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

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Abstract
Pakistan is often criticized for its anti-terrorism legal regime—which institutionalizes preventive indefinite detention, special courts, and speedy trials. Pakistani officials, on their part, rebut this criticism by pointing to the Anglo-American anti-terrorism legal regimes, and generally to "the global paradigm of security." Interestingly, should we trace the genealogy of the anti-terrorism legal regime of Pakistan, we find rich historical-juridical linkages between the Pakistani and Anglo-American regimes. These linkages converge on, or at least begin from, the British law of high treason. This law was adopted in certain colonial regulations in the early 19th century. In this article I demonstrate how the legal form and substance of the high treason law and of certain other colonial regulations traveled through colonial and post-colonial security laws, such that they have recently come to converge with the global paradigm of security.

Key Words: Security Laws of Colonial India, Anti-Terrorism Laws of Pakistan, Anti-Terrorism Laws of the UK and the US**,** Preventive Detention, Special Courts, Speedy Trial.

Introduction:

In a short PBS documentary on the subject of missing persons in Pakistan, or more specifically on indefinite preventive detention in Pakistan, Wasi Zafar, the then Law Minister (2007), is presented some hard questions relating to security and anti-terrorism laws.[1] Conscious of the political sensitivity relating to the subject of indefinite preventive detention, especially in official circles, Zafar tries to avoid answering the questions. However, when pressed into finally answering Zafar transfers blame and guilt onto Western governments. A part of the interview, I think, merits reproducing here:

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> Montero: … if the government of Pakistan is violating the constitution by secretly detaining the suspects?
> Zafar: It's not necessary that family should contact to a terrorist…And in your countries, even in America, in Europe, everywhere…if one is a terrorist, he loses many rights, many 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.

What is instructive about this brief interview, especially for the purposes of this essay, is how the apparent inability and/or unwillingness to explain the legal warrant of executive's actions results in a typical line of defense: to make reference to Western regimes of security. Given the absence of a larger public debate in Pakistan, before and after the passage of security laws, a debate that could have furnished some semblance of a viable legal justification, such a line of defense is understandable and perhaps natural, even though its political propriety and legal substantiality remain wanting.

Insofar as the existence of these security regimes is incontrovertible, which Zafar at no point attempts to deny, the aspect that becomes crucial in his defense is the allusion as to how these various regimes legally and operationally relate to each other. In other words, Zafar's answers are not simply acerbic retorts. The subtext of his answers points to something academically more instructive and urgent, i.e., that the various security regimes in the West and East do not stand independent and free of entanglement. Together they share a common legal form and substance, and hence are loosely tied together and form what Giorgio Agamben calls 'the paradigm of security.'[2] Noticing this sub-textual reference in Zafar's answers becomes all the more important and timely when analyzed in the backdrop of a debate on the nature of Pakistan's security regime. According to one opinion in the debate, for instance, by eminent political scientist Charles Kennedy, Pakistan's security regime, or what he terms its anti-terrorism legal regime, is quite unprecedented. In a recent article, after giving a critical account of Pakistan's anti-terrorism legal regime, Kennedy concludes with the following note: "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)."[3] Innocuous though it may appear, Kennedy's advice at once begs the question: Are these Western states really latecomers in introducing anti-terrorism legal

regimes? Apparently, and in the short view, the answer might be affirmative. We know that one of the major anti-terrorism laws in Pakistan was passed in 1997, which was later amended on August 14, 2001, about a month before the terrorist attacks of 9/11. On the other hand, in the US and the UK some of the anti-terrorism laws most formative to those countries' contemporary legal regimes were passed after 9/11. However, when we place the security regimes of the West in the long view, or more technically, approach them with a genealogical lens, we come to the contrary conclusion: Western security regimes are not only much older, but also form the main source of Pakistani (and for that matter Indian) security regimes. The latter states partly inherited security laws from the colonial state of security in India, and partly borrowed them from the recent Anglo-American security regimes.

The aim of this essay, however, is not to discover which state has the oldest security regime. Rather the aim is to highlight how they have historically been related, especially the security regimes of Pakistan, India, the UK, and the US. And the reason to begin the essay with the interview of a Pakistani Law Minister was not primarily to point to the fact that officials admit the existence of the security regimes in these states, but more so to bring to our attention certain juridical categories that they inadvertently (or perhaps habitually) invoke: "anti-state activity," "enemies of the state," and "the loss of rights." These categories are at the heart of the present global security regime, just as they were at the heart of security regimes for the past few centuries. And the crucial aspect worth noticing about them is that as the earlier generations of security regimes gradually died out, they almost always left behind these juridical categories, undiminished in their legal substance, which after some changes to their legal form were picked up by new security regimes. Accordingly, in order to trace the (colonial) genealogy of the security regime of Pakistan and its relationship with the Anglo-American security regimes, we need to highlight, methodologically speaking, the trajectory of these juridical categories traversing through different security laws and their regimes over the past two centuries.

On a broader level, our focus on these juridical categories takes place within the ambit of two infamous juridical derogations that security regimes generally entail: a) the suspension of the rule of law, and b) the suspension of civil courts or part of their jurisdiction. The former derogation results from the provisions that allow for preventive detention, and the latter results from the provisions for special courts, such as, anti-terrorism and martial courts, as well as

from providing for speedy and extraordinary trial procedures. I point out that the genealogy of these juridical derogations, along with the juridical categories underpinning them, in Pakistan, and for that matter in India, can be traced back to early 18th century colonial laws, especially the Regulation X of 1804 and the Regulation III of 1818. The legal form and substance of these regulations was drawn from certain security laws of England, especially the law of high treason. Once introduced in colonial India, these juridical derogations thrived through the colonial era, and were passed on to Pakistan and India after independence. After surviving through the post-independence era, they have only recently in the wake of the War on Terror come to converge with the global paradigm of security.

The Colonial Paradigm of Security

The genealogy of the paradigm of security in England, Agamben indicates, stretches back to the mutiny acts of the 17th and 18th centuries.[4] On his indication, even though he does not further explain, it can be conjectured that the first Mutiny Act of 1689 provided the elemental basis for two exceptions to the rule of Common Law: it made martial law and courts a) relevant to peacetime, and b) applicable at home. However, at the time, the exceptions were hardly consequential for the rule of (Common) law—they neither implied the suspension of law nor yielded a new prerogative to the sovereign to proclaim martial law within the realm. While the exceptions would take time to manifest their legal consequences, the object of the act was quite manifest and consequential. It was to provide for the security of the sovereign and the realm, especially in the face of a fledgling institution of standing army, which it was feared could pose potential threat of rebellion/mutiny. However, even as the object of the act was clear, it can be argued, it did not set out anything new. The security of the sovereign and the realm had long been an enduring political concerns, one that was well recognized in Common Law, and ensured by a severely punitive law—the law of high treason. Accordingly, should we endeavor to trace the normative origins of the paradigm of security in England, we will have to stretch our genealogy further back to the high treason acts. The mutiny acts, on their part, came as corollaries to the law of high treason, especially at the time when the expediency of disciplining a fledgling standing army on the one hand, and the constraints imposed by the Petition of

Rights, 1628, on sovereign's martial law powers on the other, produced room for them.[5]

The law of high treason has, at the minimum, two key substantive elements that normatively link it to the modern paradigm of security. One key element is the loyalty to the sovereign, and hence the urgency of his security, which as the object of the law for a long time remained sanctioned as paramount and above the very basic rights of subjects. Another key element, which follows from the first, is the subject of the law: the offences directed against the security of sovereign and the Realm. These offences primarily include the following offences: to levy war or take up arms, aid and abet the enemy, and rebellion. The normative relationship between the law of high treason and the modern paradigm of security evolved, I presume, as these key elements of the former, with some adaptation in their form, but not much in substance, pass on to the latter, especially to the security and anti-terrorism laws, over the course of past two centuries. In this long course, one of the initial crucial junctures came along with the shift in security concern from the person of the sovereign to the political entity of the state in England. It came along, or at least began, in the middle of the 19th century, when the Treason Acts of 1842 (and later of 1848) marked "a departure from equating the monarch's personal safety with the essential security of the state," which is obvious in the provisions for the reduction of certain high treason offences to high misdemeanor and felony.[6] In other words, the defining aspect in this paradigm shift or departure was the sign of how the key substantive elements of the law of high treason create the occasion for *the offences against the state*, or simply political offences. Accordingly, we can argue that the early signs of the modern paradigm of security in England emerged during this time, with the unpacking of (or "ambivalence toward"[7]) the law of high treason and the rise of the offences against the state. However, it is important to note that it is only by WWI and the passage of the Defence of the Realm Act (DORA), 1914, that the paradigm of security in England becomes manifest and legally consequential. In other words, it is in the DORA that we see the convergence of the two exceptions mentioned above: the exception of martial law and martial courts—originally conceived in the Mutiny Acts—and the supremacy of the security of state over the rights of subjects—originally grounded in the law of high treason.

The convergence of the key substantive elements of the laws of high treason and mutiny in the DORA, 1914, however, was not the first of its kind. About a century earlier, in the colonial state of

Bengal, the British had ventured this convergence in the form of Regulation X of 1804. In other words, the English laws of high treason and mutiny provided the key elements for articulating colonial laws of security. The offences that were treasonous under the Treason Act, 1351, were provided in the Regulation X almost verbatim and were subjected to martial law jurisdiction. Three such categories of offences are worth noticing. First, the offence of "levy[ing] war against our lord the King" provided in the High Treason Act is phrased in the Regulation X as follows: "to have borne arms in open hostility to the authority," Second, the offence of "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere" provided in the High Treason Act is phrased in the Regulation X as follows: to have "abetted and aided the enemy." Third, the petty treason in the Common Law is provided in the Regulation X as follows: to have "committed acts of violence and outrage against the lives and properties of the subjects."[8] From their experience at home, the British colonial administration was well aware of the fact that trial procedure of high treason was considerably cumbersome and often lengthy, and hence not suitable to their interests in the colonial state. Therefore, the administration chose to introduce a different law, Regulation X, and empowered the colonial administration to try treasonous offences in martial courts.

The Regulation X provided that the Governor-General in Council could a) establish martial law, b) suspend or direct any public authority or officer to suspend the ordinary Criminal Courts of Judicature, and c) direct the immediate trial by courts martial. The Regulation not only provided for the death sentence, but also provided for, as in the case of high treason, the forfeiture of property and effects, real and personal. Later Act V of 1841 provided that the government could issue commissions to set up tribunals competent to try offences mentioned in the Regulation X.[9] And two decades later, the Indian Council Act, 1861, empowered the Governor-General to issue ordinances to authorize special tribunals, during times of emergency, the existence of which he himself determined.

In England by the turn of 18th century, it had become evident to the government that the law of high treason and the severe punishment it prescribed was, at times, not enough to guarantee the security of the sovereign. Meanwhile, the nature and understanding of the threat to the security of the sovereign was undergoing crucial change, from the concern for revolts and rebellions to that of commotion, rioting, and public disorder. These latter forms of

offences, although directed against the state, could not be dealt with the law of high treason, partly due to the difficulty of a lengthy trial procedure and partly due to the question of proportionality of punishment. In order to deal with these offences, the government came up with a different solution. It chose to suspend *habeas corpus* and to place individuals under extended detention. For instance, in the last decade of the 18th century, during its wars against revolutionary France, the government suspended *habeas corpus* twice—May 1794 to July 1795 and April 1798 to March 1801. After the end of war, a proletariat movement for parliamentary reforms began and quickly became violent. When the Prince Regent's coach was attacked in January 1817, the parliament enacted the Habeas Corpus Suspension Act, 1817.

Next year in Bengal, the Regulation III—A Regulation for the Confinement of State Prisoners—was passed, which authorized the colonial administration to suspend *habeas corpus*, even before such a right was conceded. The suspension of habeas powers were justified for "the reasons of state"—a phrase that corresponded to the predominant political rationality of the time, technically termed *raison d'état*—which was said to be the maintenance of alliances formed by the British government, preservation of tranquility in the dominions, and preventing internal commotion. 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.

Apart from depriving the detainee of the right to be presented before a magistrate and to have a legal counsel for defense, he was also deprived of the right to be informed of the grounds of his detention. The officer under whose custody the detainee was placed prepared a bi-annual report "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, on his discretion, the Governor-General in Council could extend detention of "a state prisoner"—a new juridical category that stood between the categories of a regular prisoner and a prisoner of war—every six months, and could potentially make it indefinite.

In 1850, the Governor-General's territorial jurisdiction under the Regulation was extended to all conquered territories of the East India Company. Moreover, a proviso was added regarding "the removal of doubts" of courts relating to the question of law as to whether state prisoners could be "lawfully detained" in the territories under their jurisdiction.[10] Eight years later, the Regulation was introduced in the provinces of Madras and Bombay with a proviso that the Governor-General in Council could order the removal of state prisoners from one place of confinement to another within the territories controlled by the Company. Moreover, the power to detain was also made available to provincial governors.[11] In 1861, the Indian Council Act promised to bring "peace and good government" to the country, but only after reiterating the Governor-General's power to authorize preventive detention by way of issuing ordinances.[12] Finally, in 1872, Regulation III was extended to the province of the Punjab, and it remained in force until after independence.

Developing a uniform penal code for all conquered territories of India was one of the legal imperatives of the colonial government. By the second quarter of the 19th century, efforts were already underway. In 1837, the Law Commissioners of India presented to the Governor-General in Council a brief copy of the penal code. On the top of the list of crimes enumerated was the category of "offences against the state." These offences corresponded to the ones already provided in Regulation X of 1804 and Regulation III of 1818, especially the waging of war, aiding and abetting and/or instigation and conspiracy for and during war against the state, and waging war against an ally or committing depredation on the territories of a state that was at peace with the colonial government. Apart from providing these offences, some new provisions were proposed, which either related to these offences or stood alone. First, the Copy of the Code proposed that the offences against the state should be made subject to the jurisdiction of civil courts with a uniform criminal procedure, which, it was indicated, was underway. This provision, however, was not meant to eliminate the martial law jurisdiction. Second, Section 109 introduced a new offence, that of the "previous abetting" of waging war or rebellion. The offence referred to initial activities involved in the process of waging war or rebellion. Interestingly, it was being introduced in India at a time when courts in England as well as in the US were taking pains to restrict it, by restricting the construction of the law of treason.[13] In

defense of introducing this new offence, the Law Commissioners reasoned: "As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations."[14] With regard to punishment for the highest state offences, the commissioners apportioned the highest punishment of death. They reasoned that the highest punishment could be apportioned for the highest offences, which they thought were "either murder or the highest offence against the State."[15] Logically, on the scale of punitive proportion they had placed the security of the state on an equal level with the security of the life of an individual. The equation was, however, further upset in favor of the former by a proviso that added the punishment of forfeiture of property, hence likening offences against the state with the offence of high treason. Accordingly, in their punitive respect, offences against the state ranked higher than homicide on the list of crimes. Third, the act or omission of concealing the existence of any design of waging war was declared punishable for up to fourteen years of sentence and fine.

Finally, the colonial state wished to address the problem of political resistance in the code. The subject matter was spread over two chapters: Chapter V with the offences against the state, and Chapter VII the offences against the public tranquility. In the former chapter it was provided that any act that affected government's use of legal powers or that "overawes by means of a riotous assembly," or overawed the government in any other way, would be punished with imprisonment for up to seven years and a fine. Moreover, it was provided that causing "disaffection to the Government" by words, signs, or representation would be punished with banishment for life or imprisonment for three years and a fine. In the latter chapter, the issue of public tranquility spread over eleven sections, which in Regulation X of 1804 was provided in few words. It was provided that an assembly of twelve or more persons with the object to overawe the government would be considered "a riotous assembly." Other offences against the public tranquility included showing resistance to the execution of law and putting a person in "fear or hurt".

The penal code was, however, passed and enacted in 1860. Once enacted it remained in force throughout the entire colonial period, and is still in force to this day in both Pakistan and India. More details in the form of illustrations, explanations, and notes were

added in the Code, especially with the aim to address as many gaps and exceptions as could possibly arise, though "the frame-work and phraseology", the framers stated, remained the same.[16] Just as in the 1837 Copy of the Code, the Code of 1860 placed the offences against the state on the top of the list. They were further divided and graded according to the severity of the offence and punishment into three classes: a) offences against the Queen and her Government, b) offences concerning relation of the Indian government with other governments, and c) offences relating to the custody of prisoners of state and war. The second class of offences reflected the provisions of Regulation X of 1804, while the subject matter of the third class went back to Regulation III of 1818. The first class of offences included the waging of war, attempting to wage, or abetting the waging of war against the Queen. This class was to be punished with death or transportation for life, as well as forfeiture of all property. The offence of "previous abetting" was removed, and in its place the offence of "prepare to wage war" was given. This offence was made punishable by transportation for life or up to ten years of imprisonment as well as forfeiture of property. Concealing the design of waging war was made punishable up to ten years and a fine.

In the explanatory note the framers explained the first class of state offences in the context of the English law of high treason. The framers wrote that while the occasion for an offence against "the person of the Sovereign and the members of the royal family" would "scarcely arise in India", treasonous offences could still be done against the Queen. They could be indirectly done in the form of offences against Her Majesty's government in India, and elsewhere in the Empire. The framers indicated that just as high treason was an offence directed against the allegiance-protection relationship between the Queen and her subjects, the offences against the state were also directed against this relationship between the Queen's Indian government and her subjects. These offences they said "threatened to destroy or injure the whole fabric of political society", although they didn't care to explain the exact nature of that political society or how it had come into existence. Because subjects received protection from Her Majesty's government in India, they were duty-bound to show "true and faithful" obedience. In the absence of a civil law of rights—to recall, the absence was acknowledged by the framers in the 1837 Copy of the Code—it seemed that the emphasis of the colonial state was centered more on duties than on rights.

The chapter on public tranquility was expanded in the code. In the 1837 code, there were only 11 sections. The number increased to 20, and the chapter in which they were included was provided with illustrations and explanations. In the introductory note to the chapter, the framers stated that the offences against the public tranquility "hold a middle place between State offences on the one hand, and crimes against person and property on the other." The chapter, they wrote, primarily focused on "unlawful assemblies of person who, whether they assemble tumultuously or otherwise, have a common unlawful purpose in their minds, the execution of which will disturb public order and excite alarm." One of the important provisions related to the distinction between an unlawful assembly and a riotous assembly. Section 141 provided that an assembly of five or more persons with a common object to "overawe" the government, to resist execution of law, to commit mischief or criminal trespass, or overawe a subject. Members of an unlawful assembly were liable to imprisonment up to six months which might include fine. Section 146 provided that if force or violence was used, even by just one member, in pursuance of the common object, such unlawful assembly would be considered riotous assembly, and all of its members would be liable to up to two years of imprisonment.

Just as the framers attended to these details, they began to realize how asymmetric the overall legal system had grown. Penal laws were among the first that were codified, even as they acknowledged that penal laws were/are subsidiary and auxiliary to civil law. Because it prescribed rights and duties of subjects as well as delimited the powers of the executive, civil law was/is the principal substantive law. Moreover, the framers argued that at the time of their making, penal laws, or a penal code, assume the existence of civil laws, or a civil code. But just as they made an honest statement, given their acknowledgement of the asymmetric relationship between different "departments" of law or code(s), the framers were also apparently apologetic and registered a proleptic defense about what they called the "uncertainty and obscurity" of the penal code. Hence in order to defend the code, which they and their predecessors had taken pains to author, compile and edit, they acknowledged its shortcomings, but only by way of putting the blame on the "dark and confused" state of other departments of law. To quote them:

> A Penal Code[…]is then an auxiliary to the other departments of the law. If many important questions concerning rights and duties are undetermined by the Civil law, it must often be

> doubtful whether the provisions of the Penal law do or do not apply to a particular case [...] A Penal Code therefore necessarily partakes of the vagueness and uncertainty of the rest of the law. It cannot be clear and explicit while the substantive Civil law and the law of procedure are dark and confused.[17]

The framers acknowledged that the laws that ideally should have been auxiliary and supportive had replaced the principal laws and taken the central stage of the legal system. Interestingly, they might not have realized that their acknowledgement exposed how the legal system of the colonial security state was being run on a subsidiary and auxiliary law.

Instead of paying attention to introducing constitutional law guaranteeing fundamental rights and prescribing defined duties, the British sought to claim some credit for the framing of a consolidated and uniform penal code for all territories of India. It is true that the legal system of the colonial state moved a step forward from individual regulations, which often differed on a temporal and territorial scale, to a unified system of penal laws and procedure. But interestingly, the claim to this achievement could not last long, as in the first quarter of the 20th century, especially with the outbreak of WWI, the legal process began to undergo a reversal: from a unified system of penal laws back to individual security regulations. And it is worth noticing that this change, or a similar one, first took place in England.

The Defence of the Realm Acts (DORA), 1914-1915 and the Defence of the Realm Regulations (DORR), 1914-1918 virtually replaced the rule of Common Law. The DORA, 1914, authorized the trial of British subjects by martial courts, thus materializing the possibility that was only latent in the mutiny acts of 17th century and that was once heatedly debated in the Jamaica Case, 1865. Due to severe public criticism, an amendment was made to the DORA on March 16, 1915, to substitute martial courts with civil courts and trials by jury. The relief was, however, available only to subjects and not to anyone who fell under the category of aliens. Interestingly, the amendment also provided such relief to British women married to aliens (Section 8). In this way the amendment was tantamount to clearly drawing a line between subjects and aliens, and hence making legally consequential the individual's *divisiones personarum*. Nevertheless, the relief did not diminish the nature of the offence of contravening the DORA, which was to be considered as a felony

punishable by penal servitude for life, and in cases of assisting the enemy by death and forfeiture of property. The amendment specifically provided that if any case qualified as a case of high treason it would still be tried as a case of felony. Evidently, this provision was made to avoid the cumbersome and often lengthy trial procedure of the law of high treason. Moreover, the amendment provided for two procedural novelties. First, it said that "for the purpose of speedy trial" a case could be initiated anywhere in the country, and not just where the offence actually took place. Hence the notion of speedy trial—in fact, speedy procedure of trial, and not speedy justice as such—took its initial roots in this act. Second, it gave courts the authority "to exclude the public", or certain attendees, from the court, purportedly in "the interests of national safety." This provision amounted to a crucial procedural change in the trial of felony cases, or what was earlier high treason, or in India the offences against the state.

The DORA authorized preventive detention under Regulation 14(b). Under it government could detain civilians of "the hostile origin or associations"—a juridical category that has since survived and has become even more significant in present times—and restrict their movement for indefinite time. Such preventive detentions were challenged, but the British courts decided that government had valid discretion to detain anyone, even on mere suspicion. For instance, in *Rex v. Halliday* 1917 (and later in *Liversidge v. Anderson* 1942) the court accepted the principle of "subjective satisfaction" as opposed to that of "objective satisfaction" on the part of government in detaining persons as sufficient criteria for the reasonableness of suspicion.

On March 19, 1915, three days after the passage of the amendment to the DORA, in India the Governor General gave assent to the Defence of India (Criminal Law Amendment) Act, DIA. The DIA, taking its legal form and substance from the DORA, authorized the colonial government to make rules or regulations in the name of public safety and defence of the country. Just like the DORA, it was preoccupied with political offences, which it classified under the term "certain offences." By now this phrase was more than a century old and it still referred to almost the same offences as it did in Regulation X of 1804: waging war, assisting the enemy, and causing disaffection. These offences were once provided through individual regulations, later made part of the Penal Code, and now placed under the DIA. While in Regulation X these offences were subject to courts martial, as well as under DORA 1914, the DIA provided for a special

tribunal "for the more speedy trial." The essence of all these courts of different generations was speed. The speedy trials in practice entailed circumvention of the regular, lengthy, and cumbersome trial procedure of the Code of Criminal Procedure, 1898. Under the DIA a special tribunal was to consist of three commissioners, two of whom were required to have legal experience and qualifications. The tribunals were given the power to award capital sentences in cases of waging war and assisting the enemy. Moreover, it was provided that the decision was "final and conclusive." There was no right to appeal the decision and no other civil court had the power to revise the decision or exercise "any jurisdiction of any kind in respect of any proceedings under this Act."

The end of WWI, it was expected, would bring an end to the exercise of emergency powers within six months as declared both in the DORA and the DIA. However, the expectations were not met and new emergency laws were enacted at the end of the war. In India, on March 21, 1919, in the wake of a stepped up political resistance to colonial rule, the government enacted the Anarchical and Revolutionary Crimes Act (ARCA). Meanwhile in England, a year and half later, the Emergency Powers Act was enacted. In the case of the former act, the purpose was said to "supplement" the ordinary criminal law and to make emergency powers "exercisable." However, the act did not define what it generically termed anarchical and revolutionary movements and crimes. Instead it took out a list of offences from the Penal Code and put them together in the form of a schedule, and attached it to the act. These penal crimes were to be treated as anarchical and revolutionary offences, and would also justify the invoking of emergency powers. The major offences, however, were once again waging war, assaulting or overawing the government, and abetting mutiny or sedition. Moreover, several lesser crimes from the Penal Code were included, for instance, rioting, extortion, criminal intimidation, dacoity and robbery, murder and culpable homicide, damage to public infrastructure, mischief by fire or explosive substance, and lurking, house breaking and entering. All of these offences were made subject to the jurisdiction of special courts set up under the direction of a high court, each consisting of three judges of that or any other high court. The act provided in detail a special procedure of trial, and declared that court decisions were to be final and conclusive. Some notable features of the special procedure included a) discretion of the government to initiate proceedings; to prepare charges and serve the

accused; and to determine the place of court sitting, b) the court was not bound by rules of adjournment, c) the court could order to prohibit or restrict the disclosure or publication of proceedings, d) other superior courts were excluded from exercising jurisdiction over the trial, and e) the recorded evidence of a person who later died, disappeared, or was incapable of giving evidence was made admissible. For two reasons the Anarchical and Revolutionary Crimes Act, 1919, was a prototype of modern security laws. First, it demonstrated well the new technique of borrowing crimes from the Penal Code, listing them in a schedule, and giving them a generic name. Second, it provided a detailed special procedure of trial, and barring the regular superior courts from interference, whether judicial or administrative.

With the outbreak of WWII, the defence acts were once again invoked. This time it was the Defence of India Act, 1939 and it came with more details. The government was authorized to make rules on virtually anything that related to defence and public safety—the two subjects that were drawn from the DIA, 1915—and to the public order, efficient prosecution of war, and maintenance of supplies and services essential to the life of community. Apart from that under the "generality of the powers" to make rules, a phrase used in the Act, the act provided for thirty-five specific subjects on which government could make rules. However, in one way or another, much of government's focus was on a few specific subjects, especially the waging of war, assisting the enemy, and causing disaffection. Accordingly, the act provided for "enhanced penalties" for these offences, and by 1943 made them subject to the Enemy Agents Ordinance—an ordinance that was severely derogatory to the British claim of justice by way of the rule of law.

The DIA, 1939, provided for special tribunals whose rules of constitution and procedure were framed on the pattern of the DIA, 1915, and the Anarchical and Revolutionary Crimes Act, 1919. However, some of the provisions were notably different and they only caused further derogation from justice. First, the qualification of members of tribunals came down to the district magistrate or session judge. Only one member was to qualify as a judge of High Court. Second, the tribunals were authorized to award punishments which included the death sentence, transportation for life, and long-term imprisonment. Those who were awarded capital sentence were given the right to appeal their case to a high court, but they had no right of appeal against the awarded sentence. Third, the government could transfer to a special tribunal any case from any other special or

ordinary criminal court. Fourth, a special tribunal could take cognizance of an offence even if it was not trying the accused. Fifth, a special tribunal was not required to write down evidence at length in writing except in the cases of capital sentence, and even in that category it would "cause a memorandum of the substance of what each witness deposes." Sixth, a special tribunal was not bound to recall and rehear any witness. Rather it could proceed on with the trial on the basis of already recorded evidence. Lastly, a special tribunal could try the accused in his absence, inasmuch as he had appeared once.

The special tribunals set up under the Enemy Agents Ordinance, 1943, entailed further derogation from justice. It did away with the three-member composition of special tribunals. Under it a special tribunal consisted of one judge, who was appointed by the government. He was to be a Session Judge or an Assistant Session Judge. The government not only determined the time and place of sitting, but also could 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 a high court. The decision of the appeals special judge was final. The higher courts were barred from exercising their administrative authority to transfer a case from a special court to an ordinary court. The ordinance further provided that an accused had the right to be defended by a legal pleader, but 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 the decision and other documents relating to the case, but he was supposed to return them within ten days after the end of proceedings, and must not disclose information to anyone regarding the trial. After independence, Pakistan adopted this Ordinance, while its special procedure also made its way into the Army Act 1952. Under the Army Act civilians can be tried in a martial court with a similar special procedure.

Preventive detention and other restrictions on the freedom of movement were also authorized in the rules made under the DIA, 1939. Rule 26, for instance, 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…

On the other hand, Rule 129 provided that any officer, whether of police or administration so authorized could arrest any person without warrant "whom he reasonably suspect[ed] 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."

By the time WWII ended, and British India approached its independence, the security regime of the colonial state had immensely expanded. Let us recall that in the early 19th century, the fledgling colonial state had begun with a legal system that barely constituted of more than a few individual security regulations. The model, or the legal form and substance, of these regulations were drawn from the English law of high treason. In particular, the legal form of treason helped create the category of offences against the state. Martial courts and special commissions were introduced in lieu of the jury procedure for treason trials, while in cases where a charge was difficult to establish the law of preventive detention was given to provide the solution. By mid-century, security regulations were consolidated and codified into a penal code, for the purposes of greater uniformity throughout the colonial state. But by the first quarter of the 20th century, especially with the outbreak of WWI, security regulations once again came to the central stage. These security regulations had by now created a powerful colonial security regime, but obviously at the expense of other "departments" of the legal system. Given this reliance on security regulations, it can well be argued that the colonial state began and ended with security regulations and special procedures.

The Post-Colonial Paradigm of Security

We know that the newly independent states of Pakistan and India adopted much of their legal corpus from the colonial state. This adoption included several security laws, but more importantly it included their legal form and substance. I stress the latter because even as certain laws could not be adopted, their legal form and substance appear to have been adopted in one form or another. However, I also want to note that the legal form and substance of the current anti-terrorism laws have two sources—not only colonial security laws, but also more recent British security laws. I explore the colonial legacy first, before moving on to later developments.

The Security of Pakistan Act (SPA), 1952, was one of the first major security acts introduced after independence. The Act provided

for "special measures", especially preventive detention, "to deal with persons acting in a manner prejudicial to the defence, external affairs and security of Pakistan", as well as to "the maintenance of supplies and services essential for the community." It is obvious from its "phraseology" that the legal form of the act was drawn from the Defence of India Act and Rules, 1939. However, in the SPA we notice a shift from the object of defence to that of security, inasmuch as defence is understood as a temporally limited object, limited to wartime, while security is an ongoing, temporally unlimited, and pervasive object. It is perhaps this shift that explains why the SPA is in force to this day. And should we recall at this juncture Law Minister Wasi Zafar's interview that opened this paper, it won't come as a surprise that David Montero referenced this act. It is under this act that several persons remain under indefinite preventive detention, and because their whereabouts remain unknown they are also remembered as "missing persons." What is more disturbing is that, as Zafar unabashedly declared, the missing persons have lost their constitutional right to challenge their detention. For the purposes of this essay we can raise the question as to what is the legal basis, if any, of the loss of constitutional rights? To answer this question we need to notice that the SPA, 1952, did not only draw its substance from the Defence of India Act and Rules, 1939, but also from the Government of India Act, (GIA) 1935. The GIA, 1935, was one of the first major constitutional acts that provided for preventive detention in Indian constitutional law. Although fundamental rights were not guaranteed under the GIA, there still were certain provisions—those relating to preventive detention—that created the possibility in advance to check such rights. After independence, when Pakistan began to frame its constitution with this act as the basis, these provisions were adopted and with them the check on the constitutional right of habeas. The constitution of Pakistan, 1973, for instance, in Article 10, guarantees safeguards against arbitrary arrest and detention, except what it calls preventive detention. In Clause 3, it denies these safeguards to those who are aliens and to those citizens who are held under "preventive detention."

Moreover, the constitution provides that any individual can be placed under preventive detention for up to three months. Toward the end of three months an "appropriate review board" consisting of selected judges of a superior court is to review the detention and decide on whether or not to release the detainee. After reviewing the case, the board can extend the period of detention for up to three

more months. The procedure is required to be repeated again at the end of the extended period. With this procedure a detainee can be held for up to three years. Despite this long detention, Clause 7 provides for the possibility of further detention of those who could be declared enemy agents. With this clause the substance of Enemy Agent Act, 1943, has virtually made its way into the constitution. In February 1975, an amendment was introduced to increase the number of offences subject to detention.[18] The amendment provided that any person who threatens security, defence, and/or integrity of the country or is engaged in an "anti-national activity" could be placed under preventive detention. It is obvious that the amendment drew on the SPA, 1952, and the Suppression of Terrorist Activities Act (STAA), 1975. It is also interesting to notice that like the GIA, 1935, the Constitution of Pakistan, 1973, made preventive detention subject to both federal and provincial legislative lists. Recently, Schedule 4 of the 18th Amendment, 2010, has provided that provincial governments can legislate on preventive detention for certain additional purposes: the maintenance of public order and supplies and services essential to the community.[19] I return to preventive detention, especially the linkages between Pakistani and Anglo-American laws in a moment.

Here I want to highlight the subtle shift in the object of security laws from that of defence to security and eventually to terrorism. I have already observed that in the DIA, 1939, the object was defence and it was clearly declared in the preamble. On the other hand, the concern for security was always present, but it was not central. It is in the SPA, 1952, that we notice the shift from the object of defence to that of security. And the shift from the object of security to that of terrorism comes at a later stage in 1975 with the passage of the STAA. The latter shift at this stage, however, was only rudimentary, as its primary context was local party politics and not state security. Therefore, despite the use of the category of terrorism, the focus remained much on the suppression of acts of sabotage and subversion. It should be noted that terrorism was not even defined in the STAA. Instead a list of "scheduled offences" was provided, and these offences were collected from the penal code. Moreover, they resembled the scheduled offences of the ARCA, 1919. In other words, the offences that were once termed anarchical and revolutionary crimes were now termed as terrorism. The act also provided for special courts and procedure, which were also modeled on the DIA, 1939, and the ARCA, 1919.

The use of the category of terrorism in the STAA, 1975, raises the question of its origin. My genealogical probe suggests that the category of terrorism and the STAA, 1975, exhibit clear linkages with the British emergency laws of Northern Ireland in the early 1970s. Two years before the passage of the STAA, the British government had passed the Northern Ireland Emergency Provisions Act, (NIEPA) 1973. It was one of the first security laws in the post-war era that not only provided a preliminary legal definition of terrorism, but also provided for special courts and procedure in the UK. Later this legal definition of terrorism was passed on to the NIEPA, 1989, and eventually, to the Anti-Terrorism Act, 2000, whereupon it came to extend over the entire UK.

The 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." Although NIEPA, 1973, tried to define terrorism as a distinct category, the offences that were listed were not. These offences were given in an attached schedule, and were collected from different existing laws. For example, they included arson and riot from the Common Law; setting fire to private or public buildings, or other forms of property and machinery from the Malicious Damage Act 1861; causing grievous bodily harm from the Person Act 1861; causing explosion likely to endanger life or damage property from the Explosive Substance Act 1883; possessing, carrying, using firearms, and ammunition without license from the Firearms Act (Northern Ireland) 1969; and robbery and aggravated burglary from the Theft Act (Northern Ireland) 1969. Similarly, in Pakistan the STAA, 1975, came with a schedule, which listed offences from the penal code and several other laws such as the Explosive Substances Act, 1908, the Arms Act, 1878, the Railways Act, 1890, the Telegraph Act, 1885, the Aircraft Rules, 1937, and the Anti-National Activities Act, 1974. From these scheduled offences it is not difficult to tell that the STAA, 1975, took its legal form and phraseology from NIEPA, 1973, while its substantive contents/offences were brought in from colonial laws. Later we notice that this technique of adding schedules—which followed after the making of the consolidated penal code in 1860—is used in Act IX and X of 1992, and the Anti-Terrorism Act, 1997.

The Anti-Terrorism Act (ATA), 1997, was one of the first major anti-terrorism laws in Pakistan. It was clearly modeled on the NIEPA, 1989, and when in 2001 it was amended and hence expanded by an ordinance, it came to show close resemblance to the British Anti-

Terrorism Act, 2000. For instance, the definitions of terrorism in the two acts are strikingly similar. The Pakistani law 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.

While the British 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.

In the United States, the Patriot Act, 2002, defines terrorism by making an amendment in the United States Code, Title 18, Section 2331. With this amendment the definition of terrorism in the US came closer to that of the UK. The Code provided that terrorism consisted of "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, those acts that "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 provided in the definition the acts of "indicating an intention to cause death or serious bodily injury," "to prepare or plan a terrorist activity," and "to solicit funds or other things of value."

One of the interesting dimensions of the American juridical debate on the War on Terror worth noticing is that it has not yet resolved the relationship between terrorism and acts of war, which 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 in the NDAA, 2011, as "hostilities against the United States or its coalition partners" (Section 1031).[20] And more clearly, John McCain, who was one of the sponsors of NDAA, in support of the act argued: "…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."[21] It is quite obvious from this unresolved relationship between terrorism and acts of war that the shift from the law of high treason to that of the criminal code in the US also remains incomplete.

Let us now return to the issue of preventive detention. One of the recent foundational laws of preventive detention in the Anglo-American security regime has been NIEPA, 1973. The object of the act, as discussed earlier, was to deal with "certain offences, the detention of terrorists, the preservation of the peace…"[22] Under this act, the Secretary of State could order to place an individual in "interim custody" for a period of 28 days. Before the expiry of that period an appointed (quasi) judicial commission would decide on the basis of "the protection of the public" whether to release the individual from custody, or to extend it.[23] It is also worth noting that the detainee is to be served with a written statement regarding his terrorist activities only seven days before the commissioner first hears the case.[24]

The NIEPA, 1973, was amended and reenacted in 1978, 1987, 1991 and 1996. In the last two acts the period of "interim detention" was reduced to 14 days, and the Secretary of State was authorized to issue detention orders only after receiving a report from a judicial adviser. What is important to notice about these acts is that the procedure of these detention laws reflected the procedure laid down in Regulation III of 1818. The following procedural steps in these acts resembled with that in Regulation III. After a person is arrested and detained for an interim period, the case is referred to an Adviser within 14 days. Here the difference was that in Regulation III the Adviser was also the officer in charge of the custody. After referral to the Adviser, the detainee is served with a written statement regarding the nature of his suspected activities. The detainee is then allowed to send a written representation to the Secretary of State and/or a request that he wants to see the Adviser in person. The Adviser prepares the report, taking into consideration the representation 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 send back the case to the Adviser. The detainee can also request for reconsideration of the order after one year. Thus apparently the detention could extend for an indefinite period of time.

In 2001, the UK's Anti-Terrorism, Crime and Security Act (ACS), provided for the detention of non-citizens. Under Section 23 non-citizens could be indefinitely detained without trial. With a certificate from the Home Secretary, a non-citizen could be detained and at once become "a suspected international terrorist." However, this provision of indefinite detention turned out to be inconsistent with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950. In December 2004, the House of Lords in *A v. Secretary of State for the Home Department* held that Section 23 was illegal on two grounds. First that it exhibited a disproportionate response to what was "strictly required by the exigencies of the situation" and thus infringing on Article 5 of the ECHR. Second that it violated the right of all human beings to be free of discrimination enshrined in Article 14 of the ECHR. Clearly, the Lords were of the opinion that the section discriminated without a rational and objective justification between citizens and non-citizens. 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 could be issued to control individuals who posed a serious risk to public safety. By an order of a high court they could be placed under house arrest for a period of six months, which could also be extended. The non-derogating control orders imposed a combination of restrictions: for instance, curfew, electronic tagging, restriction on association, search of residence, restriction on the use of telephone and Internet. These orders could extend up to twelve months and could be renewed.

Apart from detention-without-trial and control orders, there have been two other legal routes for detention in the UK. One was called "pre-charge detention" and was provided in the Anti-Terrorism Act, 2000. Under it a person could be held for forty-eight hours. In 2003, the Criminal Justice Act increased pre-charge detention to fourteen days. Then in 2006, the Terrorism Act further increased the period to twenty-eight days. Another route provides for much shorter periods of time, specifically for the purpose of questioning and body search on borders, port, and airports. This type of detention, which reflected stop and search detention under the NIEPAs, is allowed for nine hours.

In the United States detention without trial is one of the legal instruments available to the executive, especially in cases where there is a lack of substantial evidence necessary for trial. Both

citizens and non-citizens can be placed under preventive detention.[25] Moreover, it is not constrained by law, whether international or local, or by judicial oversight. This type of preventive detention, along with the deployment of armed forces in civilian areas, is reminiscent of detention-without-trial and military deployment in Northern Ireland. The Bush administration claimed that human rights law did not apply "to the conduct of hostilities or the capture and detention of enemy combatants" because such matters were "governed by the more specific laws of armed conflict."[26] It was convinced that preventive detention was the exclusive subject of the executive.

At the beginning of the War on Terror, it was declared in a Presidential Military Order on November 13, 2001, that citizens of the United States would not be subject to preventive detention. For citizens there existed another law—Article III of the Constitution. The subjects of the November military order were the members of al-Qaeda or those who had "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 could be permanently incapacitated. For instance, 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."[27] Two justices, Stevens and Scalia, in the plurality decision, held that the US Constitution required that Hamadi be "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."[28] The criminal proceeding meant the proceeding of 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 deem[ed] this necessary for the public safety even if he [was] mistaken."[29] Although the plurality decision in *Hamdi* granted him the right of habeas, the passage of NDAA, 2011, has once again withdrawn that right from citizens. Accordingly, those American citizens who have been "covered persons" could be denied the right of habeas.[30]

Let us now turn to the genealogy of special courts and procedure in Pakistan and its linkages with those in the UK and the US. In 1992, the 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." And the nature of offences was explained in Act IX as follows: the offences "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."

Special tribunals under these acts were set up on the pattern of tribunals from the colonial era and those in the Northern Ireland. For instance, we can recall that the 1939 Act provided for a three-member tribunal, while later in the Enemy Agents Act, 1943, the strength was reduced to one. The NIEPA, 1973, also provided for one-member court. Similarly, Acts IX and X provided for a one-member tribunal. Moreover, the 1939 Act had 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. These acts, and later the Anti-terrorism Act, 1997, required similar qualification.

Similarly the DIA, 1939, had authorized special courts to try all prescribed and any other offences that the government placed before them. The NIEPA (Sec. 10), 1991, had also authorized special courts to try both scheduled and non-scheduled offences directed to them by the government. Moreover, it is worth mentioning that the Special Powers Act, 1922, for Northern Ireland, had provided in Section 2(4) that all kinds of offences were subject to special courts. The clause said: "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." Just as these acts, the 1992 Act (Sec. 11) and later the 1997 Act (Sec. 17) of Pakistan authorized special courts to try both scheduled and non-scheduled offences.

Furthermore, just as the DIA 1939 enjoyed the "overriding effect" on all other laws, including the penal code, the Pakistani acts also provided a similar provision. Interestingly, special courts set up under the 1939 Act also enjoyed some sort of overriding effect or precedence over all other lower courts and the Pakistani special courts were also given such precedence.[31] Hence, a case proceeding in a special court would assume precedence over any other case against the same person in any other lower court. And like Section 9 of the 1939 Act, the Pakistani acts also authorized government to

"transfer" cases from a lower ordinary court to a special court. Moreover, like the DORA and DIA, the 1997 Act authorized summary trials and a year later the 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.[32]

Certain basic elements of the trial procedure of Pakistani special courts were modeled on the colonial DIA, 1939, and Enemy Agents Act, 1943. For instance, a judge could order the exclusion of the public from the trial and carry it out in camera. An accused could be tried in his absence.[33] A special court was not bound to adjourn the expedited proceedings except in exceptional circumstances and for only a few days. The court was also not required to recall or re-hear witnesses on the account that the composition of the court had changed or that the case had been transferred to another special court. Offences against the state remained non-bailable except on the order of a high court after receiving guarantees. The appeal against the judgment of a special court was to be made to a high court.[34] The burden of proof to prove oneself innocent laid on the accused in case when he was found in an affected area where firearms were used or found in possession of firearms.[35]

In the United States, after 9/11, one of the first steps that the Bush administration took was to set up military tribunals. The November 13 Order, 2001, sanctioned special tribunals for terrorists. The Secretary of Defense appointed "one or more military commissions." The Secretary also determined where the commissions might "sit at any time and any place" as well as designated attorneys for 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 made a decision, the record had to be directed to the President or the Secretary of Defense "for review and final decision."

However, the Supreme Court's decision in *Hamdan* struck a blow to the military tribunals.[36] 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 Stevens held that in Hamdan's case military tribunal violated Common Article 3 (CA3) of the Geneva

Convention, which applied 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.

As the court invoked CA3 it apparently resulted in a juridical conundrum. The conflict was international, as the Bush administration claimed. But it did not involve two states, as the CA3 required. Evidently Al-Qaeda was not a contracting party. Then the conundrum was whether "civilized people" would yield similar judicial guarantees to those who were not civilized or who did not engage in "civilized warfare". The court believed they should, but the administration believed they shouldn't.

As a response to the decision in *Hamdan*, and in fact, the increased judicial reviews by the courts, the administration moved 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.[37] It is worth noticing that for aliens there is no guaranteed right of habeas in all these states under discussion—the US, the UK, and Pakistan.

Conclusion:

The genealogy of the security regime of Pakistan stretches back to the colonial regime of security. In the early 19th century we find two such regulations—Regulation X, 1804, and Regulation III, 1818—that stand at the origin of this genealogy. The legal form and substance of these regulations were drawn from the English laws of high treason, mutiny, and (the suspension of) *habeas corpus*. By mid-century, when a consolidated, uniform penal code was put together, the substantive contents of these regulations were merged into it. Subsequently, what used to be treason and felony under the English laws became "offences against the state" under the colonial code. Initially, these offences were made subject to martial and special jurisdictions, but later with the uniform penal code and procedure, they were subjected to ordinary jurisdiction.

With WWI the legal process, especially the transformation from individual regulations to a uniform penal code, began to reverse. With the Defence of India Acts and Regulations, 1915-1919, there emerged a peculiar tendency in colonial governance to rely on

individual regulations, purportedly for the purpose of "speedy justice." And after the war, this tendency only increased, rather developing into an art form. With these juridical developments, the colonial government once again found itself run on regulations. Accordingly, regarding the recent genealogy of the security regime of Pakistan, and for that matter of India, we can well argue that it stretches back to WWI, just as the genealogy of Western security regimes stretches back to WWI. After the independence in 1947 of colonial India, its individual security regulations and laws were inherited by Pakistan and India.

By the turn of the 20th century, the security regime of Pakistan takes its latest form—the anti-terrorism legal regime. Although much of the phraseology and legal form of this regime is drawn from the recent British anti-terrorism acts, its substantive contents and listed offences were drawn from, or are at least reminiscent of, the colonial security regime. And interestingly, British anti-terrorism acts resemble a generalization of those designed for Northern Ireland, which in turn related to the colonial security regime. Terrorism under the current legal security regime includes almost all those offences that were once acts of high treason, and later the offences against the state or the anarchical and revolutionary crimes. On the other hand, special jurisdiction, speedy procedure, and preventive detention have not only been part of the colonial and post-colonial security regimes, but also have made their way into constitutional law where they now enjoy the highest juridical guarantee.

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Notes:
[1] Montero, *Pakistan: Disappeared, One Woman's Search Rouses a Nation*.
[2] Agamben observes that the paradigm of security has replaced the state of exception as the latter is no more formally declared, but is enforced by way

of "an unprecedented generalization of the paradigm of security." Agamben, *State of Exception*, 2,14.

[3] Kennedy, "The Creation and Development of Pakistan's Anti-Terrorism Regime, 1997-2002," 411.

[4] Agamben, *State of Exception*, 18.

[5] The affinity between the Mutiny Acts and the law of high treason can be seen in the Mutiny Act, 1703, which stipulated that any correspondence with the enemy would be considered an act of high treason.

[6] Steffen, *Defining a British State*, 160–161.

[7] Fletcher, "Ambivalence about Treason."

[8] Assault and violence against King's subjects were petty treason at Common Law. See, Steinhaus 1955, 254.

[9] The Act V of 1841 also aimed to achieve "greater uniformity of the process upon trials for State offences." The act was repealed by Act X of 1872, which provided for regulating the procedure of the courts of criminal judicature.

[10] An Act for the better Custody of State Prisoners, Act XXXIV of 1850. The act was passed on August 23, 1850.

[11] The State Prisoners Act, Act III of 1858.

[12] Indian Council Act of 1861, 24 & 25 Victoria, c. 67, Sect. 23.

[13] Two decades earlier, in England, three treason trials—the Spa Fields Riots, 1817, the Pentridge Rebellion, 1817, and the Cato Street Conspiracy, 1820—had caused considerable juridical debate over the law of high treason, and especially its construction. The trials generally ended with restrictive construction of the law (See Lisa Steffen 2001, 145–147). In the United States a series of treason cases were heard around the same time. For instance see *Ex parte Bollman*, 1807, *United States v. Hoxie*, 1808, and *United States v. Pryor,* 1814. Also see earlier cases *United States v. Lee,* 1804, and *Respublica v. Malin, 1778*.

[14] The Penal Code 1837, 140

[15] The Penal Code 1837, 118.

[16] In the 1860 Code, word "framer" is used to refer to the authors of the 1837 Copy of the Code and probably also to the later editors. I here use it to refer to both, the authors of the earlier copy and the later editors and compilers of the 1860 Code.

[17] The Indian Penal Code 1860, 2

[18] The Constitution (Third Amendment) Act, 1975. The amendment received presidential assent on February 13, 1975.

[19] Before the 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 defence and security issues. (See Federal Legislative List Part I, Entry I).

[20] The phrase is also used in the Military Commissions Act, 2005. The act speaks of those persons who have either engaged in hostilities or have

"purposefully and materially supported hostilities" against the United States and its allies.

[21] McCain, "Remarks by Senator John McCain in Support of the Conference Report of the National Defense Authorization Bill."

[22] It is worth noticing that these offences that 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. (Sections 2 and 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.")

[23] Schedule 1 Part II entry 11 sub-entry 3.

[24] Schedule 1 Part II Entry 13.

[25] In *Hamdi* the Supreme Court held that the AUMF conceded to the President the power to detain US citizens captured on 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.

[26] Response of the United States to Request for Precautionary Measures-Detainees in
Guantanamo Bay, Cuba, July 2002, 41 I.L.M. 1015, 1020-21 (2002).

[27] Hamdi v. Rumsfeld 2004, 542:540

[28] Hamdi v. Rumsfeld, 542 US 507, 573 (Supreme Court 2004), 542:573.

[29] Ibid., 542:590.

[30] NDAA Section 1031. A "covered person" is one

> (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."

[31] 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…"

[32] The 1998 amendment for setting up military courts was however struck down by the Supreme Court in *Liaquat Hussain* (1999) as unconstitutional.

[33] 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.

[34] 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.

[35] This section corresponds to section 7(1) in the NIEPA 1973. 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.

[36] Hamdan v. Rumsfeld, 548 US 557 (Supreme Court 2006).

[37] Section 7 of the MCA 2005 amended Section 2241 of 28 United States Code ousting the jurisdiction of courts. Also see Detainee Treatment Act, 2005, which apparently strips the jurisdiction of courts. It should be noted that 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 did exercise review.

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