

Testing the Vires of PPA on the Touchstone of Constitution

by

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Abstract: The Protection of Pakistan Act 2014 has been the subject of intense debate/criticism, often referred to as black law/draconian measure, which impinges the individual's most cherished fundamental rights/freedoms. Having said so, however, there are others who defend it on the plea that it addresses a critical situation, with terrorists/militants having launched insurgency/belligerency, and the country confronted with an existential threat. They argue that extraordinary situation warrant extraordinary measures to control the menace and restore normalcy. Notwithstanding the need/urgency of the law, in a democratic dispensation, with Constitution being the supreme law, the legal/constitutional safeguards for rights/liberties of citizens must be observed. This is clearly established by successive judgments of the superior courts in Pakistan. In the words of Lord Aitkin, "amidst the clash of arms, the laws are not silent... they speak the same language in war as in peace". The law vests excessive/unbridled powers of arrest, detention and use of force, including order to shoot, in the law enforcement agencies. Certain provisions of the law far exceed the limits set by law/Constitution e.g. characterizing a citizen as an enemy alien, and depriving him of the right to presumption of innocence, exclusion of public from trial, keeping accused incommunicado

in internment centers, and denial of legal safeguards like preventing courts from issuing habeas corpus writs, releasing accused on bail and exercising inherent powers to prevent the miscarriage of justice, etc. Quite obviously, such provisions militate against established legal/Constitutional norms and are violative of fundamental rights/freedoms. The law, therefore, needs to be reviewed to bring it in harmony with legal norms of civilized system of governance. The Government also needs to take administrative measures to ensure the security of judges, prosecutors and witnesses to secure convictions and for capacity building of the justice sector professionals through training.

Criticism: The protection of Pakistan Act 2014 (PPA), has come into force. Earlier, the Protection of Pakistan Ordinance 2013, as amended by the Ordinance 1 of 2014, remained in operation for 8 months and subjected to intense debate/criticism by various segments of society e.g. parliamentarians, legal community, media and human rights activists. The Ordinance was referred to as “black law” and “draconian measure”, impinging on individual’s most cherished legal/fundamental rights. The PPA is not much different, it is merely a rehash of the old law i.e. Ordinance, softening few harsh provisions thereof but still retaining some extremely controversial clauses. No wonder then, the criticism persists!

Having said so, however, there are others who defend the law on the plea that it addresses a critical situation prevailing in the country. There is a raging insurgency in parts of the country, with belligerents taken up arms against the State and fighting the armed forces. Local and foreign militants

have successfully executed attacks on government institutions/military installations and are threatening to destabilise the State and dismantle the Government. Besides, there is a rising trend of religious/sectarian violence, incidents of damage to or destruction of vital installations like electric/gas supply lines and disruption of means of communication/transportation. There operate organized criminal gangs, who indulge in commission of heinous offences like armed robberies, bank heists, kidnapping for ransom, money grabbing (Bhatha collection), etc. In short, the country is confronted with multiple challenges, indeed, facing an existential threat. This state of affairs warrant more stringent measures to quell the insurgency, control the law and order situation, protect life/property and restore normalcy.

The PPA was approved following a compromise between the Government and opposition parties. As a result, some changes were made to the text of the law e.g. the life span of the new law fixed at 2 years, the maximum period of remand reduced from 90 to 60 days and judicial oversight provided to watch against the abuse/misuse of the law, etc.

Object: The stated objects of the law are, “to provide for protection against waging of war or insurrection against Pakistan and the prevention of acts threatening the security of Pakistan”. Thus, several ordinary crimes listed in the Pakistan Penal Code (PPC) or Anti-terrorism Act, when committed with above-mentioned object, constitute offences under the PPA.

Offences: The following offences are listed in the Schedule of the Act:

- i Crime against ethnic, religious, political groups or minorities including offences based on discrimination, hatred, creed or race;
- ii Use of arson, fire bombs, suicide bombs, biological/chemical weapons, nuclear arms, explosives to kill or cause hurt or destroy property anywhere including government buildings, historical places, business concerns, sites of worships;
- iii Killing, kidnapping, extortion, assault on national institutions (parliament, judiciary, executive, media, armed forces, law enforcement agencies) or their personnel, social welfare workers, other important personalities, foreign officials/visitors, tourists or any other person;
- iv Destruction of or attack on means of communication, energy facilities, dams, power generating units, grid stations, gas/oil installations, aircraft/ airport; educational institutions, police stations, security organizations;
- v Wrecking, disrupting or attacking mass transport system including trains, buses, cars and their stations/ports;
- vi Violence or attack against nuclear arms/sites, maritime navigation, shipping, post installations, nationals abroad;
- vii Other PPC offences viz waging or attempting/abetting to wage war against Pakistan, condemning the creation of State, defiling or unauthorized removal of national flag, assault on President/Governor to restrain him from exercising lawful powers, sedition, waging war against any Power in alliance with Pakistan, public servant allowing prisoner of state/war to escape, abetting mutiny, attempting to seduce armed forces personnel, harbouring armed forces deserters, wearing garb or token used by

armed forces personnel to impersonate (Section 121-140, PPC);

- viii Illegally crossing national border in connection with scheduled offences;
- ix Cyber crimes, internet offences and other offences related to information technology which facilitate any offence under this Act; and
- x Preparation, abetment, attempt or conspiracy to commit any of the scheduled offences.

The Act authorises the Government to amend the Schedule by adding or modifying any entry therein or omitting any entry therefrom. The law is given overriding effect, vis-à-vis others. In case of conflict, the provisions of the Act prevail.

Arrest and Seizure: The scheduled offences are made cognizable and non-bailable. The police or armed forces (when deployed in aid of civil power) may arrest without warrant, a person who is alleged to have committed a scheduled offence or about whom there is a reasonable suspicion or credible information that he has or is about to commit any such offence. A police officer not below BPS-15 or member of armed forces may, on reasonable apprehension of commission of a scheduled offence, after giving warning, use necessary force to prevent the commission of such offence. Such officer may, after forming a reasonable apprehension that death or grievous hurt may be caused by such act, after giving warning and as a last resort, fire/order firing to prevent the commission of such offence. Incidents of firing resulting in death or grievous hurt shall be reviewed in an internal inquiry conducted by a person

appointed by head of the law enforcement agency, and if the facts and circumstances so warrant, may also be reviewed in a judicial inquiry, caused by the Federal Government.

Police/armed forces may enter and search premises, without warrant, to make arrest, take possession of any fire arms, explosives or weapons likely to be used in the commission of a scheduled offence. Such raid be reported within 2 days to the Special Judicial Magistrate, mentioning the circumstances justifying it and items recovered.

For detention beyond 24 hours, remand must be obtained from Special Judicial Magistrate, who may, from time to time, extend the same for upto 15 days; the total period of remand however must not exceed 60 days.

Preventive Detention: The law permits preventive detention. The Government may authorize the detention of a person for upto 3 months, if it has reasonable grounds to believe that he is acting in a manner prejudicial to national integrity, security, defence or external affairs or public order or maintenance of supplies/services. Detention shall be in accordance with provision of Art 10 of the Constitution meaning within 15 days of arrest, the grounds of detention be communicated to the detenu to make representation against the order. For detention exceeding 3 months, the case is referred to the Review Board and further detention is permissible only when the Review Board is satisfied that there is sufficient cause for extension.

An enemy alien (militant whose identity is unascertainable or deprived of citizenship, acquired by naturalization) may also be detained and such

detention regulated by Art 10 of the Constitution. Government, in the interest of security of Pakistan, may not disclose the grounds for detention or divulge any information relating to a detainee, who is enemy alien or militant. Armed forces called in aid of civil power under Art 245 of the Constitution or otherwise under the Anti-Terrorism Act 1997 may detain an enemy alien or militant in designated internment camps. Such detention be regulated under Art 10 of the Constitution. Government shall frame regulations to regulate the internment orders/camps and approve mechanism for representation against such orders. The law states that past detenu shall be deemed to have been detained pursuant to this Act.

Denial of Safeguards: The accused is deprived of legal safeguards available under Cr.P.C. e.g. confirmation of death sentence by High Court (S 374), suspension of sentence/release on bail pending appeal (S 426), power of High Court to call for records of inferior courts (S 435), High Court/Session Court powers of revision (S 439, 439-A), power of Session Court to issue direction of the nature of Habeas Corpus (S 491), bail in bailable/non-bailable offences (S 496-498) and power of High Court to exercise inherent powers (S 561-A).

The law provides for exclusion of public from proceedings of Special Court on application made by the Prosecutor General on the ground that the disclosure of evidence to be produced may prejudice public safety. Government may determine the place of custody, investigation, trial of offender and confinement of convict. The Government is required to take appropriate measures for security of witnesses, investigators, prosecutors,

Special Judicial Magistrate and Judge of Special Court, and for this purpose may also establish security prison within courtrooms.

Burden of Proof: An enemy alien or militant facing the charge of scheduled offence, on existence of reasonable evidence against him or a person arrested in preparation to commit or while attempting to commit such offence shall be presumed to be engaged in waging war or insurrection against Pakistan, unless he establishes his non-involvement in the offence.

Investigation and Trial: The offence is required to be investigated by a Joint Investigation Team (JIT), headed by gazetted police officer and comprising 2 other officers of armed forces or civil armed forces. The report of JIT is placed through Prosecutor General before Special Court; the Judge, being a serving or retired Session Judge or an advocate of 10 year standing at High Court, appointment by Government after consultation with Chief Justice of High Court. Punishment prescribed for scheduled offences is 20 years imprisonment with fine and confiscation of property, unless higher punishment prescribed. The Court may also deprive the convict of citizenship acquired by naturalization. Appeal against its verdict lies in High Court.

Analysis: Undoubtedly, the law is fairly harsh/stringent, even though it addresses a peculiar situation in our national history, when the State is confronted with multiple challenges to its very existence/survival and has to deal with the menace of rising militancy, extremism, violence, hate crime, killings, and extortion for money and destruction of property.

However, it must be in accord with legal norms/principles and Fundamental Rights, guaranteed by the Constitution.

Fundamental Rights: The human/fundamental rights are about recognizing the value and dignity of life. They are crucial for civilized existence, enabling individual to enjoy life and develop his faculties, so as to make advancement in life and become useful/productive member of society. In civilized societies, governed under constitutional/democratic system of governance, basic rights and fundamental freedoms are available to citizens. The PPA may offend certain provisions of our Constitution, in particular fundamental rights/freedoms, as under:

- i Preamble/Art. 2-A provide for observance of principles of democracy, freedom, equality, social justice; guarantee of fundamental rights including equality of status, opportunity and before law; social, economic and political justice; freedom of thought, expression. The fundamental rights are to be enforced by independent/impartial judiciary.
- ii Art 4 provides for rights of individual to be dealt with in accordance with law.
 - a No action detrimental to life or liberty, save in accordance with law;
 - b No person shall be prevented from doing that which the law does not prohibit him to do;
 - c No person shall be compelled to do that which the law does not require him to do.
- iii Art 9: No person shall be deprived of life or liberty save in accordance with law.
- iv Art 10 provides safeguards against arrest/ detention. No arrest except for breach of law, right to know grounds of

detention, to engage a legal counsel of choice and be produced before Magistrate within 24 hours of arrest. No further detention except on remand granted by Magistrate.

- v Art 10A provides for right to fair trial and due process.
- vi Art 14 provides for inviolability of dignity of man, privacy of home and prohibits torture for extracting evidence.
- vii Art 15, 16, 19 provide for freedom of movement, assembly, speech.
- viii Art 24 provides for protection of property.
- ix Art 25 provides for equality before law and equal protection of law.

The constitution is basic document, it enjoys supremacy vis-à-vis ordinary enactments/legislation and customary laws/practices. Any law/custom in conflict with the constitution is a nullity. So is ordained by Art 8 of the Constitution. Chief Justice Munir wrote, constitution is the “supreme law from which all authorities derive their powers, all laws their validity and all subjects their rights”. Therefore, it should prevail at all times and in all circumstances. It must be respected and enforced. In the words of George Bidault: “The good or bad fortune of a nation depends on three factors: its constitution, the way the constitution is made to work and the respect it inspires”. In short, the law must be in accord with the basic document i.e. constitution, failing which, it could be challenged and Art 8 invoked to have it declared as null and void.

Offensive Provisions: Tested on the touchstone of established legal/Constitutional norms/principles and fundamental rights, guaranteed by the Constitution as well as precedents set by the superior courts e.g.

Liaquat Hussain v Federation (PLD 1999 SC 504) and Mehram Ali v Federation (PLD 1998 SC 1445), certain provisions of the Act may not qualify the test. It is so because they are vague, hence, capable of being abused/misused by the law enforcement agencies. Certain other provisions exceed the limit set by law/Constitution, and some are indeed too harsh, inconceivable in a civilised polity. Exception can be taken to the following:

- i Loose/vague definitions of scheduled offences and authorizing the Government to make additions/deletions to entries in the Schedule (S 2 & 22): It is a serious flaw in the PPA. The acts/offences listed in the Schedule are not new, rather taken out of diverse other laws. The PPA provides for linkage/connection between the specific act/offence and object/purpose of its commission. Thus, both the act and object must be proved. The Prosecutor will be required to establish the mensrea/acstrea in the 'double action' or 'two-in-one offence'. It is no easy task though. Lacking in knowledge/expertise and having no professional training, the JIT will find it difficult to obtain convincing evidence, which the Prosecutor has to show to the court to prove the offence, beyond reasonable doubt. The JIT has a strange composition: a police officer and 2 members from armed forces. Members of armed forces have no qualification, training or experience of investigation. Therefore, it is hard to conceive that they will assist in the task of conducting competent investigation.
- ii Power of police/armed forces to use force, also fire/order firing, and arrest, enter/search premises, without warrant, on mere suspicion (S 3): Entrusting a low grade police official of the rank of sub-inspector (BPS-15) or his equivalent in the

- armed forces with the authority to shoot to kill on suspicion/apprehension that a scheduled offence is likely to be committed, is a serious flaw in law. It is contrary to a ruling of the Supreme Court in case of Mehram Ali (supra), wherein power to order firing without check/guidance was declared to be violative of Art 9 of the Constitution.
- iii Withholding information regarding the location of detainee, accused, interne or internment centre from court (S 9): Whereas the Government may be justified in withholding information pertaining to the location of a detainee, accused or interne, in view of security threats and recent incidents of jailbreak and attacks on police convoy to free militants/hard criminals, however, the measure is an after-thought, perhaps to justify the illegal detention of persons and their retention in secret location by the armed forces. When the Supreme Court took up the cases of such persons, known as “missing persons”, after a few hearings, they were reported to be confined in internment centers, run by the armed forces. Anyhow, the matter of keeping persons in internment camps is a sub-judice matter in High Court/Supreme Court and such courts may perceive this measure as stratagem to validate the original illegal action of arrest/detention of internes. It is impermissible to frustrate or obstruct the course of judicial process.
- iv Refusal to disclose the grounds of detention or divulge information relating to the detainee, accused or interne (S 9): With fundamental rights, in particular, right to personal liberty, freedom of movement, etc available to citizens, it would be hard for the courts to concede such a power to the executive. More so, because of Article 10 safeguards e.g. knowing grounds of arrest, so as to engage a defense counsel or

making representation against detention order or filing writ of habeas corpus. Furthermore, the superior judiciary has given a string of judgments on this point; hence, the courts will find it hard to concede the ground.

- v Simply because the identity of person is unascertainable or he has been deprived of citizenship, therefore, he shall be considered as enemy alien and presumed to have joined war/insurrection against Pakistan. Such person (together with other militants and persons accused of committing schedule offence), on existence of reasonable evidence, be presumed to be engaged in waging war/insurrection against Pakistan, unless he establishes his non-involvement in the offence (S 5(5) & 15): The courts will not take it lightly to let an accused be punished on suspicion, with conviction secured on mere presumption. Indeed, the presumption of innocence is a centuries-old principle, well established, locally as well as at the internationally plane; hence, its reversal will be hard to justify.
- vi Person deprived of his right of citizenship (S 16): The right of citizenship is provided by law i.e. The Pakistan Citizenship Act 1951. The international law also lays stress on the point that individuals must not loose or be deprived of their nationality, as a stateless person is exposed to all sorts of indignities and the rigours of law, without support from the state.
- vii Exclusion of public from trial (S 10): In-camera proceedings are generally discredited and deprecated by courts. This is so because it violates fundamental rights to fair trial and raises doubts about courts' independence/impartiality and their ability to dispense justice freely and fairly. Therefore, very strong/valid reasons will have to be advanced to convince the court to allow in-camera proceedings.

- viii Appointment of Special Court/Special Judicial Magistrate from outside the judiciary (S 8): The Act authorizes the Government to appoint judge/magistrate from amongst lawyers meaning outside the regular judicial hierarchy. It is extremely controversial. This provision is contrary to the Supreme Court judgment in the case of Liaquat Hussain (supra), wherein the Court held that such an appointment is unrecognized by law and the forum cannot avail/execute judicial powers which is the prerogative of regular courts.
- ix Non-applicability of legal safeguards available under the Cr. P.C. (S 18): This is a novel provision wherein centuries-old established legal safeguards, available under the Cr.P.C. have been denied to an accused/detainee under the PPA. Such safeguards also include the legal right to writ of habeas corpus (S 491 of Cr.P.C.) as well as fundamental right to similar remedy under Art 199 of the Constitution, and the inherent power of High Court to make orders to prevent the abuse of judicial process or secure the ends of justice, etc. It is difficult, to conceive as to how this may be achieved and how could the courts allow such blatant derogation from established legal norms/ fundamental rights.
- x Arrested person kept in internment centers, past detainees deemed to have been arrested/detained pursuant to the provision of the Act (S 6): It is hard to conceive as to why internment centers need be established in the presence of prisons/police stations. Furthermore, in the case of missing persons in the Supreme Court, it was revealed that the armed forces are keeping some suspects in secret locations. Such suspects were picked up from houses/streets and/or taken out of prisons/police custody, without any charge or registration of FIR. The act was palpably illegal and brazen violation of the fundamental rights to personal liberty and freedom of

movement, etc. Therefore, the Court insisted that citizens cannot be denied their fundamental rights; hence their prolonged detention in internment centers is illegal. The Government of KPk then reported to the Supreme Court that the Ministry of Defense have decided to proceed against delinquent armed forces officers, responsible for unauthorized detention of such persons in the internment centers. The Court ruled that all missing persons must be accounted for, if there is any allegation against anyone, proper FIR be registered against him, otherwise released. The case is pending. The provision in the PPA to regularize the past detentions is tantamount to validating an illegal detention, an unwarranted interference in judicial process and an attempt to cause miscarriage of justice.

The Way Forward: The above are only some of the glaring examples of excesses contained in law. The list goes on and on. The PPA may be the need of hour, and justified in the prevalent disturbed conditions in the country, but many of its clauses far exceed the permissible limits, set by law/Constitution. The above-referred provisions, seemingly, are offensive to established legal norms/principles and militate against fundamental rights, hence, may be reviewed with a view to bringing it in harmony with norms of civilised system of governance and democratic dispensation. This would entail chipping off certain ends/objects, sought to be achieved by the Act and suitably amending other clauses for the sake of greater clarity and securing conformity with legal/constitutional safeguards.

An eminent and pressing need of the time is for the Government to take steps to improve the mechanism of implementation of laws in the country.

If this is done, there would be no special need for enacting harsh/stringent laws. The penal laws, and in particular, provisions of the Anti-terrorism Act 1997 (ATA), are already fairly stringent. The ATA is a most comprehensive code and modern legislation on the subject. It has been frequently amended/reformed, but unable to achieve its objectives of curbing terrorism through improved mechanism of crime detection, arrest/detention of perpetrators of the crime, their prosecution and conviction. The conviction rate is alarmingly low and further dwindling. The fault lies in the failure to implement the law. In the present national scenario, when no one's life, honour or property is safe, no adequate security/protection has been provided to witnesses, investigators, prosecutors, judges, despite categorical assertion to the effect in law. In the circumstance, how may witnesses come forward to depose against hardened criminals and dreaded militants, and how can the investigators/prosecutors discharge their functions effectively and efficiently to produce strong/valid evidence in court and secure conviction. These professionals lack capacity and have no adequate training arrangements to update their knowledge and enhance their experience/expertise. And even though judicial training academies exist for the purpose, their services are not being fully utilized. Mere law reforms and introducing stringent penal provisions would not do until security is provided and resources allocated for the capacity building and training of professionals in the justice sector. Only then may the objects of law realized, conviction rate enhanced and deterrent effect given to the law.

