

A Preliminary Note on the Genealogy of the concept of Enemy Alien in Pakistan

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Abstract

On July 9, 2014, parliament of Pakistan passed a stringent security law, the Protection of Pakistan Act (Act No. X). The law focuses on enemy aliens and the threat they pose to state's security. As it was passed and enforced, the law did not generate much debate on the origin and historical value of the legal concept of enemy alien. This article aims to dig up the genealogy of the concept of enemy alien by highlighting a) its origin in the UK and the US; b) its introduction by the British in colonial India; and later c) its adoption by the state of Pakistan.

Keywords: Protection of Pakistan Act, enemy aliens,

Introduction

On October 31, 2013, the President of Pakistan issued an ordinance called the Protection of Pakistan Ordinance (PPO). The Ordinance was issued on the recommendations of an advisory committee set up by Prime Minister Nawaz Shareef for amending the Anti-Terrorism Act, 1997. The committee was set up in the wake of a massive para-military operation going on in Karachi city. Upon the recommendations of the committee seven amendments to the anti-terrorism Act 1997 were made to expand the scope of anti-terrorism law (Act XX, 2013). Apart from these recommendations, the committee also made certain other recommendations relating to reinforcing state security against potential enemy aliens. These recommendations eventually resulted in the Protection of Pakistan Ordinance, 2013. Then on January 22, 2014, a second ordinance was issued to amend the 2013 Ordinance to further expand its legal scope. The second ordinance came with a Statutory Regulatory Order (SRO) from the Interior Ministry, which made it retroactively in force since December 5, 2013. Finally on July 9, 2014, the two ordinances were codified into an act called the Protection of Pakistan Act, 2014. Later as the government feared that Supreme Court might put the act to judicial review, it gave the act constitutional cover under 21st amendment (2015).

Although these laws were passed in a short span of time, the government tried to reach out to different political parties, and especially the individual members of the parliament, requesting them to agree to the bill of the proposed act. As the debate began on parliamentary floor and in press statements, much of it revolved only around two political issues: a) government's hesitation to pass the act on its own, and b) the potential exercise of the act against Pakistani citizens, including the members of opposition political parties. Interestingly, however, the debate did not touch on the legal merits and demerits of the act. Moreover, it did not inform anything about the historical context of the concept of enemy alien.

This article is an effort to dig up the history the concept of enemy alien. We trace its history and origin in the early 20th century Britain. On the other hand, we trace the history of a related concept of "alien friend" in the US, which loses currency and gives way to the concept of enemy alien around the same time. With these discussions we draw the Western origin and historical context of the concept. Then we discuss how the British colonial government introduced the concept in India. First they introduce the concept of "foreigner" in mid 19th century, which remains on the law code of colonial India for entire colonial period. Then during the two World Wars they introduce the concept of "enemy agent." After independence in 1947, Pakistan adopts the colonial legal code and along with it these concepts.

Genealogy of the Concept of Enemy Alien

a) The Great War and Enemy Aliens

Toward the turn of 19th century, in the UK as well as in Europe and the US, it had become a widely accepted opinion of international law that the state possessed the sovereign right to expel aliens from its territories. In this regard judges often made references to Vattel and Blackstone.ⁱ In the exercise of this sovereign right a state could also arrest aliens or prescribe a specific route of exit. However, detaining an alien or putting him/her to any other inconvenience or loss beyond what was inevitable to the fact of expulsion was often protested and could make a state liable at international law. However, alien merchants, on the account of Blackstone, enjoyed express protection of Magna Carta in England.ⁱⁱ

With the outbreak of WWI the legal personal status of aliens suffered a major setback. The emergency laws prescribed in the Defence of the Realm Act, DORA, (1914-1915) and the Defence of the Realm Regulations,

DORA, (1914-1918) virtually replaced the rule of Common Law and International Law. The DORA, 1914, authorized trial of British subjects and aliens by martial courts. This authorization also resulted in the materialization of the possibility that was once latent in the mutiny acts of 17th century, and that was once heatedly debated in the Jamaica Rebellion Case, 1865. Due to severe public criticism, an amendment was made to the DORA on March 16, 1915, to substitute martial courts with civil courts and trials by jury. The amendment gave British subjects the right to trial by civil courts for offences against the regulations, except in times of invasion or when government had declared a special emergency. But the amendment excluded aliens from having this right to trial by civil courts and jury.ⁱⁱⁱ Furthermore, because aliens hadn't had the right to trial by civil courts, they were neither entitled to a notice in writing of the nature of charge(s) against them after arrest nor a notice in writing of their rights under the Act.^{iv} Interestingly, the amendment provided the right to trial to British women married to aliens (Section 8). However, if a British woman married an alien she could risk losing her nationality under the British Nationality and Status of aliens Act, 1914.^v The March 1915 amendment to DORA was clearly a law that drew the legally consequential line between subjects and aliens, enacting the *summa divisio* in the personal legal status.

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

Apart from the restrictions imposed by the DORA, the Alien Restriction Act, 1914, made it mandatory for all aliens to register with the police. This mandatory provision outlived the war with the passage of the Alien Restriction (Amendment) Act, 1919. These Acts also directed courts not to entertain doubts regarding government's power to deport. In other words, the government could issue orders to deport an alien at any time, and could also restrict any areas in which he/she could live. The primary aim of the former Act was to target the 'enemy aliens' resident in Britain. It restricted

their employment rights, especially those of foreign seamen working on British ships. The act also made illegal for aliens to promote industrial action. It also targeted aliens who could be categorized as criminals, paupers, and ‘undesirables’. Moreover, from 1915 to 1924 the government regularly carried out census of aliens, and prepared lists of potential alien enemies. Separate detention centers were put up for (enemy) aliens, thus splitting the detention system from judicial system. Moreover, the war also necessitated making the policy of transferring aliens to dominions and colonies, thus creating the raw basis of rendition.

b) Alien Enemies versus Alien Friends

In the United States a century-old debate on the rights of aliens comes to an end by the WWI. The debate began with the Sedition and Alien Acts, 1798, and revolved around the question whether or not aliens enjoyed protections and rights under the constitution. Although the debate mostly affected the rights of white European aliens, it was however significant as a test of the scope of American constitutionalism. The Federalists took the position that aliens were not party to the compact (i.e., the constitution) and therefore they could not claim rights or protections under it. They emphasized that aliens were subject of the law of nations, rather than that of the municipal law. On the other hand, Republicans took the position that constitution was fundamentally a law, which subjected everyone under its command, and therefore guaranteed equal protection and rights to “persons” and not just to citizens.^{vi}

While this debate went on through the course of 19th century, many individual states accorded rights to *alien friends* under their constitutions, including the right to political suffrage. The Supreme Court also accepted a degree of formal juridical equality of citizens and aliens in normal times to hear the justiciable claims of aliens. For instance, the Court observed that aliens were under the sovereign’s protection while within the territory and inasmuch as they obey the laws (*Carlisle v. United States*, 1873). Toward the end of the century as the demand for immigrants plummeted, feelings of ambivalence and then hostility in American began to emerge. Asians and blacks were already facing discrimination, and then European aliens also lost their privileged position.

By the end of the WWI began “the rabidly anti-alien decade of the 1920s.”^{vii} States that were hitherto vying for immigrant-alien, began to develop mistrust of them. State legislatures introduced legislations placing increased restrictions on them. The Court also yielded to legislative

judgment that aliens could not be trusted. Different legislatures thus barred aliens from certain occupations, activities, and rights. For instance, they were barred from owning billiard halls in name of the public good (*Clarke v. Deckebach*, 1927), owning rifles and shotguns to preserve wildlife (*Patsone v. Pennsylvania*, 1914), and owning land to benefit citizens (*Terrace v. Thompson*, 1927). The Court accepted the political argument that the alien lacked allegiance to the state, which made him untrustworthy, and therefore state's discrimination against him was thought legitimate.

Supreme Court's response to federal and state legislation at outset of 20th century, according to one insightful observer, was shaped by the concern for balancing the fear of the other with the fear of governmental tyranny.

Aliens were understood to present a direct threat to the continued existence and security of the nation. Hence when the Court perceived the threat to citizens' liberty posed by aliens to be greater than that posed by government—as it did in the great majority of cases—it would allow the government to regulate. Only when the Court perceived the threat to liberty posed by governmental action to be greater than the threat posed by aliens would it intervene and strike down the regulation at issue.^{viii}

Later in *Eisentrager*, 1946, the Supreme Court held that alien enemies do not have the right to *habeas corpus*. They were treated as bearers of minimal rights. The Court also quoted Blackstone: "At common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war'". The Court quoted cases from the War of 1812 and argued that in the early 19th century case law it was an accepted principle that the "resident enemy alien [was] constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exist[ed]".^{ix}

c) The Great War and Enemy Aliens in Colonial India

By mid-nineteenth century, the British colonial government was engaged in small wars on different fronts, and a Great Game on the northwestern front. Hence, in order to establish effective control, the colonial government thought to territorially delimit the Indian state and to give formal legal identity to its subjects. Foreign Department files from that time provide cogent accounts of itinerant groups, bands of depredators, marauding gangs, religious adventurers, wandering nomads, and various other types of aliens. These aliens the colonial government said entertained "some ill-grounded idea of the defenceless state of our Bombay possessions."^x Accordingly, laws were passed in 1857, 1862, and eventually a comprehensive Foreigners Act in 1864 to check mobility of aliens.

Let us highlight certain provisions of the Foreigners Act 1864 to understand the initiation of legal control system of aliens. First, the act provided that anyone who was not a natural born subject of Her Majesty or a native of British India would be considered as a foreigner. This provision excluded those Indians living in princely states, autonomous or tribal territories, and border territories with neighboring states. Second, whether or not a person was a foreigner the burden of proof (of his identity) was on that person. Third, in order to ensure “better government” the act aimed at “preventing foreigners from residing, sojourning, and passing through or traveling in British India without consent of the Government.” It should be noted that apart from this law foreigners were already subject to the penal code 1860 for any crime they committed. So the purpose of the act was not simply to aim to stop crimes, but also to place a check on the free movement. Accordingly, foreigners were required to register upon arrival. This included informing their name, place of arrival and destination, date of arrival, and the object of pursuit. Moreover, the act provided for surveillance of their movement: “foreigners could be placed under the surveillance of the Police so long as the peace and security of British India demanded.” Fourth, the act gave the Governor General and all local governments the power to issue orders in writing asking any foreigner to leave from any British territory and while leaving take a prescribed route. Should a foreigner violate an order or any provision of the act, he could be arrested without a warrant and placed under safe custody, which could extend indefinitely. His release would depend upon satisfaction of the government as to the “conditions of peace and security.” However, the act provided that the person was allowed to obtain a bail, and that he was to be “put to as little inconvenience as possible during detention.” Sixth, if anyone obstructed an officer from performing his duty under the act, he could be punished with imprisonment and fine. It is worth noticing that the act did not include an indemnity clause, which had provided indemnity to actions of the police or administration. The act also did not involve foreigners already living in India.

Even though this act--along with other laws relating to vagrancy and census initiated the legal *divisio personarum* between subjects and aliens, it is not until the WWI and its aftermath that the personal legal status of aliens begin to drastically change.^{xi} The Defence of India Act and Rules 1915, which curtailed several freedoms including the freedom of movement, applied both to subjects and aliens. However, the war put aliens on a greater level of disadvantage. All aliens were suspected enemy aliens unless proved otherwise. Many European enemy aliens were transferred to

India and placed in camps. Toward the end of the war the Government of India Act 1919 transferred the power of dealing with matters relating to aliens to the central government. Next year the Passport Act was passed, which placed new set of regulatory rules on the entry and movement of aliens in India. Because passport was a new requirement, and many countries hadn't developed the system then or that many aliens were not aware of what it was, they were left at the mercy of discretionary powers of the colonial government. On the other hand, the passport requirement also meant that any British Indian subject wishing to travel abroad would also need a passport and hence the consent of the government. The act also gave powers to police officers above the rank of sub-inspector to make arrests without warrant of person violating any provision of the act.

In the aftermath of WWI, three Imperial Conferences (1918, 1921, and 1923) took place. In these conferences the power of the state to exclude aliens from entering, traveling and residing was accepted without any reservations from participants, which included Indian members. In fact, in January 1920 the government of India decided to completely bar the entry of enemy aliens for a period of five years after the conclusion of peace. Thus the Conference members ignored to see that it was the Imperial war that had created and/or exacerbated the category of aliens (which then included enemy aliens, refugees, stateless people, and asylum seekers) and that at the end of the war the government was restricting, oppressing and humiliating them.

The next round of laws dealing with restrictions on aliens started around WWII. In April 1939, months before the outbreak of the war, the Registration of Foreigners Act was introduced. There was some debate in the legislative assembly, especially on the question of who was to be considered an alien. Some members complained that the government previously used the 1864 Act to exclude native Indians of princely states and autonomous and border territories when they involved in civil resistance movements. The government, heeding to these concerns, explained that people domiciled in India, including the princely states and other territories, and those in the UK would not be excluded. However, that the subjects of other British colonies would be considered foreigners. The punishment for contravening the act was increased from two months to one year. Surveillance of foreigners was retained (from 1864 Act), and foreigners were to report both their arrival and departure, as well as carry with them their proof of identity all the time.

As the WWII began, the government once again introduced Defence of India Act and Rules, 1939. However, this time a stricter control system was enacted. Accordingly, a foreigner could neither enter nor leave the country without permission, and the government could also place a complete ban on entry and departure of foreigners. It could order to procure photographs, thumb impressions, and specimen of handwritings. A foreigner could not only be detained in safe custody, but could also be replaced to prescribed areas and makeshift camps. The term of imprisonment for contravening the orders was increased to five years. The officials were given discretionary powers to reject the object of pursuit or reasons of entering/traveling and if already present the reasons to extend his stay. Just as these rules were set up for the war emergency, at the end of war the-now-nationalist colonial legislature appropriated them into a permanent peacetime law—the Foreigners Act 1946.

On November 13 Sardar Vallabhai Patel introduced the bill for this Act. He argued that the 1939 Act needed a supplemental and more robust act. He proposed to repeal the 1864 Act on the reason that it was “used or abused for treating Indians as foreigners in India.” However, he had designed the bill on the pattern of 1864 Act, and had added provisions from certain war time laws, especially the Defence of India Act and Rules 1939, and Foreigners Act 1940. The new act provided that a foreigner was required to stay in a prescribed area with “restrictions on his movement.” He could be required to submit himself to medical tests, prohibited from associating with any prescribed group of people and/or activities, and/or carrying any items. He could be detained and those wishing to access him could also be turned away. If he was ordered to remove himself from any place or the country, then he was to bear the cost of it. Government could control and even shut down places frequented by foreigners. Regarding the identity of a foreigner, the act added a new provision. In case the identity of a foreigner was not known or contradictory, the government would decide on his identity/nationality. Finally, the act gave indemnity to the acts of the police and officials: “No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act” (Article, 15).

Apart from Foreigners Acts, there was another stringent law enforced during WWII called the Enemy Agents Ordinance 1943. The Ordinance provided severe punishment, including that of the death penalty, for activities relating to waging of war, assisting enemy, and causing disaffection. This ordinance was severely derogatory to the Common Law

justice. Special tribunals were set up under the Ordinance that clearly demonstrated the derogation of (the British claims of) justice. Under it a special tribunal consisted of one judge, who was appointed by the government. He was to be a Session Judge or an Assistant Session Judge. The government not only determined the time and place of sitting, but also could transfer cases from one special judge to another. On appeal against the decision of a special court, the case was to be reviewed by another special judge, who was chosen from the judges of a high court. The decision of the appeals special judge was final. The higher courts were barred from exercising their administrative authority to transfer a case from a special court to an ordinary court. The ordinance further provided that an accused had the right to be defended by a legal pleader, but that "such pleader shall be a person whose name is entered in a list prepared in this behalf by the Government or who is otherwise approved by the Government." Similarly, the accused was given the right to receive a copy of decision and other documents relating to the case, but he was supposed to return them within ten days after the end of proceedings, and must not disclose information to anyone regarding the trial. After independence, Pakistan adopted this Ordinance, and interestingly its special procedure also made its way into the Army Act 1952.

The adoption of these two laws provided the basis, the local one, for the concept of enemy alien. However, the term enemy alien was not used or at least it did not become legally consequential until it was introduced in the Article 10 of the constitution (1973). But there in the constitution it remained under-defined. It primarily denoted a potential check on fundamental rights of aliens and other individuals including citizens who could be characterized as enemy aliens (or in other words, agents of the enemy). Its early scope of subjectivity—persons who could be its subjects—was generally understood in terms of enmity with the neighboring India. It is only with the recent War on Terror that its scope has widened to cover not only individuals of other states but also country's own citizens.

Conclusion

By the turn of 19th century, the political view that aliens are unwanted and dangerous persons begin to strengthen in the UK. In the US, for long time since the country's independence, the concept of alien friend rivaled the concept of alien enemy. However, by WWI both in the UK and the US the concept of alien enemy or enemy alien, often used alternatively, become

one of the central concerns of defence laws and regulations. In colonial India the concept of foreigners is introduced around the same time as in the UK in mid-nineteenth century. It is introduced in the context of small wars on Indian borders, as well as the Great Game. The Foreigners Act 1864 remained in force until independence. However, during WWI the British colonial administration added more laws and regulations relating to placing restriction on aliens. Then during WWII similar laws and regulations were enforced. Eventually, the new Indian Congressional leadership drafted a law—the Foreigners Act 1946—which was later adopted by both Pakistan and India, and it remains in force to this day. Apart from this act, the two independent states adopted the Enemy Agents Ordinance, 1943. From these laws the concept of foreigner or alien developed, and eventually took new form of *enemy alien* in the 1973 constitution of Pakistan. Recently as the government decided to make laws relating to enemy aliens, the availability of the concept in the constitution provided the fundamental legal ground. In our next essay, we aim to dig up this more recent history of the concept, as well as we debate the various provisions of the two ordinances (PPO, 2013/2014) and the act (PPA 2014).

Endnotes

ⁱ In a Canadian appeal to the Privy council, Lord Atkinson invoked Vattel to explain that the state could exercise absolute and exclusive power over aliens: “One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interest.” Lord Atkinson quoted in Lord McNair and A. D. Watts, *The Legal Effects of War* (Cambridge: Cambridge University Press, 1966), 72. Blackstone referring in general to strangers had earlier written: “for so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king’s protection; though liable to be sent home whenever the king sees the occasion.” Commentaries (1765) I, 259-260.

ⁱⁱ Magna Carta, chapter 41, says: “All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the

ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.”

ⁱⁱⁱ 5 Geo. V, chapters 28 & 34.

^{iv} 5 Geo. V, chapter 34.

^v This provision was a reenactment of Naturalization Act, 1870. Also see, *Fassbinder v. Attorney General*, 1922. The provision was amended in 1933. The new provision said that if a British woman subject acquired her husband’s nationality or declared alienage only then she would lose her British nationality. However, it is not until 1948 that women in the UK were granted their own right to nationality regardless of their marital status.

^{vi} For a detailed analysis of the views of the two parties, see Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (New Jersey: Princeton University Press, 2010).

^{vii} Leonard Dinnerstein, “The Supreme Court and the Rights of Aliens,” *This Constitution* Fall 1985, no. 8: 25–35.

^{viii} The Harvard Law Review Association, “Developments in the Law: Immigration Policy and the Rights of Aliens” 96, no. 6 (April 1983): 1301.

^{ix} *Johnson v. Eisentrager* 339 U.S. 763 (1950), accessed July 27, 2015.

^x Foreign Department Files, Miscellaneous, Vol. 331, National Archives of India. Also See, Paula Banerjee, *Borders, Histories, Existences: Gender and Beyond* (New Dehli: Sage Publications India Pvt Ltd, 2010) pp. 11, 35.

^{xi} According to Lord McNair and Watts there was hardly any distinction between subjects and aliens in the British Empire prior to WWI. C.B.E. Lord McNair and A.D. Watts, *The Legal Effects of War* (Cambridge: Cambridge University Press, 1966). But this does not mean that there was not legal distinction, or that the Empire did not want one, but that the change that occurred by WWI made the previous change seem negligible.

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