Indefinite Preventive Detention: An Anglo-American Legacy of the State of Exception

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Abstract:
It is now widely known that anti-terrorism laws, and especially the provision for indefinite preventive detention, have become part of western liberal criminal justice system. These laws create an anti-terrorism legal regime, which derogates from the principle of rule of law. However, there are scholars, for instance Charles Kennedy, who believe that anti-terrorism legal regimes have been deployed more in developing countries, for instance Pakistan, than in the West. In this article, we set out in brief a genealogical description of the Western anti-terrorism legal regime and the provision for indefinite preventive detention. Moreover, we demonstrate that the anti-terrorism legal regime in Pakistan and the provision for preventive detention has its origins in the British colonial security regime.

Keywords:
Indefinite, Preventive, Detention, Anglo-American, Legacy, Exception

Introduction:

Toward the end of 2011, the US Congress approved a controversial defence act called the National Defense Authorization Act (NDAA). Under this act executive could, and it still can, deny terror suspects, including US citizens, the right to trial. The act permits the executive to indefinitely detain terror suspects and gives the US military more discretion to handle foreign terror suspects.

Ironically enough, the NDAA was approved on the 220th anniversary of the Bill of Rights. It not only extended the life of Guantanamo Bay detention camp, but also codified the vast emergency powers of the executive to

a) Deploy secret military missions within the United States,

b) To collect intelligence information on the people,

c) To indefinitely detain persons (both American citizens and non-Americans) in military custody without granting them the right to trial, and

d) To permanently incapacitate persons suspected of terrorist activities.

After a decade of fighting the War on Terror, and killing Osama bin Laden, many human rights advocates in the US, and many more in the rest of the world, had hoped that thewar would wind down. However, the passage of

National Defense Authorization Act (NDAA) diminished that hope. It rather created the fear of further extension of the war. Moreover, it is feared that the war is leaving its perverse imprint on American law and society. For instance, from the point of view of liberal criminal justice system the NDAA created a legal black hole or state of exception. The fear is, as Giorgio Agamben explains, that the emergency powers gained by the executive during wartime often tend to survive at the end of war(Agamben, 2005, pp. 6–7). Recalling Carl Schmitt and Hannah Arendt, Agamben in his remarkable treatise *State of Exception* writes:

> Faced with the unstoppable progression of what has been called a 'global civil war,' the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics. This transformation of a provisional and exceptional measure into a technique of government threatens radically to alter—in fact, has already palpably altered—the structure and meaning of the traditional distinction between constitutional forms. (Agamben, 2005, p. 2)

While indefinite preventive detention has become part of American liberal criminal justice system, some scholars like Charles Kennedy have not only overlooked this question of fact but have rather suggested that such political tools have been extensively used only in developing countries like Pakistan. In this paper, we provide a genealogical overview of the anti-terrorism legal regime of the West, and also highlight how the origins of Pakistani anti-terrorism legal regime go back to British colonial security laws.

Anglo-American Origins of the global Anti-Terrorism Legal Regime and Indefinite Detention:

The Anglo-American origins of indefinite detention and generally of the anti-terrorism legal regime are tied up with the law of high treason. This assumption, however, might seem doubtful, especially as some scholars have argued otherwise. For instance, George P. Flectcher, the Cardozo Professor of Jurisprudence, in his article, *Ambivalence About Treason* writes in the wake of John Walker Lindh case that although the law of high treason formally exists in the American constitutional order, the American liberal political and juridical culture is ambivalent toward it:

> The mood now is better characterized as ambivalence. We supposedly hate treason, but we are unsure whether and how we should punish it. The last time the government prosecuted acts of adhering to the enemy was during World War II. Our contemporary ambivalence is expressed in opting for restrictive interpretations of key elements in the

> crime. […] Why are we so ambivalent about treason? Why threaten the supreme penalty and then look for excuses not to apply the law? My thesis is that because of its feudal origins, treason no longer conforms to our shared assumptions about the liberal nature and purpose of criminal law. Our ambivalence about treason corresponds to legislative moves made in other countries to convert the offense into a crime with liberal contours.(Fletcher, 2003, pp. 1612–1613)

While it might be true that in the American juridical discourse there prevails ambivalence to the law of high treason, the reason for this ambivalence is not however the liberal juridical culture. In fact, the ambivalence is because what Fletcher calls the "key elements" of the law of high treason have migrated to the anti-terrorism legal regime. The legislative and executive instruments like Authorization for Use of Military Force (AUMF), the Patriot Act, and NDAA have adopted these key elements. It is under these new laws that criminal justice dispensations are given.

Allegiance to the state, for instance, is one of the key elements of the law of high treason and is now part of the Patriot Act and the NDAA. The United States Criminal Code provides that in order to be guilty of high treason one must "owe allegiance to the United States"(*18 USC*, 1976). Allegiance can be required due to the status of citizenship or just the physical presence in the state or any other qualified relationship with the state, for instance, holding a passport. This element or requirement of allegiance and a duty to the American State is now one of the basic elements of NDAA, and a justification for preventive detention, rendition, and military custody, and trial of American citizens and non-citizens. Interestingly, on the other hand, it is well known that the right to claim and enforce allegiance is one of the key characteristics of a totalitarian state.

A couple of other related key elements of the law of high treason, as clearly provided by Article 3 Section 3 of the U.S. constitution, are a) waging war against the United States, b) aiding and abetting the enemy, and c) giving comfort to the enemy. Now these elements also make up part of the NDAA. For instance, John McCain defended the Act, in his Congressional speech, saying: "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."("National Defense Authorization Act For Fiscal Year 2012: Conference Report," 2011, p. S8635)

Another key element of the law of high treason is to "compass"—imagine or contrive—the crime of treason. We are reminded of the Philosopher arguing in Hobbes' famous *Dialogue Between a Philosopher and a Student*, that the crime of compassing "lyeth hidden in the breast of him that is accused"(Cromartie & Skinner, 2005, p. 74). Over time courts in the UK and the USA ruled to link the cognitive process of compassing treason with the evidence of physical "overt act."

However, the NDAA, with the provision for arrest, detention and incapacitation on the basis of suspicion, has proposed another solution, preventive detention, to punish for what remains hidden in the breast of the accused.

The term "enemy" is another key element of the law of high treason as well as that of the international law of war. According to well-established public and international law tradition, the term enemy is defined in relation to a declaration of war by a territorial state. Hence, in order to declare a person an enemy, there should be an official declaration of war (for instance, by the Congress as in case of the United States) and the war should be between two territorial states. On the other hand, the anti-terrorism legal regime in the United State has adopted, and frequently used the term enemy, without regard for those provisions. The United States pays no regard to or circumvents the traditional legal provisions by inventing new variants of the term enemy, for instance "enemy combatants" and the "associated forces" as declared in the NDAA. Moreover, the NDAA circumvents the key procedural requirement of two witnesses to testify the overt act as prescribed in the law of high treason of the United States.

The West is not a latecomer in introducing exceptional security laws. We can point to such laws from English legal history as well. For instance, the British government passed exceptional laws when faced with the Irish crisis: the Emergency Powers Act 1920, Prevention of Terrorism (Temporary Provisions) Act 1974, and Prevention of Terrorism Act 1989. Later a more comprehensive act, Anti-Terrorism, Crime, and Security Act 2001, was introduced for the whole of UK. However, here we want to give a more distant example to demonstrate how the English law of high treason provided the legal form and substance to the anti-terrorism legal regimes in both the UK and South Asia.

Colonial Origins of Indefinite Detention in South Asia:

In his 2004 essay, *The Creation and Development of Pakistan's Anti-terrorism Regime, 1997-2002*, Charles H. Kennedy after highlighting the fallouts of Pakistan's anti-terrorism legal regime—that is emergency laws, special courts (including the Anti-terrorism and martial courts) and speedy justice—concludes: "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)"(Kennedy, 2004, p. 411). No doubt there is much for the West to learn from "the tortured history" of juridical dispensations in Pakistan. However, Kennedy's temporally limited research leaves us with an intriguing question: Is the West a latecomer in introducing exceptional laws and juridical apparatus? To make this argument, we think, Kennedy glosses over a crucial thread of legal genealogy of security laws. What is today termed as an anti-terrorism legal regime

in Pakistan, and a warning for the West to pause from initiating something like that, was, in fact, initiated by the Great Britain in early 19th century colonial India. It is only recently, with the creation of anti-terrorism regimes in South Asia, the United Kingdom, and the United States, that the legacy of the state of exception comes a full circle.

Let us take up the genealogy of the English law of high treason to highlight the early origin of security legal regime in both South Asia and the West. The first major law of high treason was introduced in 1351. This law underwent certain gradual changes, but remained in force for centuries. In early 19th century this English law of high treason was adapted for needs of an expanding colonial state in India. Thus in 1818 a regulation was introduced—A Regulation for the Confinement of State Prisoners (Regulation III of 1818). The Regulation read:

> Whereas reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquility in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, 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.

The "reasons of state" or more accurately the colonial state of the 19th century India as provided in the 1818 Regulation and the reasons of state provided by the 21st century states of Pakistan, the UK and the US in their anti-terrorism laws are strikingly similar, for instance, in provisions about domestic security, tranquility/peace, defense of state interests, and maintenance of alliances. Moreover, it was for the first time in colonial India that the institution of preventive detention is provided. The colonial instrument provided for indefinite preventive detention when there was no sufficient ground to institute a judicial proceeding. In other words a person could be detained on the basis of suspicion. In UK the Anti-Terrorism Crime and Security Act 2001 provided for indefinite detention of non-citizens on the same basis of "reasonable grounds" for suspecting a person to be a terrorist. Similarly, Pakistan's Anti-Terrorism Act 1997 allows arrest, detention, and use of force "against whom a reasonable suspicion exist."

Let us recall that the American NDAA also authorized detention based on suspicion. This aspect is interesting to notice a recent speech of President Barack Obama from early 2011. His words bear striking textual similarity with the provision regarding preventive detention in the colonial instrument discussed

above. Obama says, "There may be a number of people who could not be prosecuted for past crimes, in some case because the evidence maybe tainted, but who nonetheless poses a threat to the security of the United State"(Maddow, 2009).President Obama not only defends indefinite detention, but he also defends—when he talks about past crimes—the potential retroactive nature of the law of detention.

In 1850, in colonial India, the Governor-General's territorial jurisdiction under the Regulation III was extended to all the 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.[1] 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.[2] In 1861, the India Council Act promised to bring "peace and good government" to the country, but only after reiterating Governor-General's power to authorize preventive detention by way of issuing ordinances.[3] Finally, in 1872, the Regulation III was extended to the province of the Punjab. It is worth noticing that the regulation remained on the India Code even after the end of the colonial rule.[4]

In early 20th century, while the Regulation III remained in force, new laws were introduced to reinforce preventive detention. The outbreak of WWI brought about one of such laws—the Defence of India Act, DIA, 1915. The DIA was modeled on British Defence of the Realm Act (DORA, 1914), which had provided for preventive detention of British subjects. The DIA also provided for preventive detention of British subjects as well as aliens in India. Moreover, the British colonial government could also detain foreigners or aliens under the Registration of Foreigners Act (or Aliens Restriction Act) 1914. At the end of the WWI the preventive detention provisions were reincorporated in the Anarchical and Revolutionary Crimes Act 1919. Later when the WWII broke out in 1939, preventive detention was once again introduced on the pattern of DIA 1915. It is also worth noticing that during the first half of 20th century the British courts also

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

2 The State Prisoners Act, Act III of 1858.

3 The State Prisoners Act, Act III of 1858

4 (Kalhan, Conroy, Kaushal, Miller, & Rakoff, 2006, pp. 123–124)

recognized executive's power to enforced preventive detention. Such recognition came in two cases—*Rex v. Halliday* 1917 and *Liversidge v. Anderson,* 1942—even though these cases were severely criticized. In these cases, British courts had accepted the principle of subjective satisfaction as opposed to that of objective satisfaction on the part of government as sufficient criteria for the reasonableness of suspicion while detaining persons.

Conclusion:

It is inaccurate to say that the West is a latecomer in the process of introduction of anti-terrorism laws and political tools of control like that of the indefinite preventive detention. In fact, as we demonstrated in this essay, anti-terrorism legal regimes both in the West and South Asia have a long history. In South Asia, the anti-terrorism legal regime is primarily based on colonial laws (as well as borrows from more recent anti-terrorism laws in the UK and the US). The indefinite detention was for the first time introduced in early 19th century by the British colonial administration in the form of Regulation III of 1818. The regulation survived for more than a century. At the outbreak of WWI the Defence of India Act 1915 was introduced, which provided for indefinite preventive detention. On the other hand, aliens and foreigners could be easily detained under the Foreigners Acts of 1864 and 1914. At the end of the war the provisions of indefinite detention were available through Regulation III and Foreigners Act of 1919. At this stage yet another law was introduced—the Anarchical and Revolutionary Crimes Act 1919—which incorporated the provision for preventive detention. When WWII broke out the indefinite preventive detention was once again introduced on the model of the Defence of India Act 1915.

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