HUMAN RIGHTS IN SOUTH ASIA : A CASE STUDY OF THE RIGHT TO LIFE AND PERSONAL LIBERTY IN INDIA AND PAKISTAN (1973-1993)

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AJAY KUMAR SINGH

SOUTH ASIAN STUDIES DIVISON
CENTRE FOR SOUTH, CENTRAL, SOUTH-EAST
ASIAN AND SOUTH-WEST PACIFIC STUDIES
SCHOOL OF INTERNATIONAL STUDIES
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जवाहरलाल नेहरू विश्वविद्यालय
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI - 110067

CENTRE FOR SOUTH, CENTRAL, SOUTH EAST
ASIAN AND SOUTH WEST PACIFIC STUDIES
SCHOOL OF INTERNATIONAL STUDIES

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CERTIFICATE

Certified that the dissertation entitled **"HUMAN RIGHTS IN SOUTH ASIA: A CASE STUDY OF THE RIGHT TO LIFE AND PERSONAL LIBERTY IN INDIA AND PAKISTAN (1973-1993)"**, submitted by Mr. **Ajay Kumar Singh** in partial fulfilment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** has not been previously submitted for any other degree of this or any other University. This is his own work. He is, however, solely responsible for any errors and omissions in the draft.

We recommend that this dissertation may be placed before the examiners for evaluation.

Nancy Jetly

Dr. NANCY JETLY
(Supervisor)
Centre for South, Central Southeast
Asian and South West Pacific Studies
School of International Studies
Jawaharlal Nehru University
New Delhi-110067

Kalim Bahadur

Prof. KALIM BAHADUR
Chairperson
Centre for South, Central Southeast
Asian and South West Pacific Studies
School of International Studies
Jawaharlal Nehru University
New Delhi-110067

GRAM : JAYENU TEL. : 667676, 667557 TELEX : 031-73167 JNU IN

For

Papa and Mummy

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AJAY KUMAR SINGH

CONTENTS

PREFACE

The primary aim of the present study is to make an objective analysis of the entire gamut of issues relating to the Right to life and personal liberty in India and Pakistan. The dissertation has, therefore, been broadly divided into three parts. Part one (Chapter II) examines the constitutional/statutory provisions relating to the freedom and security of person along with the restrictions and limitations imposed upon such freedom. Part two (Chapter III) analyses the practice of State *vis-a-vis* individual liberties in the two countries. Finally, part three (Chapter IV) examines the role of judiciary in India and Pakistan as a protector, defender and guardian of the rights of man.

A great deal has been spoken or written on human rights issues in India as well as in Pakistan. Unfortunately, too much of it is either special pleadings/monographs (e.g., on issues of preventive detention, police atrocities, public interest litigation, etc.) or scantily dispersed in books not directly dealing with the subject. In case of Pakistan the problem is further compounded by the lack of adequate publications on human rights issues due to a relatively restrictive freedom of expression guaranteed to the people

by authoritarian regimes over the years. Nevertheless, there is a good deal of material available on the subject in the form of reports of international as well as domestic non-governmental organisations (NGOs). These include the copiously documented annual and other periodical reports of the Amnesty International and Asiawatch at the international level. At the domestic level, there are reports of NGOs like People's Union for Civil Liberties (PUCL), People's Union for Democratic Rights (PUDR), Citizens for Democracy (CFD), Andhra Pradesh Civil Liberties Committee (APCLC), etc. in India and those of Human Rights Commission of Pakistan (HRCP), Pakistan Human Rights Law Network, Rahat, etc. in Pakistan. Lastly, there is a huge amount of material on the subject in newspapers and magazines of the two countries during the period under review.

The scope of the present study is directly related to the growing contemporary concern with human rights violations in South Asia, especially in India and Pakistan. The fact that no worthwhile study has been done relating specifically to the issues concerned with the Right to Life and personal liberty in the two countries, makes this work supremely relevant.

CHAPTER I

INTRODUCTION

The Right to life and personal liberty is the most precious right of human beings in civilized societies. There is a very real sense in which all human rights derive from, and are dependent upon, the self-evident nature of the right to life. It has held tremendous fascination for people throughout the corridor of centuries. Probably no cause has led men to greater deeds of valour, or inspired them to kiss the gallows or face firing squads than that of personal liberty. And, it is for this reason that most of the constitutions (written or unwritten) in the world seek to expressly confer this 'fundamental' right on their people. The character of a state (democratic/totalitarian/authoritarian) is irrelevant when it comes to bestowing a plethora of personal liberty to its people.

The principle that there are inviolable human rights is now accepted by all the nations through their acceptance of the different Conventions and Declarations on the subject. These include, *inter alia*, the UN Charter (1945), the Universal Declaration of Human Rights (1948), the European

Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Convention on Civil and Political Rights (1966) and the Convention Against Torture. More recently, the Vienna Declaration on Human Rights (June 1993), underlined that "Human Rights and Fundamental Freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of governments."[1]

The crucial question, however, is how real and effective this right is in practice. A Constitution may have elaborate provisions for the purpose, but they may merely constitute an illusion or facade of rights without any real substance. Indeed, the exercise of the right of liberty can never be absolute. It is always subject to reasonable restrictions. The liberty of a few cannot be allowed to be asserted in such a manner as to destroy the liberty of many. The freedom of one man's fist must end where another man's nose begins. Hence, there has to be a proper balance between the rights of the individual and those of the

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1. Quoted in PUCL Bulletin (New Delhi), August 1993.

state/society, between individual liberty and social control. Therefore, in extraordinary situations even the basic individual rights are curtailed in the collective interest, or for the security ofthe State itself.

However, due to various factors such as the changing character of modern nation-states, social divisiveness and political instability, coupled with a deficient institutional framework and inadequate resources, these sacrosanct rights are frequently violated or ignored. Thus, a paradoxical situation ensues in which people are denied by the state fundamental rights which the state itself not merely recognises but claims they already enjoy![2]

At the outset, therefore, it is pertinent to analyse the changing character of the modern state. Today the state is once again in focus.[3] Abandoned by the structural-

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2. James M. Buchanan, The Limits of Liberty: Between Anarchy and Leviation (Chicago, 1975). Employing the techniques of modern economic analysis, this book offers a strikingly innovative analysis of a persuasive problem of social philosophy - the problem being one of the classic paradoxes concerning man's freedom in society, i.e., in order to protect individual freedom, the state must restrict each person's right to act.

3. "Politics of the State", Seminar (New Delhi), March 1990, pp.12-13.

functional theorists in the post-World War II years as they found it unwieldy to operationalise, the state has of late been brought back in[4] as a legitimate object of study. Underlying this revival, however, is a concern with an increasingly repressive character of the State which is, more often than not, detrimental to the freedom of person.

Rajni Kothari, an eminent political scientist, dwells on this changing character of the state at great lengths.[5] The sharp decline in the legitimacy and authority of the modern state has been accompanied by major assertions of people's rights from a wide variety of vantage points. "From class-based struggles against the hegemonies of upper castes and classes to the wider issues of women's rights and environmental protection to strident defence of cultures, regional identitites and nationalities, constitute a broad range of popular awakenings and movements. People's commitment to and faith in democratic values have been rising precisely when these have been in decline among the

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4. P. Evans, D. Rueschemeyer and T. Skocpol, eds., Bringing the State Back In (London, 1985).

5. Rajni Kothari, State Against Democracy: In Search of Human Governance (New Delhi, 1987).

elites".[6] The result has been a marked transformation of the social basis of democracy from the early liberal defence of incremental diffusion of institutional spaces to more radical assertions of "civil liberties" and "democratic rights".

As the state is proving both incapable of responding to various `awakenings' and `movements' and unwilling to expand its social base, it is led to assume confrontational postures *vis-a-vis* various sections of the people who are dubbed by the ruling elites as extremists, anti-social and even anti-national. Such a siuation is used as a convenient cover for oppressive and repressive measures perpetuated by the state through police, paramilitary and armed forces.

Again, in multi-ethnic and plural societies, with their myriad cultural expressions of the political process such as ethnicity, class, regionalism, *linguism* etc., the political elite resorts to populist and plebiscitary politics and a gradual undermining of institutional intermediaries like judiciary and legislative bodies. After this, "all that

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6. Ibid., p.18.

remains is charisma and its direct appeal to the masses, thereby making mass society the purveyor of an authoritarian polity and a captive state structure".[7] This results in the escalation of tensions in society - in the politics of religion, language and region.

In time, all these processes of tension-generation sow seeds of disaffection, parochial separatism and ultimate disintegration. This can only be halted by a resort to more and more repression, and by transforming the issues of social management into problems of `law and order' and `security'. Thus, `law and order' has become an increasingly popular slogan with those in power. And, as soon as a problem gets reconstituted as a `law and order' issue the state is able to mobilise all its repressive apparatus to offer a `solution' which also bears the politically important hallmark of `legitimacy'.[8]

Moreover, the changing external role of the nation-state has forced it to build itself up into a `national

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7. Ibid., pp.22-24.

8. Paddy Hillyard and Janie Percy-Smith, The Coercive State (London, 1988).

security regime' in order to defend its territorial integrity and sovereignty. The greater the perceived threat to its security, the greater is the reliance on force and military strength. The resultant repressive behaviour of the state with a closing-in of the open spaces between the state and the citizenry, in the ultimate analysis, appears to be only logical.

Added to these is the Weberian description/justification of the state as "the monopoly agent of legitimate violence".[9] Influential also has been the formulation given by R.M. MacIver and C.H. Page: "The state is distinguished from all other associations by its exclusive investment with the final power of coercion."[10] The coercive character of the State has two distinct forms: the everyday form of coercion and the conjunctural form of coercion. The first is organically built into the institutions of police, army and persons. These law and order institutions are built on the principle of coercion to protect the Benthamite idea of

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9. Quoted in Julius Gould and William L. Kolb, eds., A Dictionary of the Social Sciences (UNESCO, 1974), p.690.

10. MacIver and Page, Society: An Introductory Analysis (Delhi, 1987), pp.453-463.

`equality, freedom and property' of all citizens. It is through this that the coercive apparata of the state derive legitimacy. On the other hand, the various national security and emergency laws constitute typically the conjunctural form of coercion. These laws invest enormous powers to the police, armed forces and the prison houses. Thus, different conjunctures are used to reorder the coercive character of the state and articulate it on a full scale.[11]

Finally, the relatively new phenomenon of terrorism/ insurgency has considerably changed the character of contemporary state. The modern terrorist/insurgent does not target the state but the society.[12] The state is generally not able to target him in normal circumstances without causing enormous collateral damage, even affecting civilians. The former action is labelled terrorism and when the state uses force to deal with the situation, the collateral damage is generally called human rights violations. Inevi-

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11. Arun Kumar Pathak, "Relative Autonomy", Seminar, March 1990, p.27.

12. Jasjit Singh, "The Challenge to Internal Security", Asian Strategic Review 1992-93 (New Delhi, 1993), pp.314-315.

tably, therefore, in a terrorised society the normal rule of law - the foundation for the practice of human rights - becomes incapable of dealing with the terrorist-dominated social structure and States take recourse to extra-legal means.

However, if in order to suppress the terrorists, the Government uses draconian extra-legal methods and deprives the citizens of basic human rights, it loses in the process both legitimacy and political support. When the security forces assume the role of prosecutor, judge and executor, it provides a base for launching a state-organised terror.[13]

The effect of the changed character of modern states is amply reflected in the South Asian region, especially in India and Pakistan. One predominant factor in the sub-continent, however, has been the increasing sense of *relative deprivation* among the people in general, arising out of an ever widening gap between the expectations and satisfaction levels. Robert Hardgrave, for example,

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13. Shankar Sen, "Terrorism and Human Rights", Hindustan Times (New Delhi), 6 August 1993; Randhir Singh, "Terrorism, State and Democratic Rights", Economic and Political Weekly (Bombay), 8 February 1992.

identified the major problem in the domain of public power in India as "the revolution of rising frustration", i.e. demands and aspirations have increased in the process of modernisation but the capacity and the will of the government to respond effectively has not kept pace.[14] The resultant social discontent was met with inevitable repressive measures and one regime after another in South Asia became extra-constitutional and repressive. And, a point came when India, Pakistan, Bangladesh and Sri Lanka were under emergency, which was followed by prolonged military rules in Pakistan and Bangladesh.

The rise of ethno-nationalism (e.g. North East states in India, Sind in Pakistan) and religio-political radicalism (e.g. in Punjab) has considerably affected state practice *vis-a-vis* the fundamental rights of the people. South Asia has been witnessing a growing resurgence and revivalism of religion and ethnicity, having an increasing tendency to move into areas of violence and armed conflict. This is normally dealt with force by modern states. In such a situation, even established democracies like India are faced

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14. Quoted in Yogendra Yadav, "Theories of the Indian State", Seminar, March 1990, p.17.

with inherent limitations including the problem of when, and how much, force to use. More often than not, "democracies tend to defer force till situation demands even higher levels of force to succeed".[15]

However, it is significant to note that both in India and Pakistan there has been a persisting alienation between the coercive apparatus of the state - which includes police, jails and courts - and the millions of people who constitute the non-privileged, disadvantaged "masses".[16] One of the reasons for this alienation has been the attitude of those who man the law and order apparatus, to the masses. The state may have numerous valid reasons for being repressive but the bottomline is that both in India and Pakistan it has essentially remained a coercive state in spite of several constitutional/statutory provisions guaranteeing civil liberties to the people. The fact that the repressive mechanism of state in Pakistan has been more active and pronounced is due to the fragility of institutional frame-

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15. Jasjit Singh, n.12.

16. Lalit Chari, "Police Represion and the Criminal Law", in A.R. Desai, ed., Violations of Democratic Rights in India, Vol.1 (Bombay, 1986), p.85.

work which has frequently hampered the growth of civilian democratic rule in the country.

The state guarantee of elaborate human rights provisions in India is found considerably diluted on an analysis of state practice towards the same. Thus, for instance, preventive detention laws have been grossly abused over the years in India, especially for the suppression of political dissent. The imposition of "internal emergency" on 28 June 1975 was an eye-opener in this regard. Draconian laws like the Maintenance of Internal Security Act (MISA) provided for indefinite detention without trial, and without even being told of the grounds of arrest. The MISA and the Defence of India Rules were used for the large-scale arrest of the members of opposition parties. In the 1980s new laws like the National Security Act (NSA) and TADA are performing functions similar to previous preventive detention laws. Thus, it is increasingly common to hear of a "Backdoor Emergency" that deepens the threat to democracy through the sheer might of these "black laws".[17]

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17. Barbara R. Joshi, "India and the Backdoor Emergency", South Asia Bulletin, Vol.V, No.2, Fall 1985, pp.14-24.

Police brutality and torture has become an ingrained way of law enforcement in India.[18] Such methods are frequently used when people suspected of ordinary criminal offences as well as political prisoners are interrogated. These police practices have frequently led to the death of suspects in police custody. Although the establishment of magiterial enquiries into instances of custodial death is mandatory, such enquiries are often not held, or held only after strong enquiries are often not held, or held only after strong public/local pressure. Again, there have been instances of death in fake encounters, e.g., in the mid-70s people said to be Naxalites died in encounters reportedly staged by police.

These rough-and-ready tradition of law and order management by the police, paramilitary forces and army clearly show their lack of accountability to the common law of the land. There seems to exist a "police sub-culture" supporting unethical and illegal means to achieve quick results

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18. Upendra Baxi, "Stop Brutalisation of India", Indian Express (New Delhi), 30 March 1990.

through third degree methods.[19] Moreover, the accountability of the military in cases of human rights violations is inhibited by certain provisions of the Armed Forces (Special Powers) Act which provides general immunity to members of the military from all prosecutions or legal action.[20] It is true that the victims of police atrocities have in theory the legal remedy of filing criminal complaints or civil suits against the erring policemen for appropriate relief but such remedies are found to be useless. This is not only because litigation is time-consuming and expensive but because the police are always in a position to terrorise the witnesses and to prevent the true versions being established in criminal or civil cases.

The vast majority of prisoners in India are held without trial for years. These under-trial prisoners have included women and children held for long periods on trivial charges. According to official sources, some 92,000 under-trial prisoners were languishing in various jails in India

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19. Ved Marwah, "The Sub-Culture", Seminar, October 1977; S. Subramanian, "Why Rights Violations by Police", The Tribune (Chandigarh), 8 February 1994.

20. Amnesty International, Human Rights Violations in Punjab: Use and Abuse of the Law (London, May 1991), pp.55-56.

in the mid-80s.[21] In some states like Bihar, under-trial prisoners have been languishing in jail for 15 years or more. This is despite the Supreme Court's directives to release such under-trial prisoners if they have served more sentence than they would have if convicted.

Besides, the general prison conditions in India have been dismal. Prisoners live in extremely overcrowded conditions and bar-fetters are used on prisoners, sometimes for very long periods. The *UN Standard Minimum Rules for the Treatment of Prisoners* are thus flagrantly violated.

In case of *Pakistan*, on the other hand, state violation of human rights is more blatant for obvious reasons. The preventive detention laws have been frequently misused by the successive governments. Even after the proclamationm of a democratic constitution in 1973, the state of emergency, proclaimed in 1971, remained in force. The emergency provisions were frequently used for the arrests of government critics. Journalists, trade-unionists, leaders of opposition parties and even at times members of the Bar and Judi-

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21. The Tribune, 21 December 1986.

ciary were detained during the Bhutto regime apparently for political reasons. Then, there have been what Amnesty International characterises as "Prisoners of Conscience", i.e., those detained for `reciting objectionable poems', `writing objectionable articles' or `making objectionable speeches'.[22]

This blatant misuse of preventive detention laws has been supplemented by the trial of such detainees before special tribunals and courts set up under emergency and special legislation. The possibility of courts granting relief to such detainees by giving bail have been severely restricted under the emergency provisions.

Very much like India, police torture seems to have become commonplace in the law and order enforcement mechanism of Pakistan. Over the years, there seems to have developed a brutal pattern of police intimidation in order to obtain confessions from "suspects" after arrest. And, this has happened when Pakistan constitution has specifical-

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22. Amnesty International, An AI Report Including the Findings of a Mission to Pakistan, 23 April-12 May 1976 (London, 1976), p.32.

ly prohibited the use of torture in order to extract confessions.[23]

In several cases, harassment of political opponents has extended to members of their families. The most common practice has been to institute fake cases against the relatives of political opponents. In addition, there have been reports that opposition politicians and members of their families have "disappeared", in some cases after being kidnapped.[24]

These flagrant violation of essential human rights in Pakistan further increased with the coming to power of a military government under General Zia-ul-Haq in May 1977. A set of stern Martial Law orders were issued which expressly or impliedly suspended people's liberty. A number of political prisoners were sentenced by Summary Military Courts for contravening martial law regulations. New punishments like flogging and amputation were introduced under the 1979 Hudood Ordinances. These punishments were sometimes carried

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23. Art.14 of the 1973 Constitution of the Islamic Republic of Pakistan.

24. Amnesty International, n.22.

out in public as well.

One positive aspect of this dismal human rights scenario in South Asia during the preceding two decades has been the emergence of judiciary as a protector and defender of personal liberty. However, as compared to India, the status of judiciary in Pakistan as a watchdog of civil liberties has been a recent development.

Indeed, legal remedy is of utmost importance for meaningful and effective human rights. It is manifest that a declaration of rights or liberties would be no more than a tantalising illusion unless there be effective means by which they can be enforced. The writ of *habeas corpus* is the remedy which has been evolved and brought to its present eminence by judicial pronouncements to serve this end. This writ, regarded as the principal bulwark of liberty, "is available to bring into action the legality of a person's restraint and to require justification for such detention. Of course, this does not mean that prison doors may be too readily opened, but it does mean that explanation may be exacted as to why they should remain closed to the detriment

of man".[25]

One daunting problem in South Asia has been widespread poverty and illiteracy which makes the realisation of human rights only a remote reality for the poor. This has been largely due to three major difficulties: (i) lack of awareness of their legal rights; (ii) lack of assertiveness due to low socio-economic status; and (iii) lack of legal machinery to give them legal aid.[26] The courts in both India and Pakistan, with varying degrees of success, have tried to protect the liberty of the people by widening the constitutional provision of the right to life and by reinterpreting the concept of *locus standi*.

For example, the Supreme Court of India first took a very restrictive and literal interpretation of the term "personal liberty" (as under Art.21) in **Gopalan V. State of Madras (1950)** whereby personal liberty was said to mean only liberty relating to the person or body of the individuals. But, this restrictive interpretation of "personal liberty"

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25. H.R. Khanna, "Law and Liberty", Deccan Herald (Bangalore), 14-15 November 1988.

26. P.D. Mathew and Seema Midha, Public Interest Litigation (New Delhi, 1993).

was rejected in **Maneka Gandhi V. Union of India (1978)** and the scope of personal liberty was considerably widened by declaring that the right to `live' is not merely confined to physical existence but that it includes within its ambit the right to live with human dignity. In the result, when the state seeks to deprive a person of his personal liberty, it must prescribe a procedure for such deprivation, which must be "just, fair and reasonable".[27] Thus, the court has widened the scope of Art.21 by including within its ambit important human rights issues like speedy trial, free legal aid, prisoners right to socialise, etc.

Again, through Public Interest Litigation (PIL) or Social Action Litigation (SAL) the Supreme Court has taken an active role in protecting personal liberty. In a number of cases it has treated letters written by detainees as well as other persons as *habeas corpus* petitions, ordering judicial investigations into the allegations or itself investigating reported violations of human rights.

In Pakistan, "though compelled by circumstances to

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27. M.P. Jain, The Constitutional Law of India, (Bombay, 1986), p.582.

exercise a greater than normal degree of judicial restraint, the judges have often shown a remarkable tenacity in not abdicating their jurisdiction to review Executive Acts and have struck them down where statutory limits have not been observed".[28] The Supreme Court of Pakistan's decisions in **Asma Jilani's Case (1972)** and **Begum Nusrat Bhutto V. Chief of Army Staff (1977)** are pointers to this trend.

The Pakistan courts have shown more judicial activism in the late 1980s and 1990s in terms of protecting the rights of man by liberally interpreting the rules. The annual reports of the Human Rights Commission of Pakistan (HRCP)[29] refer to the new role of Pakistan courts. The Supreme Court, for example, announced in 1991 "a scheme to create awareness about and enforcement of human rights and protection of the rights of the depressed classes of the society." Boards for Awareness and Enforcement of Human Rights and Obligations have been set up in some districts.

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28. Mahdoom Ali Khan, ed., The Constitution of the Islamic Republic of Pakistan (Karachi, 1989), pxxi (Introduction).

29. State of Human Rights in Pakistan for 1991, 1992, 1993 (HRCP, Lahore).

But then, the courts could only act as aids to the overall system of a built-in defence of civil liberties and human rights. They could not be the substitutes for the "ramparts of the defence" against tyranny and usurption of power.[30] Thus, for example, the powers of Pakistan judiciary to protect fundamental rights had been eroded by a series of constitutional amendments and Martial Law provisions culminating in the March 1981 Provisional Constitutional Order.[31] The jurisdiction of the civilian courts has been restricted to an unprecedented extent by the loss of all powers to review military court proceeding and executive action. The power to grant bails has been severely restricted.

The Indian Supreme Court's track record as a bulwark of civil liberties is also not without blemishes. In **ADM Jabalpur V. Shukla (1976)** the Court declared that *habeas corpus* was not available to the people during emergency.[32] Moreover, there has been a visible unwillingness on the the

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30. The Statesman (New Delhi), 27 August 1978.

31. Dawn (Karachi), 23 December 1983.

32. Jain, n.27, p.732.

part of the Courts to liberally admit Public Interest Litigation in the late 1980s and 1990s, a far cry from the heady days of early 1980s. Besides, due to considerable workload and the subsequent delays in the administration of justice, the role of judiciary as the protector of civil liberties has become limited.

Indeed, human rights cannot be imposed on a society. Institutions that foster human rights develop in a society. In societies without such a tradition it is unnatural to expect that such a transformation can occur in the face of a different historical legacy and in the face of other pressing economic and political problems. "A straight progression in human rights cannot be anticipated, rather one can expect a process of advancement and subsequent retraction of rights".[33] And, in this context, the Civil liberties groups in India (CFD, PUCL, PUDR, APCLC) and Pakistan (HRCP, Pakistan Human Rights Law Network) are doing commendable work to safeguard human rights. The lack of governmental initative on human rights issues has been greatly compensated by the

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33. Louis I. Shelley, "Human Rights as an Internal Issue", The Annals of the American Academy of Political and Social Science ((AAPSS), November 1989, p.102.

remarkable work of these NGOs.

Finally, there is the problematic of perceptional differences on the issue of human rights between the governments of the South Asian region, especially, India and Pakistan, and internatioonal human rights organisations like Amnesty International and Asia Watch. This is largely due to "the rarified levels of human rights consciousness that exist in affluent societies and the seemingly mindless violations which occur in poorer milieus hobbled by illiteracy, deprivation and want".[34] There seems to be a lack of a tolerant appreciation of the constraints under which human rights are observed in the region by these NGOs who normally cling to a mechanical watchdog role. On their part, therefore, countries like India and Pakistan consider themselves well within the purview of international covenants in pursuing their case against terrorism. This is, however, not to suggest that New Delhi and Islamabad can lay claims to an unblemished record in dealing with insurrectionary groups any more than other nations in similar predicaments.

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34. Deccan Herald, 1 December 1992.

In this context, it is important to note that Amnesty International recently acknowledged that its reports on "insurgency in India" have been lopsided in the past.[35] There is now an admission that violation of human rights is not a one-way traffic and "armed political groups" have been guilty of human rights violations in Punjab and Kashmir. Significantly, the voluminous reports of reputed NGOs like Amnesty and Asiawatch have been accepted as biblical truth by western nations (especially senators in the U.S.). Thus, for example, India-bashing bills have been periodically introduced in the US Congress and newspaper editorials have rapped India on the knuckles. Aid-giving governments have spoken of a strict observance of human rights as a condition for loosening their purse strings. And, to top them all, such reports may lead to unwanted predilections and prejudices in any objective study of human rights violations in the region.

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35. The Telegraph (Calcutta), 24 December 1992.

CHAPTER II

RIGHT TO LIFE AND PERSONAL LIBERTY IN INDIA AND PAKISTAN: The Main Provisions and their Constitutional/ Statutory Limitations

The Constitutions of modern states now, as a principle, protect and promote the essential liberties of the people and the way these are protected and promoted determine the form and character of governments. The Constitutions of both India and Pakistan contain elaborate provisions dealing with the Freedom of Person.

INDIA

The Preamble of the Constitution reveals that the Constitution of India has included every type of liberty as *vinculum juris*.[1] The specific right to personal liberty is provided through Arts.19 to 22 (Part III) of the Constitution of India. **Art.19(1)** says that "All citizens shall have the right -

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

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1. R.L. Bhatt, "Personal Liberty: A Conceptual Analysis", Kurukshetra Law Journal (Kurukshetra), 5, 1979, p.13.

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) ....[2]

(g) to practice any profession, or to carry on any occupation, trade or business."[3]

Art.20 provides

"(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

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2. By the Constitution (44th Amendment) Act, 1978, Sub.cl.(f) has been omitted from Art.19(1). As a result, a citizen of India shall have no constitutionally guaranteed right to acquire, hold or dispose of property.

3. The Constitution of India (as modified upto the 15th of August 1990) [New Delhi, 1980), pp.7-8

(3) No person accused of any offence shall be compelled to be a witness against himself."[4]

Thus, Art.20 guarantees protection in certain respects against conviction for offence, by prohibiting -

(a) Retrospective criminal legislation, commonly known as *ex post facto* legislation,

(b) Double jeopardy or punishment for the same offence more than once,

(c) Compulsion to give self-incriminating evidence.[5]

Art.21, which forms the cornerstone of personal liberty under the Constitution of India, expressly says: "No person shall be deprived of his life or personal liberty except according to procedure established by law."[6]

Art.22 provides

"(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the

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4. Ibid., p.20.

5. D.D. Basu, Introduction to the Constitution of India (New Delhi, 1992), p.99.

6. The Constitution of India, n.3, p.21.

grounds for such arrest nor shall he be denied the right to consult and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

But, C1.3 of Art.22 says that "Nothing in Cls.(1) and (2) shall apply -

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention."[7]

Thus, Art.22 prescribes the minimum procedural requirements that must be included in any law enacted by the Legislature

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7. Ibid., p.22.

in accordance with which a person may be deprived of his life and personal liberty. Hence, Art.21 has to be read alongwith Art.22 which actually deals with: (i) persons arrested under the ordinary law of crimes; and (ii) persons detained under the law of preventive detention.[8]

Except for Art.19, all the fundamental rights mentioned above are available to *any person* (both citizens and non-citizens) on the soil of India.

PAKISTAN

In Pakistan the fundamental rights provisions are set out in Part II of the 1973 Constitution. The specific provisions dealing with the right to life and personal liberty greatly resemble the ones provided by the Constitution of India.

Art.9 forms the cornerstone of the fundamental rights of people and provides that "No person shall be deprived of his

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8. J.N. Pandey, Constitutional Law of India (Allahabad, 1990), p.174.

life or liberty save in accordance with law."[9]

Art.10 provides safeguards as to arrest and detention and essentially resembles Art.22 of the Constitution of India.

10.(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no person shall be detained in custody without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention.[10]

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9. The Constitution of the Islamic Republic of Pakistan (as amended upto December 1988) [Karachi, 1989], p.10.

10. Ibid., pp.10-11.

Art.12 provides for protection against retrospective punishment thereby prohibiting ex-post facto legislation.

Art.13 guarantees protection against double punishment and self-incrimination:

"No person -

(a) shall be prosecuted or punished for the same offence more than once; or

(b) shall, when accused of an offence, be compelled to be a witness against himself."[11]

Art.14 is unique to the Constitution of Pakistan

"14.(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.[12]

Arts.15, 16, 17, 18 and 19 provide for the freedom of movement, of assembly, of association, of trade, business or

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11. Ibid., pp.13-14.

12. Ibid., p.14.

profession, and of speech, respectively. These provisions are almost similar to the ones spelt out in Art.19 of the Constitution of India.

LIMITATIONS

A perusal of the constitutional provisions relating to the fundamental right of personal liberty leads us to the complex issue of the various limitations imposed on them in both India and Pakistan. Indeed, one of the most intractable problems of modern socio-political life throughout the world has been the long-standing conflict between national security and human rights. The conflict revolves essentially around "the need to find the right balance between two strongly competing claims: society's interest in survival and the individual's interest in liberty".[13] Although these interests are not always irreconcilable, much less fundamentally antithetical to each other, they have remained a source of considerable tension the world over, especially in the India sub-continent.

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13. K.S. Venkateswaran, "National Security Laws in Asia: An Overview" in Korea NGOs Network for the UN World Conference on Human Rights (Seoul, 1992), p.12.

Apart from the constitutional provisions of restrictions on fundamental rights during emergencies there are security laws which are usually classified as emergency legislation and which is most typically enacted/used during a state of emergency. But such laws are frequently found in countries having no declared state of emergency and we have examples of this in both India and Pakistan. In addition, countries often go to great lengths to camouflage security legislation as "ordinary law". This leads to a permanent derogation from many essential human rights, without the concerned governments being obliged to comply with even those minimal safeguards currently applicable to states of emergency under international human rights law.[14] Elsewhere, security laws exist cheek-by-jowl with officially proclaimed emergency legislation where the concerned governments show a marked unwillingness to accept any limitations on the use of such laws.

Both in India and Pakistan there is a plethora of laws which encroaches on the freedom of person. Such laws are either provided in the Constitution itself or enacted

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14. e.g., Art.14 of the International Covenant on Civil and Political Rights.

through governmental statutes. The statutory laws are characterised by wide variations in nomenclature. The most commonly used descriptions include Internal Security Act (e.g. MISA in India), National Security Act, (e.g. NSA in India), State Security Act (both in India and Pakistan), Public Safety Act, Defence of the State Act (DIA, DPRs), Prevention of Terrorism Act (TADA, e.g.). Besides, in both India and Pakistan there are special provisions based on national/public security doctrines which are incorporated in the ordinary criminal law, i.e., penal codes or criminal procedure codes of the two countries.[15]

Limitations in India

The provisions relating to the right to life and personal liberty enshrined in the Constitution of India are subjected to umpteen limitations. The guarantee of each of such rights is limited by our Constitution itself by conferring upon the State the power to impose by its laws *reasonable restrictions* as may be necessary in the larger interests of the community. This is purportedly "to strike a balance

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15. Venkateswaran, n.13, p.14.

between individual liberty and social control."[16] But, instead of leaving it to the Courts to determine the grounds and extent of permissible state regulation of individual rights (as the US Constitution does), the Constitution of India specifies the permissible limitations in cls.(2) to (6) of Art.19 itself. Thus -

(i) The Freedom of Speech and Expression [Art.19(1)(a)] is subject to reasonable restrictions imposed by the state on grounds of "the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence" [Art.19(2)].

(ii) The Freedom of Assembly [Art.9(1)(b)] is subject to reasonable restrictions in the interests of "the sovereignty and integrity of India or public order" [Art.19(1)(b)].

(iii) The Right to form Associations or Unions is again

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16. As laid down by the Supreme Court in **Gopalan V. Statte of Madras**, All India Register, 1950, S.C.27.

subject to reasonable restrictions in the interests of "the sovereignty and integrity of India or public order or morality" [Art.19(4)].

(iv) The Right to move throughout the Territory of India [Art.19(1)(d)] and to reside and settle in any part of the territory of India [Art.19(1)(e)] is subject to reasonable restrictions in the interests of "the general public or for the protection of any Scheduled Tribe" [Art.1919(5)].

(v) Finally, the Right to practice any profession or to carry on any occupation, trade or business is subject to reasonable restrictions in the interests of the general public and subject to any law laying down qualifications for carrying on any profession or technical occupation, or enabling the State itself to carry on any trade or business to the exclusion of the citizens [Art.19(b)].

Ostensibly, the limitations imposed by Arts.19(2) to 19(6) on the freedoms guaranteed by Arts.19(1)(a) to (g) serve a two-fold purpose, viz., on the one hand, they specify that these freedoms are not absolute but are subject to regulation; on the other hand, they put a limitation on the

power of a legislature to restrict these freedoms.[17] However, a closer scrutiny of these provisions points towards some obvious difficulties. Penal laws give plentiful discretion to the higher or lower authority to decide when a restriction should be applied and what is a "reasonable restriction". For example, "public order" is a rather vague and wide term, and it is usually for a magistrate (belonging to the executive) to decide, on the report of the police, which meeting will disturb the public order and which will not. Similarly, terms like "integrity of India" and "the security of the State" lead to difficulties.[18] An assembly of people of a state demanding larger measure of autonomy/`full autonomy' can be stopped by the government on these grounds. But then such governmental action would be in contradiction to the spirit of federalism and democracy.

The incessant enjoyment of personal freedom is further limited by the emergency provisions of the Constitution. **Art.358** provides that while a proclamation of emergency is

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17. M.P. Jain, Indian Constitutional Law (Bombay, 1987), p.523.

18. Ram Gopal, Undemocratic Elements of the Indian Constitution (Bombay, 1977), p.18.

in operation under Art.352 nothing in Art.19 shall restrict the power of the State to make any law or to take any executive action abridging or taking away the rights guaranteed by Art.19. As soon as a proclamation of emergency has been issued and as long as it lasts, Art.19 is automatically suspended. The suspension of Art.19 during emergency "removes the fetters created on the legislative and executive powers by Art.19 and if the legislature makes laws or the executive commits acts which are inconsistent with the rights guaranteed by Art.19, their validity is not open to challenge either during the continuance of emergency or even hereafter".[19] In other words, the suspension of Art.19 is complete during this period.

The 44th Constitution (Amendment) Act, 1978 made two important changes in Art.358.[20] First, Art.19 will be suspended only when a proclamation of emergency is declared only on grounds of war and external aggression under Art.352. Second, it has inserted a new clause (2) in Art.358 which makes clear that Art.358 will protect only

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19. D.D. Basu, Constitutional Law of India (New Delhi, 1990), p.360.

20. Pandey, n.8, p.467.

emergency laws from being challenged and not other laws which are not related to the emergency.

However, in March 1988 the 59th Constitution (Amendment) Act was enacted which permits the government to proclaim an emergency in the state of *Punjab* on the vaguely defined grounds of "internal disturbance" where the "integrity of India" is threatened. The amendment also permitted the government to suspend even the protection of the right to life and thereby annulled the important protection which the Indian parliament had given to the right to life and personal liberty by the 44th Constitution (Amendment) Act, 1979 providing that the same could never be suspended even in an emergency.

On the other hand, Art.359 is wider than Art.358, inasmuch as, though Art.359 does not, of its own force, affect any fundamental right, "it empowers the President to suspend the enforcement of any of the fundamental rights mentioned in Part III of the Constitution, while Art.358 suspends Art.19 only".[21] Thus Art.359(1) says, "Where a

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21. Basu, n.19, pp.361-362.

Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Arts.20 and 21)[22] as may be mentioned in the order...." In short, Art.359 takes away the *locus standi* of a person to move a Court, on the ground of violation of any of the fundamental rights specified in the Order issued under that Article.

Arts.33 and 34 of the Constitution put further limits on the continual enjoyment/enforcement of fundamental rights of citizens, including the right to life. Under **Art.33**, Parliament is empowered to modify or restrict the application of the fundamental rights to the Armed Forces, paramilitary forces and police personnel in order to ensure the proper discharge of their duties and to maintain discipline among them. Again, according to **Art.34**, when Martial Law is in force in any area, "Parliament may by law indemni-

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22. Inserted by the 44th Constitution (Amendment) Act, 1978. This supersedes the view taken by the Supreme Court in **A.D.M. Jabalpur V. Shukla (1976)** that when Art.21 is suspended by an order under Art.359, the person imprisoned/detained "loses his *locus standi* to regain his liberty on any ground."

fy any person, in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India" or "validate any sentence, punishment or forfeiture imposed or ordered" in such area. In short, no legal remedy shall be available to the citizens against the violation of their fundamental rights by a Martial Law administration, if parliament so provides by law.

However, the most controversial provision of the Indian Constitution has been the one related to Preventive Detention (Art.22) which has been termed as `niggardly' and which could prove to be `the Achilles heel for the entire scheme of civil liberties'.[23] Preventive detention is actually "the holding of a person without trial when the evidence available is not sufficient for him/her to be charged or for a conviction to be secured by legal proof".[24] It is a means of keeping people confined in order to prevent them from acting in a particular way and is so called in order to

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23. Parag P. Tripathi, "The Persisting Dilemma", Seminar, No.302, October 1984, p.33.

24. Amnesty International, Reportt of an AI Mission to India, 31 December 1971-18 January 1978 (London, 1978), p.23.

distinguish it from *punitive detention*.

The Constitution of India authorises the Legislature to make laws providing for preventive detention for reasons connected with defence, foreign affairs or the security of India; or for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community. This legislative power to enact law of preventive detention is divided by the Constitution between the Union and the States. Under **Entry 9 of List I** (7th Schedule) the Union has exclusive power only when such a law is required for reasons connected with Defence, Foreign Affairs or the Security of India. But, **under Entry 3 of List III**, a State has power, concurrently with the Union, to provide for preventive detention for reasons connected with security of the State, maintenance of public order, or the maintenance of supplies and services essential to the community.

Thus, the Legislature would be competent to enact laws providing for the detention/imprisonment of a person *without trial* for any of the above reasons and against such laws, the individual shall have no right of personal liberty. The

Constitution, however, imposes certain safeguards against the abuse of this power [Art.22(94)-(7)]. Hence, when a person has been arrested under a law of preventive detention, the Government cannot detain him for more than two months unless a properly constituted Advisory Board (cl.4) justifies the detention. The person so detained shall, as soon as may be, be informed of the grounds of his detention, excepting facts which the detaining authority considers to be against the public interest to disclose [cls.(5) and (6)]. The detained person must have the earliest opportunity of making a representation against the order of detention.

Preventive detention laws in India, initially, for a stated limited purpose, have often been given wider application and used even to detain political opponents of the Government-in-power. In the 1970s the main instrument for preventive detention was *the Maintenance of Internal Security Act (MISA), 1971*, which was used indiscriminately during the internal emergency of 1975-77 to detain thousands of political prisoners for indefinite period without trial. This Act conferred power of preventive detention of any

person on the Union and State Governments if that person is suspected of acting in any manner prejudicial to (i) the Defence of India, the relation of India with foreign powers or the security of India, (ii) the security of the state or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community.[25] Though the maximum period of detention under MISA was 12 months, yet by a 1975 Ordinance S.16A was amended to the further detriment of personal freedom. The amended S.16A provided that during the proclamation of emergency dated June 25, 1975 a person may be detained for a period of 24 months. Though a four-monthly review was provided yet it was a mere formality because the detaining officer acted of his own without information to the detenu or without giving him any opportunity of making any representation. Moreover, under S.18, a detenu under the MISA had no right to personal liberty by virtue of natural law or common law, if any.

The MISA was finally repealed in August 1978, but with new threats emerging, first in the state of Punjab and later in the states of Assam and Jammu and Kashmir, the Government

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25. Inderjit Singh Puri, "Personal Liberty and 42nd Amendment", Kurukshetra Law Journal, 5, 1979, pp.69-80.

began enacting fresh legislation restrictive of the freedom of person. A prominent example of such laws is the *National Security Act (NSA), 1980*, which permits detention without charge or trial for upto one year (two years in case of Punjab[26]) of any person who, in the opinion of the government, is likely to act in a manner "prejudicial to the defence of India, the relations with foreign powers, or the security of India."[27] The Act dispenses with the obligation of the state to produce detainees before a Magistrate within 24 hours of arrest (as required by the Cr.P.C.) and allows the Government to withhold from the detainees facts on which detention was made on vaguely defined grounds of "public interest". Thus, a detainee held under the Act has virtually no opportunity to file a *habeas corpus* petition until the grounds for detention are communicated to him. The amended Act also revises S.14(2) of the 1980 NSA which had required that a fresh detention order could only be issued if new facts arose. Now, detention orders may be renewed on origi-

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26. The National Securty Act (NSA), 1980 was amended in 1984 to permit detention for 2 years in Punjab.

27. The National Security Act, 1980 (Delhi, 1992):S.3 of the Act.

nal grounds, provided the total period of detention does not exceed 12 months.[28]

Another law which has caused considerable concern for its impact on personal liberty is the *Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987*. The Act is an "extreme measure to be resorted to when the police cannot tackle the situation under the penal law. The intention is to provide special machinery to combat the growing menace of terrorism in different parts of the country."[29] But the Act has serious debilitating effects on the freedom of person. It allows detention in judicial custody without formal charge or trial for purposes of investigation upto a year. It also provides for trials on charges of certain broadly defined "terrorist" and "disruptive" activities: these encompass any act, including the peaceful expression of an opinion, which questions the sovereignty or territorial integrity of India or which supports any secessionist claim. The TADA provides for punishment - with imprisonment ranging

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28. Asiawatch, Human Rights in India: Punjab in Crisis (New York, August 1991), pp.100-104.

29. Laid down by the Supreme Court in **Usman Khan Dawoodbhai V. State of Gujarat**, cited in TADA with Short Notes (Delhi, 1992).

from five years to life or with death - of anyone convicted of these offences. Those advising, inciting or facilitating such activities are made similarly punishable.

Trial procedures under the TADA contain many serious deficiencies which violate international standards of due process.[30]

- Under the TADA, all proceedings before a *Designated Court* shall be conducted *in camera* [S.16(1)].
- A Designated Court is permitted to keep the "identity and address of any witness secret" [S.16(2)].
- The Act reverses the presumption of innocence in particular situations, placing the burden on the accused to prove he is not guilty [S.21]. This is a violation of international standards and of Indian law.
- TADA makes a confession to senior police officer admissible in evidence provided the police have "reason to believe that it is being made voluntarily" [S.15]. This is an important departure from the existing rules of evidence laid down in the Indian Evidence Act which

30. Asiawatch, n.28, pp.102-103.

has always disallowed confessions to the police in Court proceedings on grounds that they were unreliable.

- S.19 of the TADA limits the right of the accused to appeal until the very end of trial and then only to the Supreme Court, effectively eliminating the High Court as an appellate review body. For many people the financial burden of seeking Supreme Court review are prohibitive.

The Terrorist Affected Areas (Special Courts) Act, 1984, includes many of the provisions of the TADA.[31] Like the TADA, it permits the establishment of special courts sitting in *camera* and allows the identity of witnesses testifying before a special court to be kept secret. Again, like the TADA, it transfers to the accused the burden of proving innocence (if arrested on a charge of "waging war" and if found in a specified area). An appeal against orders made by the special court can be made only to the Supreme Court.

Apart from these statutory laws, enacted by the Central

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31. V.M. Tarkunde, "A Legal Commentary", Black Laws 1984 (Delhi, 1984).

Government, providing for preventive detention and special procedure for trial, there are a number of state preventive detention laws, e.g., *the Armed Forces (Assam and Manipur) Special Powers Act, 1958; the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983; the Assam Preventive Detention Act, 1980; the Punjab Disturbed Areas Act, 1983.* In addition to these, there is a special category of economic laws which provide for preventive detention, e.g., *the Conservation of Foreign Exchange and the Prevention of Smuggling Activities Act, 1974; the Prevention of Blackmarketing and Maintenance of Supplies of Éssential Commodities Act, 1980,* etc.

Some provisions of the *Criminal Procedure Code* also affect the right to life and personal liberty. For example, S.151 of the Code entitles a police officer to arrest without warrant if he knows of a "design to commit cognizable offence" and "it appears to the officer" that in no other way can the commission of such an offence be prevented. This provision, thus, enables the police, at any time, on the basis of complete `subjective satisfaction', to deprive any citizen of his liberty for that period of time. Simi-

larly, under S.41 of the Code, one of the grounds on which a person can be arrested is that `credible information' has been received or `reasonable suspicion' exists of a person having been involved in a cognizable offence.

Limitations in Pakistan

Unlike the case in India, the Constitution of Pakistan does not provide for a comprehensive list of restrictions on personal liberty. But many of these fundamental rights provisions have been infringed by subsequent amendments of the constitution, especially the provision relating to Preventive Detention (Art.10). The third Constitutional Amendment, 1975, widened the constitutional provisions for preventive detention.[32] Not only was the initial period of reference to a review board (for approval) extended from one month to three [Art.10(4)], but the amendment also introduced indefinite detention without trial for persons deemed to be "acting or attempting to act in a way prejudicial to the security of the state" [proviso to Art.10(7)].

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32. Amnesty International, An AI Reprt, including the Findings of a Mission to Pakistan, 23 April-12 May 1976 (London, 1977), p.19.

The Fourth Constitutional Amendment, 1975, amended Art.199 of the Constitution by which the High Courts were deprived of their powers to grant bail to any person detained under any preventive detention law and to prohibit the making of executive orders for detention. Subsequently, the Fifth Constitutional Amendment, 1976, withdrew all powers from the High Courts to give orders for interim relief, including bail, in all cases where they exercise extraordinary jurisdiction. As a result, the High Courts can no longer grant bail or give an order prohibiting the making or suspending the operation of an order for detention of any person held under any preventive detention law. Nor can they order release on bail or other interim orders to release any person awaiting trial or convicted by a court/tribunal.[33]

Presently, the main preventive detention measures adopted by the Government in Pakistan are as follows:[34]

- Maintenance of Public Order Ordinance

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33. Ibid., p.20.

34. Amnesty International, Pakistan: Arrests of Political Opponents in Sindh Proovince, August 1990-early 1992 (London, June 1992), p.8.

- Prevention of Anti-National Activities Act (1974)
- Ss.121, 121-A, 122 of the Pakistan Penal Code
- Ss.107 and 151 of the Code of Criminal Procedure.

The emergency provisions of the Constitution further limit the civil liberties of the people. Under Art.233(1), the State may suspend the fundamental rights provided for in Arts.15, 16, 17, 18, 19 and 24 of the Constitution. Again, while a proclamation of emergency is in force "the President may, by order, declare that the right to move any court for the enforcement of such of the Fundamental Rights conferred by Chapter I of Part II as may be specified in the Order, shall remain suspended for the period during which the proclamation is in force..." [Art.233(2)].

But, while the original constitutional provisions suspend only the rights contained in Arts.15, 16, 17, 18, 19 and 24, the Fifth Constitutional Amendment lifts any conceivable judicial control on legislative and executive action infringing *any* fundamental rights provisions during the emergency period. The Fifth Amendment simply stated: "...any law, rule or order made or purporting to have been made in pursuance of the Proclamation shall be deemed to

have been validly made and shall not be called into question in any court on the ground of inconsistency with any of the rights conferred by Chapter 1 of Part II."[35]

Besides, during a proclamation of Emergency Parliament may even legislate on matters otherwise within the competence of the provincial legislatures. One result of this has been the enactment of the *Defence of Pakistan Rules* under which many political prisoners were detained or tried before special tribunals in the 1970s. Trial before a special tribunal implies that the accused has only one appeal, that his trial may be held *in camera* without the presence of even his family or friends, and that normal procedural rules laid down in Pakistan Penal Code and designed as safeguards to ensure a fair trial, have been severely limited.

Under the *Suppression of Terrorist Activities (Special Courts) Act, 1975*, special courts have been created having

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35. Amnesty International, n.32, p.23.

exclusive jurisdiction over certain scheduled offences.[36] These include not only offences involving violence such as waging or attempting to wage war against Pakistan, but also political acts where violence is not involved such as defiling the national flag or removing it without authorization from the government. Some of the procedures of the Act depart from internationally recognised standards for fair trial, especially by introducing an ambiguity into the presumption of innocence. The use of special courts constituted under the Act appears to have increased in the late 1980s and 1990s, especially in Sind province.

Again, *Special Courts for Speedy Trials Act, 1987*[37] was adopted as a temporary measure. It remained in force initially for one year and was extended for a further year in 1988. It lapsed in February 1989, was repromulgated again in August 1990 but finally lapsed in November 1990 [The 12th Constitutional Amendment (July 1991) provides for the establishment of similar special courts for speedy trial]. The

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36. Amnesty International, Pakistan, Human Rights Safeguards: Memorandum submitted to the Government Following a Visit in July-August 1989 (London, May 1990), pp.11-12.

37. Amnesty International, Pakistan: Special Courts for Speedy Trials (London, Nov. 1991).

Special Courts for speedy trials have exclusive jurisdiction over certain scheduled offences. These include political acts where violence is not involved, such as sedition, as also offences involving violence, such as waging war against Pakistan. This Act departed in some respects from normal criminal procedure designed to protect the rights of defendants. For instance, the provincial government could transfer cases pending before an ordinary court if it thought it in "public interest" for the cases to be decided speedily. There was no provision for witnesses to be recalled and reheard if the judge changed during the course of the trial, or if a case was transferred from a special court to another. Again, once a case had been consigned to a speedy court, no other court could exercise jurisdiction.

Furthermore, under the Martial Law provisions' most of the fundamental freedoms, including the right to life, are totally or partially suspended. It was under certain Martial Law Regulations that Gen. Zia introduced a new set of Islamic laws in Pakistan deriving their validity from the Islamic Shariat and, having considerable detrimental effect on the freedom of person. But the general effect of the new

regulations concerning crime has been to increase the severity of punishment. Soon after he seized power in July 1977, Gen. Zia announced that whipping, hanging and the amputation of hands and feet would be awarded as punishment for certain specified crimes. Theft, for example, might be punished by the amputation (under medical supervision) of the left hand. The 1979 Islamic Laws elaborated upon these orders[38] -

"(1) Whoever commits theft liable to *hadd* (major crime) for the first time shall be punished with amputation of his right hand from the joint of the wrist.

(2) Whoever commits theft liable to *hadd* for the second time shall be punished with amputation of his left foot upto the ankle.

(3) Whoever commits theft liable to hadd for the third time, or any time subsequent thereto, shall be punished with imprisonment for life

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Gen. Zia's 1979 reforms defined *any* consumption of liquor by a Muslim Pakistani as a type of *hadd* (major crime)

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38. Ministry of Information & Broadcasting, Introduction to Islamic Laws: Addres to the Nation by President Gen. Md. Zia-ul-Haq (Islamabad, 1979), pp.A27-A28.

and specified it to be "punished with whipping numbering eighty stripes". Non-Muslim Pakistanis who drink other than as a part of a religious ceremony, and non-Muslim non-Pakistanis who drink in public are declared liable to *tazir* (lesser crime) leading to imprisonment "for term which may extend to three years or with whipping not exceeding thirty stripes, or with both."[39] Besides theft and drinking, the other major crimes (*Hudood*) considered in Gen. Zia's new laws were *Zina* (adultery) and *Qazf* (false allegation of adultery). *Stoning to death* was also introduced as punishment for certain forms of adultery. This process of Islamization under Gen. Zia continued with the creation in 1980 of a Federal Shariat Court, which is empowered to review any law and decide whether or not it is "repugnant to the Injunctions of Islam". If a law is declared repugnant to Islam, the government is required to amend it accordingly. In general, the level of official violence progressively increased under the Martial Law provisions and in the name of Islamization.

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39. Ibid., pp.A8, A9.

In April 1984 Gen. Zia promulgated Ordinance XX which amended the Pakistan Penal Code, introducing Ss.298-B and 298-C, which prohibits the Ahmadiyas from calling themselves Muslims, using Muslim practices in worship and propagating their faith.[40] These new offences became punishable with upto three years imprisonment and a fine. In practice, this Ordinance facilitates serious harassment of the Ahmadiyas and it has contributed to a climate in which members of the Ahmadiya community become more vulnerable to other forms of attack or harassment.

The continuous infringement of the essential freedoms of man in the name of Islam did not cease even after the death of Gen. Zia and the subsequent lifting of Martial Law. In September 1990 President Ghulam Ishaq Khan promulgated the *Qisas and Diyat Ordinance*, which redefines crimes and punishments under the Pakistan Penal Code and provides punishments which, by internationally accepted human rights

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40. Amnesty International, Pakistan: Violations of Human Rights of Ahmadis (London, September 1991). The Ahmadiya Movement was founded in the 19th century by the followers of Mirza Ghulam Ahmad who regard him as the prophet. However, the Ahmadiyas are not recognised as such by he State of Pakistan because they do not recognise Prophet Mohammad as the final prophet.

standards, are considered cruel, inhuman and degrading.[41] The concept of qisas is defined in the Ordinance as "punishments by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing death if he has committed *qatl-i-amd* (intentional killing), in exercise of the right of the victim or a *wali* (heir of the victim, or the provincial government if there is no heir)." This means, for example, that if the relevant rules of evidence are fulfilled and if the accused is found guilty of having severed the victim's finger, the victim has a right to have qisas punishment inflicted on the offender - which in this case would be severence of the offender's finger. In most cases where the death penalty cannot be applied as a qisas punishment for murder, the convict becomes liable to pay *diyat* (compensation) to the heirs of the victim, and may also be sentenced to imprisonment.

Again, in July 1991, the Pakistan federal cabinet decided to amend S.295C of the Pakistan Penal Code which

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41. Amnesty International, Pakistan: New Forms of Cruel and Degrading Punishment (London, March 1991).

read[42] -

> "Whoever... defiles the sacred name of the Holy Prophet Mohammad... shall be punished with death, or imprisonment for life...."

The amendment to Pakistan Penal Code removes the alternative punishment of imprisonment for life and makes death penalty mandatory for defiling the name of prophet Mohammad. And, though S.295C is applicable to anyone showing disrespect to the Prophet, it is obvious that the members of he minority Ahmadiya Community may face the death penalty as a mandatory punishment for the exercise of their religious belief.

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42. Amnesty International, Pakistan: The Death Penalty Made Mandatory for Defiling the Name of the Prophet (Urgent Action, 20 August 1991), [London, 1991).

CHAPTER III

STATE PRACTICE AND CIVIL LIBERTIES

It is evident from the foregoing analysis (Chapter I) that due to diverse reasons the character of modern nation-states have changed considerably to the detriment of civil liberties. This is especially true in the South Asian region, particularly in India and Pakistan. Indeed, "South Asia has been witnessing a syndrome of rising expectations promoted by a weird brand of left-of-centre politics based on populism and populist gimmicks"[1] (In India and Pakistan it all began with Mrs. Indira Gandhi and Z.A. Bhutto). Regimes won power or stayed in power during most of the period under review (1973-1993) on the basis of populist programmes which the ruling classes had neither the will nor the means to fulfil. The resultant social discontent - arising out of an ever growing sense of relative deprivation - was met with stepped up repressive measures by the State. Juxtaposed with this, the recurring problems of social divisiveness (on the basis of religion, language, region,

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1. Mohan Ram, "Civil Rights Situation in India" in A.R. Desai, ed., Violations of Democratic Rights in India, Vol.1 (Bombay, 1986), p.91.

caste, etc.) and political instability have made the State, in both India and Pakistan, essentially coercive.

In the name of public order and public safety, the governments have not only enacted draconian laws but have also made widespread and drastic amendments in vital laws which guarantee that individual liberties and freedoms cannot be easily trifled with. Alarmingly, they have been put beyond judicial review or the laws have been given restricted judicial protection. The enactment of laws through `democratic processes' to `curb lawlessness' is actually an attempt of the State to legitimise its repression.[2] And, the logic of State's behaviour is such that when a party like the CPM, with its radical protestations, assumes power in West Bengal, it responds in the same way as the Congress or any other party would. For example, nine people died in West Bengal police lock-ups in 1980, seventeen in 1981 and thirteen in 1982, and when newspapers exposed these custodial deaths, the CPM Government promptly

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2. Sudip Mazumdar, "Undertrials: A Living Hell", Seminar, October 1984, p.17.

denied the allegations.[3] Thus, a party which itself has been a victim of repression (in the early 1970s in the wake of Naxalbari movement) justifies repression once it gets control of the State.

It is in the nature of an exploitative society that by and large the coercive apparatus of the State is not used - in the socio-economic context - against the dominant groups.[4] Conversely it is used - in the same context - against the poor and the downtrodden. Hence, it is easy for a policeman, conditioned by the socio-economic context and the legal provisions, to look upon the masses as a reservoir of political criminals. Even J.F. Ribeiro, the former Punjab Police Chief, makes a telling point when he says that support for police excesses comes from "the burgeoning middle classes which feel threatened by the criminal fringe among the have-nots."[5] Moreover,although no proper tabulation has been done, it is certain that a high proportion of

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3. Ibid., p.18.

4. Lalit Chari, "Police Repression and the Criminal Law" in A.R. Desai, ed., Violations of Democratic Rights in India, Vol.1 (Bombay, 1986), p.87.

5. Quoted in Patwant Singh, "State Repression", Hindustan Times (New Delhi), 23 May 1994.

those awarded capital punishment in both India and Pakistan, are from among the socially and economically weaker sections.[6]

In this background, an attempt is made here to assess the practice of State in both India and Pakistan in terms of the freedom of person. The main levels of situations adopted by various scholars and human rights groups the world over in determining a country's human rights "status" are as follows:

- Preventive detention,
- Police Atrocities, including Torture, Custodial deaths and extra-judicial killings,
- Prison conditions,
- Lack of Fair/Speedy trial,
- Cruel, Inhuman and Degrading Punishment.

The extent of the endemic nature of the occurrence of these situations varies from country to country, leading thereby to a broad assessment of a particular country's human rights "status".

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6. Jaspal Singh, Hand Book of Socio-Economic Offences (New Delhi, 1985), pp.17-34.

INDIA

Preventive Detention

The chaotic operation of preventive detention laws in India can be reduced to some pattern by dividing it into three categories:

(a) Suppression of political dissent,

(b) Curbing trade union rights, and

(c) Dealing with problems of crime of the law and order dimension.[7]

However, the enactment of a majority of preventive detention laws in India is generally with reference to the "threat-to-national-security" syndrome.[8] The very idea of a threat to security invites repressive measures and with these follow arbitrary arrests, illegal confinements and custodial violence. It becomes increasingly obvious that

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7. Iqbal A. Ansari, "Preventive Detention: Its Incompatibility with the Rule of Law" in A.R. Desai, ed., Violatioons of Democratic Rights in India, Vol.1 (Bombay, 1986), p.98.

8. K.G. Kannabiran, "Preventive Detention: Erosion of Constitutional Safeguards", Economic and Political Weekly (Bombay), 4 May 1985, p.788.

the State does not any longer represent the value system it is intended to promote and sustain, but looks like working towards the systematic destruction of the same value system.

The systematic use of preventive detention laws against political opponents and dissenters in India began with the Internal Emergency of 1975. The MISA and the Defence of India Rules in particular were used extensively to detain political opponents of the Congress Government after the declaration of Internal Emergency on 26 June 1975. It is not yet known as to precisely how many political prisoners were detained without trials during the Emergency. However, "official statistics published by the Janata Government showed that 34,630 people were detained under MISA during the State of Emergency (This figure excludes thousands of political prisoners detained and charged under the Defence and Internal Security of India Rules). Of these 6244 were held under the ordinary provisions of the Act, but the vast majority, i.e. 28,386, were held under the Emergency provision of the MISA, Art.16-A, which permitted political detainees to be held without even being informed of the

grounds for arrest."[9] The Shah Commission in its Report (Vol.II) said: "The Commission has now a comprehensive view of the excesses committed in Delhi.... the callousness with which arrests were made on false allegations to serve personal or party objective, and with a view to smother protest, the manner in which the statutory provisions governing detention, confirmation of detention and review of the detention orders were honoured in their breach... the ease with which established administrative procedures and conventions were subverted for the benefit of individuals, who had contacts at the `right places'."[10]

After the repeal of MISA by the Janata Government, political prisoners began to be detained under N.S.A. (1980), TADA (1987), TAAA (1984) etc. (Ch.II). These preventive detention laws have been regularly used to curb the personal freedom of people, especially in Punjab and Jammu and Kashmir.

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9. Amnesty International, Annual Report, 1977 (London, 1978), p.278.

10. Quoted in Gobinda Mukhoty, "Indian Constitution and Civil Liberties", in A.R. Desai, ed., Violations of Democratic Rights in India, Vol.1 (Bombay, 1986), p.82.

Indeed, the suppression of political dissent with the help of preventive detention rightly evokes unqualified repugnance and condemnation from many quarters. But same is not the case when preventive detention laws are used to suppress workers' trade union rights. Apart from being an onslaught on individual's personal liberty such detentions encroach on worker's right to collective bargaining and serve as instruments of economic exploitation of the working classes. The first general Railway strike (May 1974) provoked a very strong government reaction and led to massive arrests. According to Amnesty's estimates some 30,000 trade unionists were detained, mostly held under preventive detention laws.[11]

Preventive detention laws have also been used by the Government during the period under review to deal with problems of crime related to ordinary law and order situations. Such laws have been frequently used in case of eve-teasing, theft of public property, smuggling etc., even though the Indian Penal Code and the Cr. P.C. is there to take care of such offences. There appears to be only a thin

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11. Amnesty International, Annual Report, 1973-74 (London, 1975).

line of demarcation between `law and order' and `public order' in the practice of the State. But as Justice Hidyatullah had rightly put it: "The contravention of law always affects order but before it can be said to affect public order it must affect the community, or the public at large."[12] The fact that increasing use of preventive detention laws is being made against ordinary citizens does not show any great concern for civil liberties by the state, but only betrays the impatience and arbitrariness of the executive.

Whatever may be said in favour of preventive detention in India, its practice remains contrary to Art.9(4) of the International Convention on Civil and Political Rights. "Security of State, "maintenance of public order" and "mischief" are notions too broad and indeterminate to form acceptable grounds for prolonged prevention detention, particularly when facts alleged to justify it need not be disclosed to the Courts, Advisory Boards, or whatever. The Shah Commission Report aptly concludes: "...in short, the

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12. Ansari, n.7, p.99.

manner in which a large majority of these persons were incarcerated for the only fault, namely, dissent or suspected dissent from the views of the centres of power, should be a warning to every thinking man as to how an Act initially intended to serve an extremely limited purpose to deal with the misdeeds of a special category of persons can be given such a wide and comprehensive application so as to embrace all sections of the population to penalise dissent."[13]

Police Atrocities

Police atrocities in India encompass within its broad ambit (a) use of third degree methods in course of investigation; (b) custodial deaths; (c) `encounter' deaths; and (d) tortures inflicted on people engaged in areas, categorised as `disturbed areas'.[14]

Police brutality and torture have long been common and widespread in India and have continued during the period under review. Such methods are frequently used when people

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13. Shah Commission of Enquiry, Interim Report II, Quoted in Amnesty International, Report of an AI Mission to India, 31 December 1977-18 January 1978 (London, 1978), pp.27-28.

14. For details see Ch.II.

suspected of ordinary criminal offences are interrogated, in order to extract confessions or for purposes of intimidation. "Bereft of modern means of crime detection, devoid of public cooperation and utilising archaic judicial procedures, the police tends to achieve quick results through the use of third degree methods".[15] Although there is no legal sanction for third degree methods, there appears to be some official acceptance of their use among officials at both the state and central government levels. For instance, in October 1980 the Union Home Minister was reported as saying: "Though a shameful thing, third degree methods has to be applied because there were hardened criminals who would not otherwise come out with the truth."[16] There is a widespread belief among the police that in dealing with hardened criminals and habitual offenders, third degree methods and inhuman treatment are not only legitimate but necessary for effective detection of crime and successful prosecution of criminals. Even the general public does not seem to be averse to the police using violence against "criminals".

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15. S. Subramanian, "Why Rights Violations by Police", The Tribune (Chandigarh), 8 February 1994.

16. Times of India (New Delhi), 27 October 1980.

Violation of their human rights by the police seldom attracts people's attention unless a death takes place in custody.

There has been a discernible pattern of physical torture perpetrated by the police/security forces in India. The following pattern emerges from a scrutiny of the torture of political prisoners during the Emergency (1975-76):[17]

- Stamping on the bare body with heeled boots.
- Beating with canes on the bare soles of feet.
- Rolling a heavy stick on the shins, with a policeman sitting on it.
- Making the victim crouch for hours in a `Z' position.
- Beating on the spine.
- Beating with rifle butt.
- Inserting live electric wires into body cervices.
- Forcibly laying nude on ice slabs.
- Burning with lighted cigarettes and candle flame.

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17. Extracted from "Human Rights in India", Hearings before the Sub-Committee on International Organisation of the Committee on International Relations, U.S. House of Representatives, 1976; Cited in A.R. Desai, ed., Violations of Democratic Rights in India, Vol.1, p.262.

- Denying food, water and sleep and then forcing the victim to drink his own wine.
- Stripping the victim, blackening face and parading him in public.
- Suspending the victim by his wrists.

This general pattern of police torture established during the emergency has been present throughout the period under review. However, at times newer and more ghastly methods of physical torture have been employed when deterrence appears to be an element of police torture. For example, 36 suspected criminals in Bhagalpur Jail in Bihar were deliberately blinded by the police between October 1979 and November 1980 by having their eyes pierced and soaked in acid.[18] Throughout the 1980s the Indian Press has been giving detailed accounts of rights violation by police, especially in Andhra Pradesh, Kerala, Tamil Nadu, Bihar, West Bengal, U.P. and Madhya Pradesh. The alleged methods of torture include hanging people upside down, severe beatings (sometimes until the victim's limbs are broken), burnings and applying heavy rollers to the victim's legs and the

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18. Arun Shourie, "The Blindings in Bhagalpur", Indian Express, 11-12 December, 1980.

use of electric shocks.[19] A sort of climax was reached in June 1980 in Baghpat (U.P.) where a woman - Maya Tyagi - was stripped and assaulted by local police, who in broad daylight killed her three male companions. In early 1994 the Punjab police reportedly tatooed the foreheads of some hapless women while three Uttar Pradesh policemen beat and kicked a detenu in full public view.[20] Such methods have been particularly common during the investigation of ordinary criminal offences (such as theft), and are most widely used against the poorer sections of society, notably the tribals and harijans.

The use of such brutal interrogation methods frequently resulted in the death of suspects in police custody: for example, between January and September 1980 at least 27 deaths in police custody occurred and during 1981 at least 21 prisoners were reported to have died in police custody.[21] Such cases have been reported from the states of Bihar, West

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19. Amnesty International, India: Torture, Rape and Deaths in Custody (London, 1992), pp.186-189.

20. The Tribune, 8 February 1994.

21. Amnesty International, n.18, p.187.

Bengal, Madhya Pradesh, Uttar Pradesh, Karnataka, Gujarat, Rajasthan, Haryana, Tamil Nadu and the Union Territory of Delhi. Custodial deaths are not limited to the killing of dacoits or hardened criminals (although the killing of hardened criminals by the police does not have any legal sanction whatsoever). The horrifying cases of Rajan, an engineering student of Kerala who disappeared from police lock-up never to be found dead or alive, or actress Snehlata Reddy, whose being put to brutal and inhuman treatment led to a fatal heart attack during the emergency period, are illustrative.

Understandably then, in most lock-up deaths the victims are generally the socio-economically disadvantaged, their defencelessness a factor that goes against them. In the Indian Express survey of 45 custodial deaths in 1980,[22] not one victim was reported to have been a hardened criminal. The police usually cite "suicide", "disease", "shock" or "injuries received prior to arrest" as causes of death but post-mortem reports in most cases indicate that the victims

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22. Arun Shourie, "Lethal Custodians" in A.R. Desai, ed., Violations of Democratic Rights in India, Vol.1, pp.318-322.

died of multiple injuries while in detention.

In addition, there have been cases of "encounter deaths". To Soli Sorabjee, "Police encounters" is often an euphemism for murdering persons whom the police regard as dangerous criminals and whose prosecution and conviction according to the law of the land are very difficult because of serious handicaps in securing evidence against them.[23] Indeed, the term "encounter" is a unique contribution of the police in India to the vocabulary of human rights. It initially implied an armed confrontation where fire was exchanged and in the ensuing shooting people were killed. But, since the early 1970s, when guerrilla tactics employed by Naxalite groups in Andhra Pradesh and West Bengal provoked stern police reaction, it represents in most "cases the taking into custody of an individual or group, torture, and subsequent murder". "The death generally occurs as a result of brutal torture or stage-managed extermination in an appropriate area. An official release then elaborately outlines a confrontation and encounter, where the police

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23. Soli J. Sorabjee, "Educate Police on Human Rights", Times of India, 13 January 1992.

claim to fire in self-defence."[24]

Numerous enquiries into this phenomenon have established that the police found it easy to liquidate the Naxalites and publicise them as "encounters". The *Tarkunde Committee* which examined 77 Naxalite deaths in police encounters in Andhra Pradesh during the Emergency, concluded that at least 19 of these cases were cold-blooded murders.[25] Again, throughout the 1980s there were reports of encounter deaths by the police and paramilitary forces, especially in Punjab, Assam and Jammu and Kashmir.[26]

Police atrocities in India are found to be more evident in areas designated as "Disturbed Area". By the simple procedure of a proclamation through a gazette notification, the Government can declare any area in any State as a "Disturbed Area". It is sufficient if the Governor of the State or the Administrator of the Union Territory, or the Central Government is of the opinion that the whole or any

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24. PUCL Bulletin (New Delhi), March-April 1982, p.9.

25. Sudip Mazumdar, "Deaths in Police Custody", in A.R. Desai, ed., Violations of Democratic Rights in India, Vol.1, pp.307-308.

26. Amnesty International, Annual Report, from 1983 to 1993 (Sections on India).

part of a State or Union Territory is in a disturbed or dangerous condition. No objective criteria are laid down to define what events or occurrences would justify such a declaration. In a `disturbed area' the army/paramilitary forces is given a virtual *carte blanche* to conduct, search and destroy operations, to enter private premises and search them, and to arrest individuals without warrant.[27] Normal procedures are dispensed with by the military which ostensibly acts to aid civil authority.

Such human rights violations under the garb of "disturbed area" have become a way of life in the North-Eastern States of India. "Arbitrary detentions, torture, rape and extra-judicial killings of men, women and children have been reported from many areas which have been declared `disturbed' for indefinite periods of time and where Armed Forces (Special Powers) Act, 1958, is in force".[28] The grisly record goes back to the 1950s and continues till

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27. Amnesty International, INDIA: `An Unnatural Fate' Disappearances and Impunity in the Indian States of Jammu and Kashmir and Punjab (London, December 1993), p.37.

28. Indian Express (New Delhi), 6 June 1991.

today. Civil liberties groups have documented innumerable instances of such human rights abuses.[29]

From October 1983 when President's Rule was imposed on Punjab to the restoration of popular government in early 1990s, this state was also treated as a `Disturbed Area'. In Andhra Pradesh, areas have been notified "disturbed" since 1969 (the list of areas have been growing since) under the Andhra Pradesh Suppression of Disturbances Act. Certain offences against person and property invite enhanced punishment, i.e. death, and even abetment of these offences are punishable by death.

Prison Conditions

In India, prison conditions are generally poor. The detenus, *under-trial* prisoners and convicts are the three categories under which a person is kept in jail. Moreover, our prison system is unusual in the sense that it allows for different treatment to the different categories of prison-

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29. Disturbed Area: The Roots of Repression in Nagaland, Mizoram and Andhra Pradesh (Bombay, 1979); Endless War: Disturbed Areas of the North East (Delhi, PUDR); Stop Military Rule in Naga Inhabited Areas (New Delhi, NPMHR, 1979).

ers. Either in the case of "A" class prisoner or "B" class prisoners (political prisoners of different categories), the conditions are slightly better than that of "C" class prisoners. The condition of "C" class prisoners who constitute the majority are miserable. They live in prison conditions which fall far short of the minimum prison conditions as laid down in the *United Nations Standard Minimum Rules for the Treatment of Prisoners*.

Amnesty International in its 1974 Report on prison conditions in West Bengal,[30] estimated that in the early 1970s there were between 15,000 to 20,000 political prisoners in West Bengal jails, some of whom were detained for upto five years. Most of these undertrial prisoners were allegedly the ultra-left activists, commonly known as "Naxalites". These prisoners were found to live in extremely overcrowded conditions, which could have contributed to the deaths of 88 prisoners (reportedly while trying to escape) during the period between December 1970 to January 1972. The report further listed the use of *bar-fetters* on prisoners, sometimes for periods of upto two years, and

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30. Amnesty International, Report on Prison Conditions in West Bengal (London, September 1974), p.12.

insufficient hygienic and medical facilities, as well as the use of torture.

These dismal prison conditions in West Bengal is equally true for the whole country - the only difference being in degree. The factors responsible for the horrible prison conditions in West Bengal are also true in other states, especially in Bihar, Uttar Pradesh, Rajasthan, Madhya Pradesh, Haryana and Andhra Pradesh. The deplorable state of affairs in the country's most prestigious jail - New Delhi's Tihar Jail - is illustrative of the malaise. It is worthwhile to quote in full in a 1992 newspaper report:[31] "There have been more than a dozen deaths in the Tihar Jail over the past four years mainly due to the negligence by the staff and insanitary conditions in the overcrowded jails which house four times the number of inmates they were designed for. The Lt. Governor of Delhi was right in visiting the prison and immediately ordered potable waters to be delivered and the choked and broken drains and sewage pipes to be replaced. But far more needs to be done. Medical

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31. Indian Express, 26 June, 1992.

Care in Tihar Jail has been a scandal over the years. Regular medical inspections of the premises and inmates are unheard of. Corruption among the staff is legendary and responsible for the pitiable quality of food, supervision and facilities. The wholly indifferent attitude of the Administration towards the inmates is coloured by the belief that they are hardened criminals and should be grateful for whatever they get."

Non-Speedy Trial

A speedy trial is the essence of criminal justice. In India, the right of speedy trial is implicit in the broad ambit of Art.21 as interpreted in **Maneka Gandhi's** case. No procedure which does not ensure a reasonable quick trial can be regarded as `reasonable, fair and just'. Hence, it is now an established fact that the right of a speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Art.21.

In practice, however, judicial delays has become a fact of life in India. By mid-1980s, some 92,000 undertrial prisoners were languishing in various jails in India with more than 60,000 in Uttar Pradesh, Bihar, Madhya Pradesh,

West Bengal and Punjab alone, according to official sources.[32] In fact, the figure of undertrial prisoners has hovered around 90,000 since 1980. Over and above this number are the detainees under the NSA and TADA, and such other measures. And, this is despite the Supreme Court repeated directives to release such undertrial prisoners as have served more sentence than they would have if convicted.[33] The State's could-not-care-less attitude in this regard is amply reflected in *Rudul Sah's case*. A sessions court had acquitted him of a criminal charge on June 3, 1968 but he was released from Muzaffarpur Jail only on October 16, 1982, more than 14 years after acquittal. Rudul Sah's story was published by newspapers and a writ of *habeas corpus* was filed in Supreme Court. So sordid and disturbing was the case that the Court issued notice to the Bihar Government and awarded compensation for his illegal detention. But then Rudul Sah was not even an undertrial - he was an innocent man. There have been several cases in the

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32. The Tribune, 21 December 1986.

33. See Ref. Supreme Court's decisions in:
(i) Hussainara Khatoon (No.1) V. Home Sec., State of Bihar (AIR 1979, SC 1360).
(ii) Kadra Pahadiya V. State of Bihar (AIR 1982, SC 1167).

1980s when undertrials have languished in jails for years without trial and many of whom even die there. The Union Home Minister informed the Lok Sabha that between January 1981 and March 1982, 400 undertrial prisoners died in jail.[34]

PAKISTAN

Preventive Detention

Very much like India, preventive detention laws in Pakistan have been grossly abused by the State during the period under review. After the creation of Bangladesh, a civilian government under Z.A. Bhutto came to power and under which Pakistan acquired, in 1973, a democratic constitution drafted by a directly elected general assembly. However, the state of emergency, proclaimed on 23 November 1971, shortly before the outbreak of the Bangladesh War, remained in force. Bhutto's growing intolerance of the Opposition led his government to use strong arm methods in dealing with dissidence both within his own Pakistan Peo-

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34. Sudip Mazumdar, n.2, p.18.

ple's Party (PPP) as well as others opposed to his policies. Bhutto made his intentions pretty clear: "The programme is to rule, the people are stupid and I know how to make fool of them. I will have the *danda* (stick) in my hand and no one will be able to remove me for twenty years."[35]

Hence, the emergency provisions coupled with the other preventive detention laws like the DPRs were used for the large sale arrests of government critics including, journalists, trade unionists, leaders and members of both left and right-wing opposition and even occasionally members of the Bar and judiciary. The Chief Minister of the Sind province announced in the provincial assembly in November 1975: "The number of persons detained in the province of Sind under the Defence of Pakistan Rules in 1972, 1973 and 1974 was 1976 and those detained under the preventive detention laws (other than DPR) was 30,166 in 1972; 34,547 in 1973, and 36,279 in 1974...."[36] The figures quoted here relate only to the province of Sind and do not include preventive detention figures for the other three provinces,

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35. Quoted in Md. Asghar Khan, Generals in Politics: Pakistan 1958-1982 (New Delhi, 1983), p.51.

36. The Leader (Karachi), 14 November 1975.

including Punjab.

Political prisoners could be charged and tried in a variety of ways.[37] Many were known to have been charged with ordinary criminal offences of a serious nature, such as complicity in murder and theft. Particularly in the case of political imprisonment, it used to take months to get a case to court. But when the trial used to start and there appeared to be no evidence to substantiate the allegations, the case could be withdrawn and the accused rearrested under a variety of new charges, usually under the Defence of Pakistan Rules. Moreover, the possibility of the courts granting relief to such prisoners by giving bail were severely restricted under emergency legislation. And, in those cases in which political prisoners were brought to trial, they were charged before special courts under special procedures, rather than under the ordinary criminal procedure (see Chap.II).

In July 1977, the army headed by General Zia seized

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37. Amnesty International, Report including the findings of a Mission to Pakistan, 23 April - 12 May 1976 (London, 1976), p.38.

power from the civilian government in a bloodless military takeover. In September the Martial Law regime issued a proclamation revoking the state of emergency which had been declared at the outbreak of the Bangladesh War. Consequently, the Defence of Pakistan Ordinance, under which the Defence of Pakistan. Rules had been issued, was repealed. However, the provisions for preventive detention remained, both under the Maintenance of Public Order Ordinance, and under Martial Law Order No.12, introduced by the new Government.

All political activities were banned following the military takeover and leading members of Pakistan People's party and the Pakistan National Alliance were taken into "protective custody".[38] Political party workers were arrested in large numbers under the new Martial Law provisions, often to prevent them from organising or taking part in processions which were prohibited under martial law. scores of political workers, trade unionists and students were arrested under these provisions for "trying to form a

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38. Amnesty International, Short History of an AI Missin to the Republic of Pakistan, 20-25 January 1978 (London, April 1978), p.1.

procession and raise slogans", "delivering an objectionable speech", hoisting flags of a political party" and making "calls for strikes".[39] Amnesty International adopted many of them as "prisoners of conscience." Former Prime Minister Bhutto was arrested and tried on a charge of conspiracy to murder and finally hanged despite worldwide pleas for amnesty in April 1979.

Even in the late 1980s and early 1990s (during which popular government was installed) there have been frequent allegations of arbitrary arrests. In 1989-90 the federal government, led by the PPP and the Islamic Jamhoori Itihaad (IJI) provincial government in Sind made liberal use of the Maintenance of Public Order Ordinance (MPOO), arresting hundreds of ethnic and political activists in Karachi and Hyderabad.[40] The MPO was also used by the Punjab government. Although many people were undoubtedly arrested because of their political activities, others picked up by the police were criminals who were politically active. Prison-

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39. Dawn (Karachi), 13 October, 1977 and 19 February 1978.

40. U.S. Department of State, Country Reports on Human Rights Practices, 1990 (Washington, 1989), pp.1589-1590.

ers under preventive detention were frequently held incommunicado. G.M. Syed, leader of the Jeay Sindh movement (a Sindhi nationalist party) was held under house arrest after members of his party burned the Pakistan flag in Sukkur.[41] He and his followers were charged with sedition and desecration of the national flag and detained, but not brought to trial. There were repeated allegations of arbitrary arrests during anti-bandits operations in Sind province in 1988. "Relatives of known bandits were jailed occasionally to force the bandits to surrender kidnap victims or themselves to the police. This counter-hostage tactic is an outgrowth of traditional tribal practices, which still strongly pervade much of Sind province."[42]

Denial of Fair Trial and Non-Speedy Trial

During the Bhutto regime political prisoners were increasingly tried by special tribunals and special courts set up for the purpose. Trial before a Special Tribunal implied that the accused had only one appeal, that his trial could be held *in camera* and that the normal procedural

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41. Ibid., p.1590.

42. Ibid., p.1464.

rules, laid down in the Pakistan Penal Code and designed to ensure a fair trial, were severely limited. Bail and interim orders for relief could not be obtained and it appeared that prisoners on trial before special tribunals did not enjoy specific prisoners' rights laid down in the prison rules for undertrial prisoners.[43] In the case of Special Courts, "the change in the burden of proof, the severe limitations on appeal and bail, the loose wording of the rules for evidence and prisoners' loss of internationally accepted rights of penal treatment such as remission, were serious and unjustifiable deviations from the legal safeguards ensured in ordinary criminal law".[44]

The Zia period was marked by the trial of political prisoners by military courts. There were two types of military courts: summary military courts and special military courts. Both had jurisdiction to try civilians on a wide range of martial law offences as well as on offences punishable "under any other law for the time being in

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43. Amnesty International, n.38, p.45.

44. Ibid., p.49.

force."[45] There was no provision under martial law for review of the legalty of decisions taken by martial law authorities by any court of law in Pakistan, including the Supreme Court. However, in spite of this, the higher courts retained some supervisory jurisdiction over the acts taken by the martial law authorities. For example, a petition before the Sind High Court challenged the varying sentences (from 8 to 12 months' imprisonment and 8 to 10 lashes) awarded to seven boys found guilty of "taking out a procession and raising pro-Bhutto slogans" by the summary Military Court, Nawabshah.[46] The petition asked for quashing the sentence on the ground that the accused were "denied opportunity of self-defence."

Many death sentences in Pakistan were imposed following trials before Special Courts for speedy trials which appear to have followed inadequate procedures. These courts were introduced in 1987 and in the first six months of their existence over 50 people were sentenced to death, in some

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45. Amnesty International, n.38, pp.14-15.

46. Dawn, 30 December 1977.

cases after trials lasting only for two to three days.[47]

Human rights activists in Pakistan have expressed several concern about the Special Courts.[48] First, the accused is hampered from preparing an adequate defence and calling witnesses because of the short time allocated before the trial (usually a matter of days). Second, there is a general impression that the judges in these courts are predisposed to find defendants guilty, given the high political profile of the proceedings. Third, the decision to refer a case for this system is an arbitrary one, made by the senior levels of the provincial government. The criteria for deciding which cases can be tried under the courts is vague and broad enough to enable provincial authorities to abuse the system.

Like India again the pace of justice has been slow due to the limited number of judicial benches, the heavy backlog of cases and outdated court procedures. In Lahore, for

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47. Amnesty International, Pakistan Human Rights Safeguards: Memorandum Submitted to the Goovernment Following a Visit in July-August 1989 (London, May 1990), pp.21-22.

48. U.S. Department of State, n.42, p.1465.

example, four people involved in a murder case had been jailed for nearly $2^1/2$ years waiting for the prosecution to submit cases against them in 1988.[49]

Police Atrocities

There is a striking similarity between the pattern of police atrocities in India and Pakistan. Although the Pakistan constitution specifically prohibits the use of torture in order to extract confessions (Art.14, Sub.2), allegations of police torture were copiously documented by Amnesty International.[50] Between 1973 to 1975 political prisoners were subjected to ill-treatment in the form of severe beatings, suspension from the ceiling by hand, insertions of chilli in the anus and assaults on sensitive parts of the body. In many cases, harassment of political opponents was extended even to members of their families. The most common practice was to institute a number of cases against the relatives of political opponents, which usually had to be withdrawn in court.

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49. Ibid., p.1464.

50. Amnesty International, n.37, p.62.

While successive governments have ruthlessly cracked down on opponents through the use of third degree methods, Pakistani Police force has institutionalised torture as its primary method of crime detection by perfecting newer and more horrible forms of torture. The *cheera* is apparently a new torture method. It consists of the blindfolded victim having his legs pulled apart as far as possible. A 1994 Amnesty International report on torture and custodial deaths in Pakistan quotes a victim saying:[51] "You can hear in crunching sound when your legs are pulled apart. They finally make a 180 degree angle". Beatings and kickings, the pulling out of nails and other such methods are frequently used. The use of roller is particularly vicious. Heavy wooden or metal roller are run over prisoners' bodies, especially male genitals, while the prisoner is held down by other policemen. While muscles and blood vessels are crushed, there are no external injuries.

More than 70 per cent of the women in police custody in Pakistan are subjected to sexual harassment and physical

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51. Quoted in Times of India, 27 March, 1994.

violence.[52] While some women detainees are coerced by police officers to trade sexual favours for their release, others are simply raped. Despite regulations in 1991 prohibiting police from keeping women overnight in custody, in practice women are arbitrarily detained overnight and are sexually abused both in police custody and in prisons. Upon release from prison, women are often ostracised by their family and friends and barred from their homes.

These police practices frequently lead to deaths in custody. Many prisoners have also "disappeared" in custody especially during the Bhutto regime. According to Amnesty International's annual report for 1992, 40 people were said to have died in police stations in Sind alone.[53] These deaths in custody are in addition to those that happen in what are euphemistically called "encounters". The 1992 figure, for such deaths is over 50.[54] Some of these may have been genuine instances of armed robbers in combat with police, but many of them were certainly what Amnesty calls

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52. Times of India, 15 February 1993.

53. Amnesty International, Annual Report, 1992 (London, 1993), p.210.

54. Ibid.

"extra-judicial killings".

Cruel, Inhuman and Degrading Punishment

The Zia regime, in association with the Mullahs acted methodically to turn Pakistan into a theocratic totalitarian state. Thus, certain martial law regulations provided for the punishment of *flogging* which is provided for in the Shariat for certain offences. This punishment was given to people "leading processions and raising slogans against the government", "making objectionable speeches" and "hoisting flags of political parties".[55] It was sometimes carried out in public as well. Certain other martial law regulations provided for the *amputation of one hand* as punishment for persons convicted of theft, robbery and dacoity. This punishment is also provided for in Shariat. However, no punishment of amputation of the hand has been carried out till date. In addition, the 1979 Hudood Ordinances introduced punishments like whipping for theft and drinking, and stoning to death of women for certain forms of adultery. Thus, even consensual extramarital sexual relations are

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55. Amnesty International, n.38, pp.12-13.

considered violations of the Hudood Ordinances. The predominantly male police force uses this law to threaten people on the basis of their personal and political animosities.

The Qisas and Diyat Ordinance, promulgated in September 1990 redefined crimes and punishments under Pakistan Penal Code and provided for punishments which, by internationally accepted human rights standards, are considered cruel, inhuman and degrading (see Chap.II).

Prison Conditions

Like India once again, three classes of prison facilities exist in Pakistan. Class "C" cells, which generally held common criminals, suspected terrorists and low-level political workers, usually have dirty floors, no furnishings and poor quality food.[56] Prisoners in these cells are frequently beaten and forced to kneel for long periods. Political detainees and foreign prisoners are usually held in class "B" cells, which provide better treatment and better food. Only prominent persons receive class "A"

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56. U.S. Department of State, n.42, p.1463.

accommodations, which even include air-conditioning and private servants.

Blasphemy: The Killer Law

Hundreds of Pakistanis from religious minorities have been jailed on charges of blasphemy since 1986, when Gen. Zia increased the penalty for defaming the prophet as part of his Islamisation programme. In July 1991 the Nawaz Sharif government made death penalty mandatory for defiling the name of prophet Mohammad.

However, at the root of most blasphemous cases are land disputes or personal jealousies. In 1992 Gul Masih, a Catholic, became the first person to be hanged for blasphemy. His neighbour, a Muslim with whom he had political differences, accused him of criticising Islam during an exchange at the community water tap.[57] Another man found guilty of blasphemy since 1991 is Md. Arshad Javed, a Sunni Muslim who is mentally ill. He stood on his rickshaw during an anti-Rushdie rally in 1989 and shouted "I'm the Christ.

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57. Jennifer Griffin, "Blasphemy: The Killer Law", The Tribune, 1 January, 1994.

Salman Rushdie was correct."[58]

The scant number of convictions hides the actual impact that these laws are having on Pakistan's minority groups. Indeed, when accusations of blasphemy are bandied out, the accused often loses his life before the case even reaches the courtroom!

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58. Ibid.

CHAPTER IV

ROLE OF JUDICIARY AS A BULWARK OF CIVIL LIBERTIES

Law, if it is to be meaningful and true to its basic concepts, has to be wedded to liberty. Unless the ultimate objective of law is synthesised with liberty and hallowed by liberal virtues, it may have the semblance and seeming attributes of law, but that would be in a formal sense only. In essence, it would be the antithesis of that. "Law and liberty have thus a role complementary to each other: they have to march in unison for the common welfare of the society and people as a whole".[1] And, it is the foremost task of the judiciary to make existing laws relevant in the protection and promotion of liberty. The ultimate test of judiciary, anywhere in the world, lies in its effectiveness in protecting and promoting individual liberty. In fact, the need of such "human rights jurisprudence" is of utmost importance today and "has a transcendental significance, especially in developing Third World Countries".[2]

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1. H.R. Khanna, "Law and Liberty", Deccan Herald, 15 November 1988.

2. Soli J. Sorabjee, "Role of Judiciary - Boon or Bane?", India International Centre Quarterly, (New Delhi), 20(3); Monsoon 1993, p.12.

During the preceding two decades judiciary in both India and Pakistan-with varying degrees of success - has established itself as a sentinel of the individual right to life and personal liberty. This probably has been one major positive aspect of the grim human rights situation in the two countries during the period under review. In India, the role of judiciary as a bulwark of individual liberties has a long and voluminous history. In contrast, the status of judiciary in Pakistan as a watchdog of civil liberties has been a relatively recent phenomenon. Moreover, Pakistan's frequent brushes with authoritarianism gives its judiciary only a restricted manoeuvrability in terms of human rights jurisprudence.

Judiciary in India

The Indian Supreme Court made a "disastrous start" in construing Art.21, which guarantees right to life and personal liberty, by placing an unduly restrictive interpretation in **A.K.Gopalan V. State of Madras (1950)**.[3] In this case, the Court took the view that since the word "liberty"

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3. Soli J. Sorabjee, "India's Judiciary: The Crises in a Great Institution", Monthly Commentary on Indian Economic Conditions, (New Delhi), 29(1); August 1987; p.33.

is qualified by the word "personal", which is a narrower concept, therefore, it does not include all that is implied in the term "liberty". So interpreted, it means nothing more than the liberty of the physical body, i.e., freedom from arrest and detention, false imprisonment or wrongful confinement. Personal liberty was thus said to mean only liberty relating to, or concerning the person or body of the individual. Besides, one crucial point involved in this case was the meaning of the words "procedure established by law" under Art.21, which were interpreted to mean an enactment of a competent legislature without paying much regard to the fact as to whether such enactments are just and equitable. Hence, "the detention of the petitioner was upheld because the Court found it impossible to interpret the term 'law' in Art.21 as meaning 'just' as distinct from 'lex' and, consequently, refrained from examining the consistency of procedure laid down in the Preventive Detention Act (1950) with the principles of natural justice".[4]

The result of such restrictive interpretation of Art.21

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4. David G. Barnum, "Article 21 And Policy Making Role of Courts in India: An American Perspective", Journal of the Indian Law Institute, (New Delhi), Vol.30:1; January-March 1988, pp.30-31.

was to throw the most crucial right to life and personal liberty at the mercy of the legislative majorities. Indeed, if the ruling in this case was to be strictly interpreted and applied, nothing could prevent the legislature to enact any law prohibiting anyone from, say, taking his meal or going to bed to specified durations. And, for a long time the implication of the term 'personal liberty' remained the same whereby the courts ruled that the word law under Art.21 referred to law made by the state and not law in the abstract sense embodying principles of natural justice.

But, the Supreme Court of India in its landmark judgment in **Menaka Gandhi V. Union of India**[5] thoroughly reinterpreted Art.21 and practically overruled its decision in *Gopalan*. In this case the petitioner's passport was impounded in public interest by an order of the Government of India, without furnishing the reasons for its decision. Thereupon, she challenged S.10(3)(c) of the impugned order on following grounds.[6]

- The Section is violative of Art.14 of the Constitution

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5. A.I.R. 1978, S.C. 597.

6. R.L. Bhatt, "Personal Liberty: A conceptual Analysis", Kurkshetra Law Journal, (Kurkshetra), 5; 1979; pp.26-27.

since it confers vague and undefined powers on the passport authority.

- The Section is void as conferring an arbitrary power since it does not provide for a hearing of the holder of the passport before the passport is impounded.
- This Section is violative of Art.21 of the Constitution since it does not prescribe 'procedure' and it is arbitrary and unreasonable.
- It offends Art.19(1)(a) and (g) since it permits restrictions to be imposed on rights guaranteed by those provisions without such restrictions being mentioned in the same Article.

The leading opinion in *Menaka* was pronounced by Justice Bhagwati.[7] The Court laid down a number of propositions seeking to make Art.21 much more meaningful than hitherto.[8] *First*, the expression 'personal liberty' in Art.21 was given an expansive interpretation. The Court emphasized that the

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7. In view of the great importance of the issues involved, the case was heard by a bench of 7 judges who delivered five separate opinions. Bhagwati J. delivered an opinion on behalf of himself, while Untwalia and Fazal Ali JJ., Chadrachud, Krishna Iyer J.J., and Beg C.J., in separate judgments concurred. Kailasam J. dissented.

8. M.P. Jain, Indian Constitutional Law (Bombay, 1987), pp.582-583.

expression 'personal liberty' was of wide amplitude covering a variety of rights "which go to constitute the personal liberty of man". Some of these attributes have been raised to the status of distinct fundamental rights and given additional protection under Art.19. This expression thus ought not to be read in the narrow and restricted sense so as to exclude those attributes of personal liberty which were specifically dealt with in Art.19. *Second*, the Court reiterated the proposition that Arts. 14,19 and 21 were not mutually exclusive. This means, for example, that a law prescribing a procedure for depriving a person of 'personal liberty' has to meet the requirements of Art.19. *Third*, the Court re-interpreted the expression 'procedure established by law' and gave it a new orientation. The procedure contemplated in Art.21 must answer the test of reasonableness in order to conform with Art.14. The procedure in Art.21, according to Bhagwati J., "must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Art.21 would not be satisfied".[9] This makes the expression 'procedure established by law' by and large synonymous with the

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9. Ibid., p.583.

American 'due process' of law'. Thus, even the right of hearing becomes a component part of natural justice. Therefore, the principle of *audi alteram partem* which mandates that no one shall be condemned unheard held true for this case.

The decision in *Menaka* went a long way to strengthen the concept of human rights jurisprudence in India. But the real fillip to the Supreme Court's role as the true defender of individual liberty in the post-Menaka period was provided by the almost revolutionary process of Public Interest Litigation (PIL) or Social Action Litigation (SAL). By re-interpreting the concept of *locus standi* the Court has ruled that where judicial redress is sought in respect of a legal injury or legal wrong suffered by persons, who by reason of their poverty or disability are unable to approach the Court for the enforcement of their fundamental rights, any member of the public, acting *bona fide*, can maintain an action for judicial redress.[10] According to the traditional interpretation only a person who has suffered the legal wrong himself, could have recourse to the Court of law for relief. This new approach has paved way for easy access to Courts of

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10. P.D.Mathew and Seema Midha, Public Interest Litigation (New Delhi, 1993), pp.1-3.

justice by treating even letters written to the Court as writ petitions. Thus, PIL has revolutionised the role of Supreme Court in protecting and promoting civil liberties, especially of the poor and down-trodden.

In the post-1978 period, the Supreme Court consciously expanded the ambit of Art.21. In **Francis Coralie Mullin V. Union Territory of Delhi**[11] the Supreme Court said that the right to live is not restricted to mere animal existence but means something more than just physical survival. "The right to 'live' is not confined to the protection of any faculty or limb through which life is enjoyed but it also includes "the right to live with human dignity", and all that goes along with it, namely, the bare necessities of life such as, adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing with fellow human beings".[12] The Court held that the term 'liberty' in Art.21 is of the widest amplitude and it includes a detenu's *right to socialise* subject to reasonable, just and fair

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11. A.I.R. 1978, S.C.597.

12. J.N. Pandey, Constitution Law of India (Allahabad, 1990), p.157.

procedure established by law.

In **People's Union for Democratic Rights V. Union of India**[13] the Court held that non-payment of minimum wages to the workers employed in various Asiad projects in Delhi (their plight was brought to the Supreme Court's notice through PIL) was a denial to them of their right to live with basic human dignity and thus violative of Art.21 of the Constitution. Again, in **Olga Tellis V. Bombay Municipal Corporation**[14] the Supreme Court ruled that the word 'life' in Art.21 includes the 'right to livelihood' as well.

In the 1980s the Supreme Court has taken rapid strides in claiming prison justice as its own province. The Court has begun to take not just rhetorical, but instrumental assault on prison conditions at the stage of reviewing sentences by taking upon itself the unenviable task of protecting "the residuary right of prisoners".[15] It is now established that the protection of Art.21 is available even to prisoners who are, not merely by reason of their convic-

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13. A.I.R. 1982, S.C. 1473.

14. A.I.R. 1986 S.C. 180.

15. Upendra Baxi, The Crisis of the Indian Legal System (New Delhi, 1982), pp.217-218.

tion, deprived of the fundamental rights which they otherwise possess.

Sunil Batra V. Delhi Administration[16] is the most significant decision on prison justice in the post-independence India. It exposed, in lucid detail, the nature of unauthorised practices which prevail in our jails. It also marked a maturity of judicial concern for conditions of detention. Thus, for the first time in history, The Chief Justice of India visited with two other judges the Tihar Jail to ascertain the actual conditions, and the memorandum prepared by the CJ was used as a basis for reasoning by the Court.[17]

The main issue involved in *Batra* was the protection of residuary fundamental rights of prisoners. In this case two convicts who were confined in Tihar Jail challenged the validity of S.30 and S.56 of the Prisons Act. Sunil Batra, the first petitioner, was sentenced to death by the District and Sessions Judge and his sentence was subject to confirmation by the High Court and to a possible appeal to the Supreme Court. He was put in solitary confinement during the

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16. A.I.R. 1978 S.C. 1675.

17. Baxi, n.15, p.222.

pendency under S.30 of the Prisons Act. Batra challenged the validity of S.30 for being violative of Art.21. The Court, while upholding the validity of S.30, held that "if by imposing solitary confinement there is total deprivation of comraderie amongst co-prisoners co-mingling and talking and being talked to, it would be violative of Art.21".[18]

The other petitioner, Charles Sobhraj, an under-trial prisoner, challenged the validity of S.56 of the Prisons Act as violative of Arts. 14 and 21, under which he was put in bar-fetters. The Court held the imposition of bar-fetters for 'unusually long periods" as arbitrary and violative of Arts. 14 and 21 of the Constitution.

The Supreme Court has also held *Speedy Trail* as an integral and essential part of the fundamental right to life and personal liberty enshrined in Art.21. In **Hussainara Khatoon V. Home Secretary, State of Bihar**[19] a petition for a writ of *habeas corpus* was filed by a number of undertrial prisoners who were in Bihar jails for years awaiting trial. The Court held that the *right to speedy trial* is a fundamen-

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18. Pandey,n.12, p.163.

19. A.I.R. 1979 S.C. 1360.

tal right implicit in Art.21 and that no procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair and just'. Similarly, in **Kadra Pahadiya V. State of Bihar**[20] The Supreme Court commented: "It is a crying shame upon our adjudicatory system which keeps men in jail for years on without a trial". Emphasizing that "speedy trial is a fundamental right of an accused implicit in Art.21" the Court directed the concerned lower Courts to complete the trial expeditiously.[21]

In **M.H. Hoskot V. State of Maharashtra**[22] the Court took a big step forward in human rights jurisprudence by suggesting that *free legal aid* should be provided by the state to poor prisoners facing a prison sentence. Free legal service to the poor and needy is an essential element of any "reasonable, fair and just procedure" and it must be held implicit in the broad sweep and content of Art.21.

The Supreme Court has also bestowed its attention to questions of maltreatment of undertrials and convicts, and

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20. A.I.R. 1982 S.C. 1167.

21. Jain,n.8, p.590.

22. A.I.R. 1978 S.C. 1548; Cited and discussed in Colin Gonsalves, Mihir Desai and Jane Cox, Leading Cases on Prisoner's Rights (Bombay, 1978), p.31.

of police torture. In **Prem Shankar Shukla V. Delhi Administration**[23] the Court held that *handcuffing* should be resorted to only when there is 'clear and present danger to escape', otherwise it would be violative of Arts. 14,19 and 21 of the Constitution. Again, in **Kishor Singh Ravindra Dev. V State of Rajasthan**[24] the Court held the use of *third degree methods* by the police as violative of Art.21 and directed the Court to take necessary steps to educate the police in respect of human rights. In **Khatri V. State of Bihar**[25] (the Bhagalpur Blinding Case) the Supreme Court held *blinding of the accused* by the police while in police custody as violative of Art.21. Similarly, in **Sheela Barse V. State of Maharashtra**[26] the Court said that the *torture and ill-treatment of women suspects* in police custody was violative of Art.21.

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23. A.I.R. 1980 S.C. 1535.

24. A.I.R. 1981 S.C. 1068.

25. A.I.R. 1981 S.C. 1068.

26. A.I.R. 1983 S.C. 379.

In a series of cases 27 the Supreme Court has held that undue delay in the execution of death sentence will entitle the condemned person to approach the Court for conversion of death sentence into life imprisonment. Undue delay in the execution of death sentence would be sufficient ground to invoke the protection of Art.21.

A new judicial trend in the 1980s has been the provision for *damages for violation of personal liberty* (Art.21). In **Rudal Shah V. State of Bihar**[28] The Supreme Court held that the Court had power to award monetary compensation in appropriate cases where there has been violation of the constitutional rights of citizens. In this case the Court directed the Bihar Government to pay compensation of Rs.30,000 to Rudal Shah who had to remain in jail for four years even after acquittal. In **Sebastian M. Hongray V. Union of India**[29] the Supreme Court by a writ of *habeas corpus* required to Government of India to produce two persons before it who had earlier been taken to the military camp by army

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27. T.V. Vatheeswaran V. State of Tamil Nadu (A.I.R. 1981 S.C. 643) Sher Singh V. State of Punjab (A.I.R. 1983 S.C. 465) Triveni Ben V. State of Gujrat (A.I.R. 1989 S.C. 142), Cited in Gonsalves, Desai & Cox, Leading Cases on Prisoner's Rights (Bombay, 1978).

28. A.I.R. 1983 S.C. 1086.

29. A.I.R. 1984 S.C. 1026.

jawans. When the Government failed to produce them the Court awarded Rs. one lakh each to the wives of the missing persons as exemplary compensation. In **Boma Charan Oraon V. State of Bihar**[30] the Court declared that anyone deprived illegally of his life and personal liberty can come before it and ask for compensation for violation of Art.21.

However, the impressive record of the Supreme Court as a true defender of Civil Liberties is not without blemishes. In **A.D.M Jabalpur V. Shivkant Shukla**[31] (the Habeas Corpus Case) the Court held that "no person has any *locus standi* to move any writ petition if the right to move any Court for the enforcement of Art.21 is suspended by the Presidential Order issued under Art.359". Again, in **Union of India V. Bhanudas**[32] it was held that:

- the individual has no *locus standi* against Presidential orders of 1975;
- if a detenu is released, he can be immediately rear-

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30. Hindustan Times (New Delhi), 13 August 1983. The case was decided by the Supreme Court on12 August, 1983.

31. A.I.R. 1976 S.C. 1207; cited inV.N. Shukla's Constitutionof India (Lucknow, 1988), p.124.

32. A.I.R. 1977 S.C. 1027. Cited and discussed in Inderjit Singh Puri, "Personal Liberty And Forty Second Amendment", Kurkshetra Law Journal Vol.5; 1979,pp.78-79.

rested and put in jail without trial and he is not entitled to know the reason for his detention;

- even if a detenu dies in custody, by police torture or otherwise, there is no way of knowing it.

These decisions, in effect, authorised the state to do what it pleased with the detenues. They also reflect on the independence of judiciary which was greatly jeopardised during the 1975-1977 Emergency in face of an all-powerful executive. Nevertheless, it was during the same Emergency that "judicial independence was seen at its best in some High Courts, some of whose judges struck down various illegal orders of detention, undeterred by the likely consequence of their transfer or supersession".[33]

The effectiveness of judiciary in defending individual liberty during the period under review has been fairly minimised due to the interminable judicial delays. There are many reasons for these atrocious delalys,[34] for example, the stupendous rise in the volume of litigation, governmental delays in filling up judicial vacancies, frequent

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33. Sorabjee, n.2, p.11.

34. Baxi, n.15, pp.64-78.

adjournments granted by the Courts, the frequent strikes by lawyers and the prevailing practices of the legal profession which have generated a vested interest in delays. These judicial delays make a mockery of the justice delivery system and inevitably lead to a denial of fundamental rights to the people, especially the poor and unprivileged masses.

Judiciary in Pakistan

It is easy to look back upon the past and conveniently blame in judiciary in Pakistan for most of human rights violations in the country. But such criticism should take account of the fact that during the period under review the powers of Pakistan judiciary to protect fundamental human rights have been systematically eroded by successive governments. A series of constitutional amendments and Martial Law provisions passed since 1977 and culminating in the March 1981 Provisional constitutional Order (PCO), virtually ended the long-established independence of judiciary.[35] And, when judicial independence is in peril it is well nigh impossible for the Courts to effectively protect fundamental rights of the people.

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35. Mian Kharshid Mahamud Kasuri, "Human Rights in Pakistan", Dawn, (Karachi), 23 December 1983.

During the premiership of Z.A. Bhutto several constitutional amendments were passed which considerably weakened the powers of the judiciary in terms of protecting the right to life and personal liberty. The Fourth Constitutional Amendment, 1975, seriously limited the power of the High Court to grant bail. By an amendment to Art.199 of the constitution, the High Courts were deprived of their powers to grant bail to any person detained under any preventive detention law and to prohibit the making of executive orders for detention.[36] Consequently, the chances of getting bail once an order for detention had been made, was drastically reduced as it could only be obtained from the Supreme Court, which meant that only the rich few could appeal.

The Fifth Constitutional Amendment, 1976, withdrew all powers from the High Courts to give orders for interim relief, including bail, in all cases where they exercised extraordinary jurisdiction.[37] As a result, the High Courts could no longer grant bail or give an order prohibiting the making or suspending the operation of an order for detention

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36. Amnesty International, An AI Report, including the findings of a mission to Pakistan, 23 April - 12 May 1976, (London, 1976), p.19.

37. Ibid., pp.19-20, 31.

of any person held under any preventive detention law.

The amendment also introduced restraints on the independent functioning of Pakistan's judiciary. It introduced for the first time the concept of a limited period of office for the Chief Justice of Pakistan (5 years) and the Chief Justices of the High Courts (4 years). Appointment of the Chief Justice of Pakistan was now no longer to be made on the basis of seniority. Lastly, the amendment allowed for the transfer of judges without their consent. These changes certainly weakened the role of judiciary as protectors of the fundamental rights of its citizens.

The aim of these amendments was to deprive the courts of their principal means of remedying violations of individual liberties effectively and speedily. Thus, when passing a resolution which called upon the Government to "forthwith withdraw" the Fourth Amendment, the High Court Bar Association in Karachi said that it was "deeply concerned" at the "inroads made by it into the traditional liberties of citizens" and considered it "an unjustifiable distrust of the exercise of judicial powers by the Superior Courts".[38]

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38. Dawn, 15 November, 1975.

Moreover, during the Bhutto regime there were many instances of harassment inflicted upon lawyers who attempted to take up civil rights cases.[39]

One of the first acts of the new Martial Law regime in Pakistan was to restore the powers guaranteed to the higher judiciary for the protection of civil liberties. In July 1977, for example, the new government restored powers to the High Courts to issue writs under Art.199, including the writ of *habeas corpus*. However, one crucial exception was made here in that the government excluded the writ jurisdiction of the High Courts under Art.199 to make order against the Chief Martial Law Administrator (CMLA) and other martial law authorities.[40]

The Zia government then went on to take several measures which not only undermined the independence of judiciary but also weakened its role in civil rights defence. Two types of military courts, known as Summary Military Courts and Special Military Courts, were created having jurisdic-

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39. Amnesty International, n.35, pp.27-28.

40. Amnesty International, Short History of an AI Mission to the Republic of Pakistan, 20-25 January 1978 (London, 1978), p.4.

tion to try civilians on a wide range of offenses, including offences "under any law for the time being in force".[41] Prospects of a fair trial to an accused was greatly jeopardised under these military courts.

The Provisional Constitutional Order (PCO), 1981, barred the jurisdiction of the Courts to interfere in any matter which fell within the purview of the various Martial Law enactments or to review or question any act of or proceedings before the military courts. It declared that "the proclamation of the fifth day of July, 1977, all orders of the President, orders of the CMLA, including orders amending the Constitution made by the President or the CMLA and all other laws made on or after the fifth day of July 1977, are hereby declared notwithstanding any judgment of the Court, to have been validly made by the competent authority and shall not be called in question in any court on any ground whatsoever".[42] And, under the PCO, the judges of the Supreme Court and the High Courts were asked to take a new Oath of office which required them to swear loyalty to the CMLA. The Chief Justice and three justices of the Supreme

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41. Dawn, 20 February, 1978.

42. S. Sahay, "Zia Abrogates Judicial Review", The Statesman, (New Delhi), 8 April, 1981.

Court and several High Court Justices declined to take the new oath and were automatically relieved of their jobs. Md. Asghar Khan glumly concluded: "The traditions which the Courts in Pakistan had inherited had eroded with time but they had never been reduced to the level of complete subservience to the dictates of a military ruler as they were by Zia-ul-Haq on 25 March, 1981".[43]

Under the wider programme of Islamization, Gen. Zia introduced the *federal Shariah (Islamic) Court* whose main role was to determine if any of the existing laws in Pakistan were or were not repugnant to Islamic injunctions.[44] The special Shariah Courts operate in a manner similar to ordinary civilian courts. They try offences relating to the Hudood Ordinances and also decide whether particular laws are offensive to Islam. Cases referred to the Shariah Courts are heard jointly by Islamic Scholars and judges from civilian courts. Even non-Muslims could be brought before the Shariah Courts.

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43. Md. Asghar Khan, Generals in Politics: Pakistan 1958-1982 (New Delhi, 1983), p.162.

44. Golam W. Choudhury, Pakistan : Transition from Military to Civilian Rule (Essex, 1988), pp.228-230.

However, human rights groups have been expressing concern over several Shariah Court's decisions. In October 1990, for example the federal Shariah Court declared that death must be the punishment for anyone who is convicted for defiling the name of the Prophet.[45] In 1991, the government amended the Pakistan Panel Code (PPC) and made death sentence mandatory for blaspheming the prophet. The Shariah Courts sentenced many Ahmadiyas to death by applying the new provision (see ch. III). These courts also award punishments like flogging and stoning to death of women based on Shariat laws.

By the Eighth Constitutional Amendment, 1985, the right of the civilian judiciary to review the actions of martial law authorities and courts was withdrawn.[46] Now only those sentenced to death by martial law courts could petition to have their cases reviewed by the President; all others had to appeal to a provincial Governor.

The military government also tried to influence the judges. It is appropriate to quote here a 1980 newspaper

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45. U.S. Department of State, Country Reports on Human Rights Practices, 1990 (Washington, 1991), p.1591.

46. U.S.Department of State, Country Reports on Human Rights Practices, 1989 (Washington, 1990), p.1529.

report:[47] "The judicial system has been made subservient to the will of the warlords. The Bhutto trial was a mockery of justice. The Chief Justice of the Lahore High Court who presided over that charade has been amply rewarded. He has been promoted to the Supreme Court. Another judge (Safdar Shah, J.) who dared to dissent from the death sentence was harassed by an inquiry against him. The hapless judge ultimately fled the country". The Courts were thus subdued and frightened under the Martial law regime - a situation wholly unsuitable for taking bold decisions on human rights issues.

Nonetheless, even in face of such adverse conditions, the courts in Pakistan have shown a remarkable tenacity in not abdicating their jurisdiction to review executive acts and have struck them down where statutory limits had not been observed. In the process they have also come up to defend civil liberties.

In **Asma Jilani V. Government of Punjab**[48] the main

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47. Indian Express, (New Delhi), 24 November 1980.

48. Pakistan Legal Decisions (P.L.D.) 1972 S.C. 139, Cited and discussed in Makhdoom Ali Khan, ed., The Constitution of the Islamic Republic of Pakistan (an amended upto December 1988) (Karachi, 1989), Introduction, pp.xix-xxi.

question before the Supreme Court was whether the High Courts had jurisdiction under Art.98 of the 1962 Constitution of Pakistan to enquire into the validity of a detention order made under certain Martial law regulation of 1971. The court found the answer in affirmative. In this case the Court had also to decide the legality of the Yahya Khan regime and it had no hesitancy in declaring it to be a usurper because the 1962 constitution did not give President Ayub the right to hand over power to President Yahya. The seizure of power by him was purely illegal and amounted to an act of usurption. The court held that the *doctrine of necessity* (circumstances render impermissible things permissible) was hardly meant to validate the illegal acts of a usurper. The decision in *Asma Jilani* set the trend for more bolder decisions by Pakistan's Courts in subsequent years.

In *State V. Zia-ur-Rahman*[49] the validity of Art. 281 of the 1972 Interim constitution was challenged which validated all laws made after Yahya Khan's usurption of power notwithstanding any judgment of any Court and protected these from being questioned by any court. The Supreme Court held that while all legislative measures have been validated and the

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49. P.L.D. 1973 S.C. 49, Cited and discussed in Khan, ibid., pp.xxi-xxii.

jurisdiction of the courts ousted, it still retained the power to strike these down wherever these were found to be tainted with *mala fides* or void for want of jurisdiction. This decision was thus a *tour de force* in judicial review and the role of judiciary was emphasised with great courage and imagination.

Again, in **Begum Nusrat Bhutto V. Chief of Army Staff**[50] the Supreme Court of Pakistan justified the military take-over under the 'doctrine of necessity' and not under Kelsen's theory of 'revolutionary legality', as maintained by the Government Counsel. Had the court accepted the applicability of Kelsen's theory then the validity of subsequent government actions could only be tested against the guidelines provided by the new legal order. But, the court held that the 1973 constitution was still the supreme law of the land, though certain parts of it had been held in abeyance on account of 'state necessity'. Subsequently, the President of Pakistan and the superior courts continued to function under the constitution. Thus, the court set clear legal limits on the actions of the military government and sub-

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50. P.L.D. 1977 S.C. 657, Cited and discussed in Khan, ibid., pp.xxxvi-xxxviii.

jected them to judicial review to preserve the rule of law.

After the *Nusrat Bhutto* case the superior courts went through a short phase of judicial retreat under the martial-law regime. But they soon recovered and gave landmark judgments in a series of cases,[51] such as, ordinary criminal cases were ordered to be tried by ordinary and not criminal courts, military interference in civil disputes was prohibited, and martial law administrators were directed to give reasons for their orders transferring cases from ordinary to military courts and to show how this would serve law and order or public interest.

In August 1984 the Lahore High Court granted a convict's plea that the period spent by him in detention prior to the commencement of his sentence be taken into account by the court and thereby reaffirmed a salutory principle of natural justice.[52] In this case the prisoner was convicted by the trial court in December 1975 and his appeal was disposed of by the High Court in November 1979. Subsequently, he moved the High Court for reduction of his imprisonment by

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51. Nazir Ahmed V. Summary Military Court, PLJ 1979 Labore 373. M. Younis V. Major M. Sahid, NLR 1980 Civ(Lahore) 428, Sattar Gul V. MLA Zone 'A', PLD 1980 Lahore, 165.

52. Dawn, 28 August, 1984.

the period spent in detention before he was sentenced. The Court held that while pronouncing its verdict a court must an accused's entitlement to benefit under S.328-B of Cr. P.C. even if no prayer to that effect has been made. S.328-B provided that "where a court decides to pass a sentence of imprisonment on an accused for an offence, it may take into consideration the period, if any, during which the accused was detained in custody for such offence".[53]

In the post-Zia period Pakistan's judiciary not only asserted its independence *vis-avis* the executive but also took bold steps for an effective human rights jurispondence. The courts in Pakistan have shown more judicial activism in this period in terms of protecting the rights of man by liberally interpreting the rules and becoming more appreciative of public interest litigation (PIL).[54] The Supreme court announced in 1991 "a scheme to create awareness about and enforcement of human rights and protection of the rights of the depressed classes of the society". Boards of Awareness and Enforcement of Human Rights and Obligations have

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53. Ibid.

54. Human Rights Commission of Pakistan, State of Human Rights in Pakistan, 1991, (Lahore, 1992), pp.12-15.

been established in some districts.[55]

However, due to considerable workload and the subsequent delays in the administration of justice, the role of Pakistan judiciary in the protection of civil liberties has become limited. The U.S. State Department Country reports on Human Rights for 1989 says:[56] "There has been a heavy backlog of cases. The political impasse between the Federal and Punjab Governments has blocked appointment ofjudges in that province to succeed those who have retired or died. Over a quarter of the seats on the Lahore High Court are vacant, while scores of positions in the lower magistracy remain unfilled. These vacancies inevitably further dealy the judicial process. Karachi human rights acitivists believe there are dozens of people awaiting prosecution in Sindh jails who have been held for periods larger than the sentence they would receive if convicted". But then, these judicial ills have almost become a part of most of the Third World judiciary and adversely affect the proper administration of justice.

Indeed, the judiciary in Pakistan like similar institu-

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55. Ibid., p.14.

56. U.S. Department. of State,n.45, p.1529.

tions in other countries, has had its vicissitudes. But it has on numerous occasions during the period under review shown commendable courage and independence, especially in terms of protecting and promoting the right to life and personal liberty of the people.

CHAPTER V

CONCLUSION

In contemporary times, human rights are in a way, "legally recognised expectations from a state".[1] Despite the fluid nature of human expectations in general, human rights have been well defined and their catalogue is well codified in the various conventions and declarations at the international level, and in the numerous legislative enactments, executive orders and judicial pronouncement at the domestic level. Hence, in both India and Pakistan we have elaborate guarantees for fundamental human rights. The Constitution of India - the supreme law of the land - provides for the right to life and personal liberty under Part III of it. Similarly, Part II of the 1973 Constitution of Pakistan spells out almost similar provisions for the freedom of person.

However, this elaborate and impressive body of laws on civil liberties coexist with widespread and flagrant violations. There are two facets of it: first, the state itself

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1. Yogesh K. Tyagi, "Human Rights in India : An Overview", International Studies, (New Delhi), 29(2), April-June 1992, p.199.

imposes certain limitations on the continuous enjoyment of these rights, and, second, the exigencies of modern governance has 'compelled' the state to violate these sacrosanct human rights.

Indeed, there are no absolute rights and every right is subject to the rights of the whole society. All modern, organised societies in fact face the difficult task of reconciling the rights of individual with society's rights. Sometimes, the two are seriously in conflict and it is necessary to choose one at the expense of the other. However, any law subordinating the individual's freedom to the rights of society to meet the exigencies of any situation, must unfailingly be entrenched with restrictions and qualifications of a just procedural kind. Thus, though the Constitution of India allows the state to put "reasonable restrictions" on the freedom of person under certain specified conditions, yet it does not give the state the licence to trample on personal freedom in whatever manner it likes in the name of "reasonable restriction". The gross abuse of preventive detention laws over the years by successive governments (in both India as well as Pakistan) must be viewed in light with this.

Then there is the issue of the exigencies of modern governance. There are many factors in the broad socio-economic-political canvas which have forced the state in both India and Pakistan to take repressive measures. Thus, the fallout of factors like social divisiveness, political instability, deficient institutional framework, inadequate resources and, above all, the changing character of modern nation-states in the socio-political system has led to frequent violation of the freedom of person by the State. But then, none of these factors can justify 'state lawlessness'. No doubt, terrorism must be suppressed, insurgency needs to be rooted out and other threats to national security and integrity have to be dealt with swiftly and sternly. The police and security forces must be fully and adequately equipped and supported in every way to deal with thee problems. But to kill in cold blood a person suspected of, say, terrorist violence under the garb of 'police encounters' is murder plain and simple. Law-enforcers cannot stoop to the level of the criminal. State lawlessness is no answer to terrorism, insurgency or other threats to national security. The rule of law has to be observed even in the most trying and tempting situations. But, in both India and Pakistan, with varying degrees of incidence, the state has

enacted and enforced draconian laws and taken recourse to various repressive measures to deal with problems of 'law and order' and national security - the bugbears of modern governments.

There is a striking similarity between the practices of state in both India and Pakistan towards the issues of individual liberty. The only difference is that of degree - Pakistan's relatively adverse record in this respect is due to the fragility of institutional framework which has frequently hampered the growth of civilian democratic rule in the country.

Thus, firstly, there seems to be a sub-continental unity in the ad-hocism of law enforcement mechanism. In both India and Pakistan there has been a rough-and-ready tradition of law and order management marked by brutal police tortures, custodial deaths and extra-judicial killings. Interestingly, even the torture methods are also essentially the same, e.g., hanging people upside down, severe beatings, cigarette burnings and applying heavy rollers to victims' legs, electric shocks etc. These basic methods are then topped by more horrifying ones like the mass blinding of undertrial prisoners in Bihar or the use of *Cheera* in the

police lockups of Karachi and Peshawar.

Secondly, in both the countries the reasons for human rights violations by the police are primarily the same. The police is generally ill-trained, poorly paid and rarely held accountable - factors which encourage abuse of authority. Again, there is a police-politician nexus to maintain the status quo of political power (especially at lower levels) and a near collapse of the criminal justice system which encourages public tolerance for police violence to deal with criminals. Then there is the existence of a "police sub-culture"[2] which advocates, applauds and rewards the credo that results justify the means adopted, albeit unethical and illegal.

Thirdly, the majority of the victims of state lawlessness in both Indian and Pakistan come from the poor and down-trodden classes. Bereft of adequate financial resources these people cannot fight their rights' violations either at the executive or judicial levels. The state of human rights in Pakistan is a glaring reflection of the

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2. Ved Marwah, "The Sub-Culture", Seminar, (New Delhi), October 1977; pp.14-17. L.P. Singh, "Policing India", Denoument, vol.2, no.6&7, January-February 1991; pp.8-13.

feudal attitude of the ruling elite towards the political have-nots in the country. These have-nots include women, minorities, poor and anybody who has no clout in the army, bureaucracy, business community or the government. Similarly, in India it is not that the well-to-do do not commit crime but that they frequently get out of the bounds of law while the weaker sections of the society are more vulnerable to the reaches of law and the police.

And, finally, state in both India and Pakistan has been repressive vis-a-vis the people, no matter for howsoever justified reasons. Such is the explicit material expression of this repression in recent years that scholars have been compelled to speak of "state terrorism" or "terrorist state" in the sub-continent.[3] There is the ever-growing draconian legislation and ever-expanding apparatuses of repression and the ruthless use of both. Thus, while in India draconian laws like MISA, NSA, TADA and different Armed Forces Special Powers Act have been there during the period under review; in Pakistan, apart from laws like defence of Pakistan Rules, Maintenance of Public Order Ordinance and various Martial

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3. Randhir Singh, "Terrorism, State Terrorism and Democratic Rights", Economic and Political Weekly, (Bombay), 8 February, 1992, p.288.

Law Regulations, there is also a series of brutal laws based on the Islamic Shariat (e.g. Hudood Ordinance, the Qisas and Diyat Ordinance). These laws then provide for new structures of authority, new hierarchy of courts, new legal procedures, new ranges of offences, new and stiffer penalties, new detentions without trial and new and harsher powers for the police, paramilitary forces and the army. These measures not only provide for greater restrictions on the life and liberties of the people but they give further fillip to state lawlessness.

One positive feature of this depressing scenario has been the emergence of judiciary as the bulwark of civil liberties. In India, the various High Courts and the Supreme Court have removed many substantial and procedural inhibitions in the way of seeking remedies in cases of violations of the right to life and personal liberty. Public Interest Litigation is the leading instrument of this change by which issues of *locus standi*, burden of proof, time constraints, legal aid etc. have all been so interpreted so as to benefit victims of human rights violations. The Supreme Court has passed some landmark judgments which have gone a long way in expanding the concept of personal liberty

for the benefit of the common man. In short, 'human rights jurisprudence' has been firmly established in India.

However, in spite of the impressive record of the Indian judiciary as the true sentinel of people's life and liberties, they are not regarded as such by the people. This cruel paradox is not without reasons. Statistics show that we have had very few successful public interest cases so far.[4] Moreover, only certain judges (like Justice Bhagwati) could claim credit for boldly ameliorating certain out-rightly objectionable human rights situations, but they are cold comfort to the millions of litigants waiting for justice. Justice is being denied through a number of permissible and impermissible procedures and practices, including corruption and interminable delays in the disposal of cases.

In contrast, the record of Pakistan's judiciary in defending civil liberties has been less positive and effective due to obvious reasons. Pakistan's frequent brushes with military rule have compelled the judiciary to find a way between the rule of law and the might of the men on

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4. S.K. Agrawala, Public Interest Litigation: A Critique (New Delhi, 1985).

horseback. Their toleration, condonation or legitimisation of a regime has often been in the nature of an attempt to keep the doors of justice open for the common man (see *Asma Jilani and Nusrat Bhutto cases*). Against this background, the role of the various High Courts and the Supreme Court of Pakistan in deciding cases concerning human rights violations, has been commendable. Moreover, in the post-Zia period, the judiciary has shown greater courage and independence in terms of an effective human rights jurisprudence.

The judiciary in Pakistan is marred by almost similar ills which plague the Indian judiciary, e.g., judicial delays, corruption, monumental procedural hassles, high costs of litigation, and the like. These factors undoubtedly hamper the effectiveness of judicial role in defending human rights. But then, the bottom line is that the judiciary, which should in fact be the last line of defence against human rights violations, cannot be turned into the first line of defence. And, this is as much true for Pakistan, as for India.

Indeed, liberty is conditional upon an ordered society. There is a close nexus between liberty and the proper func-

tioning of democratic institutions. Democracy in fact embodies the principle of resistance within the principal of government itself. In this context, the violations of civil liberties in both India or Pakistan cannot be evaluated in isolation with or without reference to the failure of the democratic institutional framework (like the legislature, political leadership and judiciary) in these countries. And, while in Pakistan the democratic institutions have failed in the general absence of democratic governance, in India, paradoxically, these institutions have failed to deliver the goods despite a trusted democratic governmental framework.

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