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Subject: Analysis of the Pakistan Protection Act, 2014

Introduction

1. Since its promulgation on July 9th, 2014, the Pakistan Protection Act, 2014 (“**PPA**”) has attracted much criticism. The primary question being raised by its critics is whether as a law that claims to provide for “*protection against waging of war or insurrection against Pakistan, prevention of acts threatening the security of Pakistan and for speedy trial of offences*”, does PPA strike the right balance between fundamental rights of individual citizens guaranteed by the Constitution of Pakistan, 1973 (“**Constitution**”) while conferring on the state the requisite authority to fight terror.
2. The history of state’s monopoly over violence is one that is replete with abuses and excesses. Post 9/11, amidst concerns of terrorism emanating from non-state actors, the world has witnessed a contraction of the realm of civil liberties and expansion of arbitrary state authority to fight terror. Torture and kidnapping have been called coercive interrogation and extraordinary rendition. It has been argued that the criminal justice paradigm might not be adequate to fight the transnational threat posed by non-state terror groups and must be replaced or supplemented by war paradigm affording limited rights to terrorists.
3. The state in Pakistan has traditionally exhibited a preference for quick-fix solutions and reliance on special structures and laws to deal with terrorism, which include, inter alia, the following: Suppression of Terrorist Activities (Special Courts) Act, 1975; Special Courts for Speedy Trial Ordinance, 1987; Terrorist-Affected Areas (Special Courts) Ordinance, 1990; Terrorist-Affected Areas (Special Courts) Act, 1992; Anti-Terrorist Act, 1997; Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998; The Investigation for Fair Trial Act, 2013; and The Pakistan Protection Act, 2014. A shared effort in most of these

laws appears to be to make them 'judge-proof' i.e. create catchall categories that make it easier for the state to convict the accused.

4. Over the years Pakistan has also seen threats emanating from within Pakistan as the predominant challenge to the country's national security. The growing internal threat has not seen a proportionate focus on enhancing the capacity of civilian law enforcing agencies. Consequently there has been greater reliance on the use of the military and military-led intelligence agencies as the front internal security and interrogation agencies. However, as the existing laws of Pakistan did not conceive such role for the military, the need has been felt to review and revise these laws to create appropriate legal framework legitimizing the de facto policing and investigation roles being played by the military.
5. The promulgation of the Anti-Terrorism Act, 1997 provided for "*the prevention of terrorism, sectarian violence and for speedy trial of heinous offences*" and constituted Anti-Terrorism Courts that would ensure speedy trial of offences stipulated under the Anti-Terrorism Act, 1997. In *Mebram Ali vs. Federation* (PLD 1998 SC 1445) the Supreme Court struck down many of its provisions for being in conflict with the fundamental rights guaranteed by the Constitution and thus ultra vires. The Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998, was also challenged for being ultra vires of the Constitution and struck down in *Sheikh Liaquat Hussain vs. Federation* (PLD 1999 SC 504).
6. Section 54(1) of the Pakistan Telecommunication (Re-Organization) Act, 1996, stipulates that, "*in the interest of national security or in the apprehension of any offence, the Federal Government may authorize any person or persons to intercept calls and messages or to trace calls through any telecommunication system.*" While telephone intercepts by intelligence agencies without due process of law have continued for decades, the Fair Trial Act, 2013 established for the first time the admissibility of such intercepted material in judicial proceedings and all other legal proceedings and referred to "*modern investigative techniques such as covert surveillance and human intelligence, property interference, wiretapping and communication interception*" as an "*indispensable aid to the law enforcement and administration of justice.*"
7. By promulgating the Investigation for Fair Trial Act, 2013, the Pakistan Protection Act, 2014 and by introducing amendments to the Anti-Terrorism Act, 1997, an attempt has been made to legalize the manner in which law enforcement, intelligence gathering and investigations

were being undertaken in Pakistan, especially in relation to terrorist activities, with an active role for the military and military-led intelligence agencies. In view of the jurisprudence already produced by our superior courts in relation to fundamental rights of citizens, it is unlikely at all provisions of these laws, especially the PPA, will withstand judicial scrutiny.

Key Provisions of Pakistan Protection Act That Trigger Concerns:

8. While all criminal laws infringe fundamental rights and liberties of individuals to a certain extent, they are deemed just so long as curb rights and liberties of only those individuals who have been found guilty of committing offenses in accordance with the due process of law. In other words the object of a criminal law statute is to punish those who are guilty of committing offenses and not those who are mere suspects. It is thus essential that any criminal law statute that ends up suspending what are otherwise deemed as the inalienable rights of human rights (e.g. the right to life, liberty, and dignity etc.) does so after abiding by requirements of due process in a stringent fashion to introduce effective checks against the criminal justice system making mistakes.
9. While the proof of the pudding is in the eating, it appears from the text of PPA that the zeal to curb crime and convict terrorists has translated itself into mechanisms that will enable law enforcement agencies to pursue the collective security interests of the state and society in a fashion that could jeopardize the individual rights and liberties of citizens. In this regard the key provisions of PPA that provoke such fears are as follows:

Right to Shoot

10. Section 3(2)(a) of the Act provides an officer of the police not below BS-15 or member of the armed forces or civil armed forces with the right to shoot any person *“who is committing or in all probability is likely to commit a scheduled offense”* and makes it lawful for any such officer *“after forming reasonable apprehension that death or grievous hurt may be caused by such act”* to fire or order the firing upon any such person. This right to “shoot to kill” under the Act has therefore merged the right to pre-emptive self-defense or shoot-on-suspicion with the right to ordinary self-defense and proactive prevention of impending harm.

11. It is pertinent to note that Section 5(2)(i) of the Anti-Terrorism Act, 1997, envisaged a version of pre-emptive shoot-on-suspicion power. Due to its conflict with the fundamental right to life it was struck down by the Supreme Court in *Mehram Ali vs. Federation* while holding that “conferment of power on officers referred to in S.5(2)(i), Anti-Terrorism Act, 1997, without being fired upon by the accused is not justifiable.” The right to shoot-on-suspicion as stipulated in Section 5(2)(i) was therefore held to be “violative of Article 9 of the Constitution of Pakistan which guarantees that no person shall be deprived of life or liberty save in accordance with law.”

Search without Warrant

12. Section 3(2)(c) of the Act stipulates that “in particular and without prejudice to the generality of subsection (1), an officer of the police not below BS-15 or member of the armed forces or civil armed forces in the above situation may enter and search, without warrant any premises to make any arrest or to take possession of any fire-arm, explosive, weapon, vehicle, instrument or article used, or likely to be used and capable of being used, in the commission of any scheduled offense.”
13. Section 10 of the Anti-Terrorism Act, 1997, also purported to establish a right for the state machinery to search any premises without a warrant. The Supreme Court however held in *Mehram Ali* that “Section 10 of the Anti-Terrorism Act, 1997, in its present form, is not valid; the same requires to be suitably amended as to provide that before entering upon a premises which is suspected to have material or a recording in contravention of section 8 of the Act, the concerned officer of Police, armed forces or civil armed forces, shall record in writing his reasons for such belief and serve on the person or premises concerned a copy of such reasons, before conducting such search.

“Section 10 of the Anti-Terrorism Act, 1997 empowers an officer of the police, armed forces or civil armed forces on his being satisfied that there are reasonable grounds for suspecting that a person has in his possession some written material or recording in contravention of section 8, he may enter and search the premises where it is suspected that the material or recording is situated and may take possession of the same. This is directly in conflict with Article 14 of the Constitution, which confers a fundamental right as to the dignity of man by, inter alia, laying down that the dignity of man and, subject to law, the privacy of home shall be inviolable. No doubt, that the above right of privacy is subject to law but such law is supposed to be reasonable and in conformity with the constitutional mandate.”

14. In light of the dicta laid down in *Mebran Ali*, it is likely that an amendment to Section 3(2)(c) of the Act might be required to ensure that it does not fall foul of the right to dignity and privacy of the home guaranteed under Article 14 of the Constitution.

Preventive Detention and Internment

15. Section 6 of the Act authorizes the detention of a person if the Government has “*reasonable grounds to believe that such person is acting in a manner prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services.*” The state’s right to detain and intern without disclosure of grounds for such detention and internment has been regulated through Section 6 of the Act, which in turn has been subjected to the requirements of Article 10 of the Constitution that provides safeguards for citizens as to arrests and detention.
16. Detention under Section 6 of PPA may be sanctioned through an order in writing and the state is required to communicate to the accused the reasons for ordering preventive detention within fifteen (15) days of making such order, unless he is an enemy alien or a militant. While Article 10 of the Constitution does not afford its protection to enemy aliens, militants, who are not enemy aliens, ought not be denied the right to be furnished with the grounds for their detention.
17. Similar to Article 10 of the Constitution, Section 6 of PPA purports to subject the state’s right to detain and intern a suspect on preventive grounds subject to judicial oversight. It grants the Federal Government the power to regulate all matters related to internment orders, internment camps, representation against internment orders and judicial oversight etc. by promulgating regulations for such purpose. While Section 6 of PPA is an improvement in comparison to relevant provisions of the Pakistan Protection Ordinance, 2013, it still leaves ample room for abuse of the broad discretionary authority vested in the government and law enforcement agencies.
18. Given the history of missing person’s case in Pakistan and the inability of even the Supreme Court to discover the whereabouts of missing citizens suspected of being held by security agencies, there is a fear that unless the right of the state to order preventive detention is strictly scrutinized and the basic rights of the detainee are upheld, including that of appealing

the grounds of his detention and being presented before a judicial review board, the mechanism of preventive detention might become a means to secretly detain suspects for extended periods of time without affording them the benefit of due process.

Reversal of Burden of Proof

19. Section 15 of PPA presumes that an “enemy alien” or militant charged with a scheduled offense under the Act or a person arrested in preparation or while attempting to commit such an offence was engaged in waging war or insurrection against Pakistan unless he establishes his non-involvement in the offense. Furthermore, any person apprehended in the course of “preparation” of an offense and from whom any weapon, which is capable of being used to facilitate such offense, is recovered shall be presumed to be guilty of preparation of such offense. Section 15 therefore reverses the burden of proof and requires the accused to establish his innocence.
20. This is not the first statutory instrument in Pakistan that attempts to reverse the burden of proof. The Control of Narcotic Substances Act, 1997, the Customs Act 1969, and the National Accountability Ordinance, 1999, all include provisions that attempt to transfer on an accused the burden of establishing innocence. Notwithstanding such provisions, the Supreme Court has traditionally held that the burden of proof may only be reversed once the state has made out a prima facie case against the accused on the basis of reasonable evidence. It is likely that in cases under the PPA, the superior courts of Pakistan will interpret Section 15 of PPA in a manner that doesn’t overturn the cardinal principle of criminal justice system on its head i.e. everyone is to be deemed innocent until proven guilty.

Enhanced Legal Intercepts Regime

21. The statutory basis for legal intercepts has already existed since the promulgation of the Pakistan Telecommunication (Re-Organization) Act, 1996, Section 54(1) of which stipulates that *“notwithstanding anything contained in any law for the time being in force, in the interest of national security or in the apprehension of any offence, the Federal Government may authorize any person or persons to intercept calls and messages or to trace calls through any telecommunication system.”* All telecommunication licenses issued by the Pakistan Telecommunications Authority contain

provisions obliging licensees to comply with requests for legal intercepts from investigation authorities.

22. The Investigation for Fair Trial Act, 2013 for the first time provided a legal framework for undertaking legal intercepts, while telecommunication licensees were already complying with requests for legal intercepts and had conceded to continuing monitoring mechanisms. Under the *de facto* regime in force, there was no framework legitimizing the telecom intercepts regime or providing for any oversight over such regime. The Investigation for Fair Trial Act, 2013, it provided such framework, notwithstanding gaps within it or concerns regarding its provisions.
23. Item (1)(xiv) of the Schedule to the PPA now clarifies that *“cyber crimes, internet offences and other offences related to information technology which facilitate any offence under this Act”* would constitute offences under the PPA. The object of Item (1)(xiv) of the Schedule to the PPA, read together with the Investigation for Fair Trial Act, 2013, is to ensure that there is legal certainty that the Internet and new technologies are not excluded from the penal regime weaved together by the PPA and that information gathered from telecommunication systems/Internet is admissible as evidence under the Investigation for Fair Trial Act, 2013.