notably responsible for the ‘missing persons’ phenomenon’ in Baluchistan particularly, and elsewhere in the country. Peaceful political protesters and critics of government policies are particularly vulnerable to abuses under the new law because of dangerous ambiguity in its definition of terrorist acts. Besides ‘killing, kidnapping, extortion’, the law classifies vague acts, including ‘Internet offenses and other offenses related to information technology’ as prosecutable crimes without providing specific definitions for these offenses. The terms are so ambiguous that a non-violent online political protest could be considered ‘threatening the security of Pakistan’.

In addition, the law expands the powers of arrest without warrant for the police, members of the armed forces and ‘civil armed forces’. Under the new law, forces are provided the complete and absolute discretion to ‘enter and search without warrant any premises to make any arrest or to take possession of any firearm, explosive, weapon, vehicle, instrument, or article used or likely to be used in the commission of any scheduled offense’. The law permits them to do so without sufficient judicial control in violation of guarantees against arbitrary arrest and the privacy and the security of the home under the ICCPR. The law also includes members of the armed forces in the process of investigation and grants powers to law enforcement agencies to “shoot at sight”. Cases of forced and non-voluntary confessions abound which could then be treated as valid evidence in courts of law.

The whole idea of ‘the right to be presumed innocent until proved guilty according to law’ is totally abandoned. Instead, the law removes the burden of proof of criminal conduct from government prosecutors and requires criminal suspects to prove their innocence. It goes on to state that those arrested for suspected terrorism

offenses 'shall be presumed to be engaged in waging war or insurrection against Pakistan unless he establishes his non-involvement in the offense'.

Pakistan: Actions (in aid of Civil Power) Regulations, 2011

Another draconian law that has been passed in Pakistan is the Actions (in aid of Civil Power) Regulations. Internment remains a contentious and deeply contested issue under the provisions of this Act as well. Also, what continues through this law is the language of apprehension which lacks precision in identifying the crime. Chapter 5 (dealing with Internment) Article 9 Clause 1 justifies the internment of an individual who has committed or is "likely to commit an offence" under this regulation. Who determines or investigates the likelihood or probability of such an occurrence and by what standards of judgment, is a question demanding expatiation, sadly not provided in the text of the law. Continuing further to Clause 11 dealing with the 'Duration of Internment'- "The Power to intern shall be valid from the day when this regulation deemed to have come into force, or the date the order of the interment is issued, whichever is earlier, *till the continuation of action in aid of civil power*"- clearly provides the interning authority unquestioned authority to detain internees for an indefinite, unspecified period in blatant violation of international human rights conventions which Pakistan is a part of. Worse, it is aimed to legitimize the unlawful detention of hundreds of people who were in the custody of the security forces.

Chapter 7 dealing with Offences and Punishments also requires closer examination. Clause 16 sub-clause 1 states: "Whoever *challenges or is suspected of an act of challenging the authority and writ of the Federal or Provincial Government* or to attempt to assert unlawful control over any part of the territory of Pakistan *or resorts to the acts of waging war against the State*, shall be deemed to have committed an offence under this regulation". This clause opens the possibility of the right to question the existing dispensation through the constitutionally provided and protected Freedom of Expression being termed as challenging the authority of those in power and thus be recognized as an offence under the regulation. Sub-clause 3, "spreading literature, delivering speeches electronically or otherwise thus inciting the people in commissioning any offence under any law shall be deemed to have committed offence under this regulation", is subject to the same criticism that is made of the POPA. The concern is regarding the uncertainty and ambiguity in the nature of offences and the 'mode of incitement' therefore, in declaring an individual as a criminal under the law. There is an inherent subjectivity in the interpretation of

the clause itself which most certainly, can be used, carefully twisted by the government to serve its objectives.

After the enactment of the Actions (in Aid of Civil Power) regulations 2011, Pakistan faced international condemnation for its practice of indefinite detention, arbitrary and without charges. Amnesty International released a report in which they pointed out widespread torture and abuse in Pakistan's tribal areas in which prisoners are held by the military and intelligence agency without charges. To quote from the report, "Amnesty International research shows that, rather than seeking to apply and strengthen the human rights safeguards of Pakistan's ordinary criminal justice system in the Tribal areas, the Pakistani authorities are applying old and new security laws that authorize prolonged, arbitrary, preventive detention by the Armed Forces, and breach international Human Rights law. The AACPR in particular, along with the century old Frontier Crimes Regulation 1901, provide a framework for widespread human rights violations to occur with impunity." Pakistan's Attorney General Irfan Qadir had at that time admitted that the State was holding over 700 suspected militants 'without charge' under a law that has come under fire for its barbaric nature and loosely structured regulations which were open to manipulation and abuse to suit the interests of those who wield power. For long, the entire law was not even made public, and only those parts of the legislation which favored the government were released selectively. Latif Afridi, a senior lawyer in Pakistan's Khyber Pakhtunkhwa Province, in reference to AACPR states how the law had failed in helping Islamabad's struggle against the Taliban.

Years after the law was enacted in Khyber Pakhtunkhwa province and adjoining tribal areas, the Taliban remain active and unleash new terror campaigns. The law is also considered as an attempt by the Pakistani state to engage in systematic abuses to crush a separatist insurgency in the southwestern province of Baluchistan. Not just that, the law, by its very nature, violates Pakistan's supreme law such that the Constitution bounds security forces to produce a detainee before a court within 24 hours of their arrest, a provision which AACPR doesn't seem too keen on honoring.

The 21st Amendment to the Constitution of Pakistan

Not satisfied with the extremely draconian POPA and AACPR, the Pakistani establishment went a step further by passing the 21st Amendment to the Constitution of Pakistan. This amendment, which contains a two year sunset clause - January 2015 to January 2017 - was enacted post the 2014 Peshawar Army Public

School massacre. Its statement of objects and reasons explains, “An extraordinary situation and circumstances exist which demand special measures for speedy trial of offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan. There exists grave and unprecedented threat to the territorial integrity of Pakistan by miscreants, terrorists and foreign funded elements. Since there is an extraordinary situation as stated above it is expedient that an appropriate amendment is made in the Constitution”.

This amendment has been viewed critically for its provision of ‘speedy trial Military Courts’ which have recently been empowered to even pass death sentences on civilians. Critics point out that this shall lead to strengthening the grip of the military on a state that was ruled by military dictators for close to four decades and even today, is struggling to chart its course on the democratic path. Hassan Javid writes for *The Nation*, “In a context where the dominant narrative in Pakistan is increasingly revolving around an uncritical acceptance of, and endorsement for, the actions of the military, it must be recognized that by voluntarily agreeing to establish these courts, Parliament is essentially institutionalizing yet more military control over politics in Pakistan, rolling back much of the progress that had been made since the ouster of General Musharraf in 2008.

“All the proposed checks and balances trumpeted by the government – the idea that the courts will only operate for two years, or that they will not be involved in non-terrorism related cases – do not change the fact that a democratic government has chosen to relinquish a considerable amount of space to the military. Given the history of civil-military relations in Pakistan, this is a dangerous precedent to set... “...Rather than strengthening Pakistan’s courts and police force, or propagating a counter-narrative aimed at delegitimizing the pernicious discourse of extremism propagated by the country’s millenarian zealots, the political establishment, including the military, have been content to choose the path of expediency, preferring to tolerate any and all atrocities in the name of ‘strategic depth.’” Indeed, Javid hits the nail in the following statement, “You cannot bomb poverty out of existence (although you can bomb the poor), and all the military trials in the world will not undo the damage done by decades of state-sponsored ideological indoctrination.” Pakistan has much to learn.

Pakistani lawyer Saroop Ijaz, writing for the Human Rights Watch, was of the view: “The Pakistani government’s decision to use military courts to prosecute terrorist

suspects was a de-facto admission that the country's civilian criminal justice system is broken. Authorities have sought to justify military courts as necessary for the "speedy trial" of terrorist suspects and to circumvent perceived "loopholes" of the civilian justice system. Such criticism is not without basis. Pakistan's civilian courts have a well-earned reputation for prosecutions undermined by both corruption and a glacial pace". Frightening, indeed!

It has been more than a year since the military courts came into existence in Pakistan. Had they been successful, even to a limited extent, terrorist attacks in Pakistan should have declined. Rather, they have increased. From a total of seventeen terror strikes in 2014, the number went up to twenty in 2015. Sure, a 17.64% increase may be marginal in empirical terms, but fortunately, humanity doesn't operate on mathematics. An 18% increase also implies a corresponding rise in the number of people who fell prey to the brutal objectives of terror. Hardly three months into 2016, and the list of terror strikes is already seven. The death count? Quoting official figures – at least a hundred and fifty three!

The predominant fear among civil society groups is that the life of military courts might be extended beyond the current two years. But at the same time Pakistan's civilian courts, including its Supreme Court had been powerless in getting executive government to enforce their judgments. Now, the entire process is controlled by the military and carried out in complete secrecy, beginning with the appointment of military judges to the trial itself. The mode of operation is maintained as secretive as possible-no official case files or evidence as record, no sharing of proceedings with the apex court, even death sentences are confirmed or commuted by the Chief of Army Staff, who moves with alacrity. These courts are thus nothing more than kangaroo courts.

The Indian Perspective

The Armed Forces Special Powers Act (AFSPA)

It requires to be stated at the outset that AFSPA is not an anti-terror law in the conventional sense of the term, but a law and order provision which seeks to aid the operations of the military in areas declared as 'disturbed' through appropriate constitutional measures. Based on a colonial era law enacted to face down the Quit India movement in 1942, its immediate precedents were similar acts of 1947 implemented to control partition related riots in Punjab and Bengal. AFSPA in its present form was promulgated under constitutional provisions in September 1958

to control the Naga insurgency that had broken out in the mid-fifties and since then, has been invoked to contain volatile and dynamic situations in the prescribed 'disturbed areas' upon the ineffectiveness and consequent failure of the prevalent law and order machinery to perform its designated tasks.

AFSPA exists in support of a foundational structure which necessitated its implementation in regions the government so decides. This is also the reason why despite repeated attempts and demands from diverse sections within civil society, the Act stays. The Act provides a legal basis and legal cover to the army's operation in internal security duties. Without AFSPA, the army has no power of entry, arrest or justified and necessary offensive action as demanded by a dynamic situation that terrorism and militancy imposes. Unlike a normal law and order situation in which the army operates in aid of civil authority and has to get express permission of the civil authority to take offensive action, such debilitating constraints are not practicable in a terrorism setting.

AFSPA has come under bitter criticism from within India and outside. What needs to be understood, however, is the nature of the soldier and the reason for his deployment in the designated disturbed area before criticizing the provision of the law. Deployment of a soldier for national security assignments cannot be equated with other law enforcement agencies in general and police forces in particular. Soldier being a custodian of national security is called upon when all other means of security maintenance fail or there is a grave threat to national security and integrity from external or internal demands. The training given to the soldier to use weapons depending on the nature of threat is a constitutional provision which he is endowed with across the world. However, this training to kill the anti-national elements is through a special provision of the law and the Constitution which respective states make. This constitutional provision not only accords necessary powers to the soldier to defend his deployment, but is equally important to sustain his motivation and morale against extreme threats under adverse circumstances. Protecting the military role of the soldier is thus the reason why special provisions like the AFSPA have gained legal legitimacy given the exceptional context of their invocation.

Coming to the law itself, AFSPA can come into force only in areas designated as 'disturbed areas' through due process of law and not by the arbitrary will of those in power as clearly defined under Article 2. In such areas, where law and order have failed completely, the deployment of security forces becomes essential. Since failure is not an option for the forces once they are called upon to defend the country's

integrity, there is a need to make exceptional provisions that assist them to discharge their responsibilities. The principal articles of the Act, namely 4(a), 4(b), 4(c) and 4(d) empower the armed forces to undertake counter insurgent operations at the tactical level.

The most important segment of the Act is its fourth clause: “Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces may, in a disturbed area:

- (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;
- (b) If he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;
- (c) Arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;
- (d) Enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and may for that purpose use such force as may be necessary”.

Thus, Article 4(a) authorises any officer, commissioned and non-commissioned, to use force for maintenance of public order. Article 4(b) empowers the forces to destroy a fortified position, cache or an arms dump. Article 4(c) empowers the

arrest, without warrant, of a person who has committed a cognisable offence; and Article 4(d) permits search, without warrant, of suspected premises to recover arms, ammunition and explosive substances. Obviously, the absence of these four legal provisions would render the security forces incapable of fulfilling their assigned role. Also, as previously stated, AFSPA comes into operation only after an area has been declared disturbed. In such a situation, its non-availability would imply that a soldier cannot fire upon a terrorist, take necessary action to destroy a hideout, arrest a suspect when in doubt, and lastly search any premises to recover arms and ammunition. The law also explicitly states under Article 5, “Any person arrested and taken into custody under this Act shall be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest”. A constitutional provision against potential rights-violations is clearly guaranteed. Thus, as Brig. Harinder Singh mentions, it is not at all surprising that while several activists often raise their voice against the law, the affected states are hesitant in recommending the annulment of the Act. They realise the consequences of dilution in governance in the absence of an effective law and order enforcement capacity.

Despite the geographical and tactical sensitivity of the regions of its implementation nowhere is any reference found to the possibility of indefinite detention or internment of offenders under the Act as is a norm with the Pakistani laws. Rather, there is a clear provision of person arrested under the act to be handed over to the officer-in-charge of the nearest police station with the least possible delay (Article 5). As compared to the Pakistani special laws, therefore, AFSPA, with its built-in safeguards, stands very low on the measuring scale of a law being draconian.

It would be fair to investigate the UAPA for the Indian perspective before going ahead with a comparative analysis of the Indian framework against the Pakistani provisions.

India: The Unlawful Activities Prevention Act (UAPA) [With Amendments]

The decades after independence, particularly the 1980s, witnessed a number of legislations being enacted to tackle specific contingencies: Jammu and Kashmir Public Safety Act (1978); Assam Preventive Detention Act (1980); National Security Act (1980, amended 1984 and 1987); Anti-Hijacking Act (1982); Armed Forces (Punjab and Chandigarh) Special Powers Act (1983); Punjab Disturbed Areas Act

(1983); Chandigarh Disturbed Areas Act (1983); Suppression of Unlawful Acts Against Safety of Civil Aviation Act (1982); Terrorist Affected Areas (Special Courts) Act (1984); National Security (Second Amendment) Ordinance (1984); Terrorist and Disruptive Activities (Prevention) Act (1985, amended 1987); National Security Guard Act (1986); Criminal Courts and Security Guard Courts Rules (1987) and the Special Protection Group Act (1988).

However, it needs to be noted that while such laws were enacted to tackle specific, largely isolated instances, a severe lack was felt of a legislation which sought to deal with the menace of terrorism as a whole. Distinguishing ‘terrorism’ from ‘ordinary crime’, the Supreme Court of India in the “Hitendra Vishnu v/s State of Maharashtra” case noted that, *...‘terrorism’ has not been defined under Terrorist and Disruptive Activities (Prevention) Act (TADA) nor is it possible to give a precise definition of ‘terrorism’ or lay down what constitutes ‘terrorism’. It may be possible to describe it as use of violence when it’s most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or ‘terrorise’ people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity. A terrorist activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law...What distinguishes ‘terrorism’ from other forms of violence therefore appears to be the deliberate and systematic use of coercive intimidation. It is therefore essential to treat such a criminal and deal with him differently than an ordinary criminal capable of being tried by the ordinary courts under the penal law of the land...*

At present the only nationwide anti-terror law under implementation in India is the Unlawful Activities Prevention Act (UAPA). Provisions under the previously enacted laws including the Terrorist and Disruptive Activities (Prevention) Act (TADA) (1985-1995) and the Prevention of Terrorism Act (POTA) (2002-2004) have been merged under the now overarching UAPA. The UAPA Chapter I clause 2 sub-clause (f) defines “unlawful activity” in relation to an individual or association “as any

action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise):-

- (a) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession;
- (b) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India”.

Moreover, the declaration of an association as unlawful is certainly not an arbitrary decision, but the principles of democratic deliberation and opinion are allowed to exist, as expressed under the provisions of Chapter II, Clause 4: “Where any association has been declared unlawful by a notification issued under sub-section (1) of section 3, the Central Government shall, within thirty days from the date of the publication of the notification under the said sub-section, refer the notification to the Tribunal for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful. And, on receipt of such a reference under sub-section (1), the Tribunal shall call upon the association affected by notice in writing to show cause, within thirty days from the date of the service of such notice, why the association should not be declared unlawful”. The decision of the Tribunal shall be published in the official gazette thereafter, keeping a limited scope for any secrecy, apart from what is deemed essential in view of national interest.

The amendment introduced in 2008 for the first time defined, in legal terms, what exactly constitutes a Terrorist Act. According to Section 15 of the UAPA: “Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country:-

- (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause:-

- (i) death of, or injuries to, any person or persons; or

- (ii) loss of, or damage to, or destruction of, property; or
- (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or
- (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.”

Further amendment to the UAPA in 2012 expanded this definition to include ‘economic security’. Significantly, it also specifies the punishment for raising funds for terrorist activities in an attempt to curtail such crimes at the stage of inception.

Much criticism has been levelled against the Act since its inception but what is often ignored in the process are the circumstances under which the Act and its subsequent amendments came into force. At the time when the Unlawful Activities (Prevention) Bill was moved in the Parliament, a consensus had emerged to impose reasonable restrictions on certain rights guaranteed under Part III of the Constitution to make powers available for dealing with activities directed against the integrity and sovereignty of India. The Bill was passed in both Houses of the Parliament and received the assent of the President on 30th December 1967, and was most notably amended post the withdrawal of POTA in 2004 and later after the horrific 26/11 attacks in Mumbai in 2008. The 2012 Amendment hinges primarily on the economic and commercial aspects of illegality, thus beyond the purview of a paper focussing on the counter-terrorism dimension. It however, demands praise for making an attempt to plug in possible legal loopholes in the context of commercial crimes.

The UAPA clearly defines a list of offences and the punishments to be awarded in each case, leaving no scope for arbitrary pronouncements. This list has been

expanding with changes in the nature of crime and the threat that India faces, as seen through the 2008 and 2012 Amendments. Under the UAPA, there is no mention of confessions to the police being accepted as evidence in court, thus allowing for due procedure of law to be followed in pinning the guilt. Provisions for bail exist, with caveats, no doubt. Given the nature of threat India faces from elements who seek to destroy its unity and integrity and threaten its stability, granting such exemptions comes across as rather generous as against the content of the Pakistani laws evaluated in the preceding sections. It needs to be noted here that while laws like the National Security Act, 1980 allow provisions which can, given the nature and extent of threat, be invoked in terrorism related cases, the model of inbuilt safeguards and the rather cautious system of checks and balances ensures their judicious application through a well-defined legal mechanism, as opposed to an arbitrary invocation.

Comparative Analysis

When we compare the Indian anti-terror laws with those of states like Pakistan, one needs to analyse the basis, validity and liability of the basic constitutional frame of the respective nations. Pakistan, having been ruled by military regimes for more than four decades in its history of existence, has struggled in giving a democratic hue, in word and deed, to its Constitution. The military rulers have often modelled and re-modelled the framework legitimizing the functioning of the state and its 'government' to fulfil their interest of retaining and sustaining power within the military-intelligence nexus. Despite elections, the reins of real power continue to be in the hands of the military. Any voice of dissent opposing the de-facto rulers in uniform has been suppressed by making special provisions which seek to protect its armed forces rather than the state. In addition, the blowback of terrorism Pakistan has nurtured through its military establishment could have been tackled only through extreme and extraordinary laws framed and forced upon the political establishment by the military. In India, on the other hand, due processes of democratic deliberation and eventual acceptance in Parliament has been the norm.

As compared to Pakistan where even critiquing the army or its actions in the Parliament, or otherwise is considered a serious offence under its constitution, leave alone punishing army officials accused of human rights violations, the Indian General Officer Commanding-in-Chief (GOC-in-C) of the Northern Command, Lt Gen Sanjiv Chachra claimed that over 120 army men including 41 officers have been awarded exemplary punishment for committing human rights violations (in Jammu

and Kashmir) during the last 20 years following investigation into each of the allegations by an independent and autonomous body. The guilty including 41 army officers and 83 JCOs and other ranks were expeditiously tried by army courts and awarded exemplary punishments ranging from dismissal from service without any service benefits to imprisonment. This amply demonstrates that all cases of alleged HR violations are thoroughly investigated and personnel found guilty promptly punished. The Indian army has repeatedly stated its position that it is their primary responsibility to ensure at all times that the *awaam* (people) are not put to any inconvenience or harassment due to the army's necessary actions in a terrorism-plagued state. The army has also strictly maintained its commitment of zero tolerance towards HR violations. In addition, an HR branch has been functional at the Army headquarters since March 1993. Such branches exist in formations up to Brigade and Sector level in the Indian context and even a capsule course on the importance of respect for human rights is also conducted for troops undergoing pre-induction training at various battle schools.

It is difficult to put the Indian and Pakistani anti-terror laws on a common platform of comparison. It would be an attempt to compare apples and oranges, so to speak. The Pakistani laws, as may have been evident by now, far outweigh their Indian counterparts in their extent of arbitrariness, draconian nature and lack of due process, not to mention the secrecy in which trials are conducted. Despite facing an onerous challenge from forces of terror which seek to destabilize the security and prosperity of India, the Indian judicial procedures have repeatedly emphasized the need to invoke safeguards which seek to uphold the basic norms and standards of civil liberties, much unlike Pakistan.

The International Commission of Jurists' Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights post its visit to Pakistan in 2007 concluded certain noteworthy observations in its report titled 'Assessing Damage, Urging Action'. The panel reported that, increasingly, a 'culture of secrecy' has shrouded the processes of investigation of terrorism cases and suspects were placed under secret and arbitrary detentions in a way that they could not avail basic protections afforded by international human rights and humanitarian law, human rights standards and constitutional guarantees. Pakistan, thus, as a state whose own human rights abuses targeted at those 'it considers' as waging a war against itself, holds no right to point fingers at the rest given the nature of evidence and investigation which boldly stands to weaken its claims. Funnily enough, a state whose highest court empowers its already-neck-deep-in-controversy military

courts to pass death sentences on civilians and rules that 'secret' military court are legal, thus ceding almost the entirety of the judicial space to its military establishment, seeks to question the democratic credentials and their implementation in the world's largest democracy!

Wait, what was that quip again, 'those who live in glass houses shouldn't throw stones at others', wasn't it?

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