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Actions (in Aid of Civil Power) Regulation, 2011: A Critical Analysis

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Presentation

Introduction

The Provincially Administered Tribal Areas (PATA) of the Khyber Pukhtunkhwa province of Pakistan comprises about one-third area of the province. This area has held distinct constitutional status and sets of laws and judicial systems that have been different from the rest of the country.

In 1989, a movement began in Dir District. Its slogan and demand was implementation of Islamic laws in respect of the judicial system in Malakand Division. An organization was formed and Sufi Muhammad was made its head. The movement became famous under the banner Tahrik Nifaz-e-Shariat-e-Muhammadi (TNSM) and spread to Swat and other areas of the Malakand Division. It led to the crises of 1994 in Swat and then as one of its offshoots to the crises of 2007–2009.

The Background Scenario

Overtly Fazlullah's (who belong to Swat) movement or struggle started in 2005 with his FM radio broadcasts and sermons. It got prominence by 2006 and took a new turn by mid-2007. The first contingent of the army was deployed in Swat in July 2007, but no action was taken till late October 2007. The then caretaker provincial government, headed by Shamsul Mulk, convened a meeting at Peshawar which was attended by some selected persons from Swat. The government termed it a meeting of the Swat *jargah* with the chief minister and claimed that the *jargah* members requested for an operation against Fazlullah's group.

After this, the security forces started armed action in October 2007, called Operation Rah-e-Haq, which took a sort of full action in November 2007. The security forces used mortars, artillery and gunship helicopters, which created great havoc, losses

of property and human life and displacement of a large number of people. In January 2008, the armed forces claimed success and restoring government's writ in Swat.

In February 2008 general elections were held and the Awami National Party (ANP) bagged all the provincial assembly seats from Swat and emerged the largest party in the provincial legislature. As the election slogan of the ANP was restoring peace in the province, it entered into peace agreement with TNSM in April 2008 and with Fazlullah's Swat Taliban in May 2008. These deals however did not last long and both the sides blamed each other for not honouring the terms of the agreements.

Resultantly, hostilities renewed and in July 2008 Phase Second of the Operation was started. The miseries of the people increased as a result of both the prolonged operation and the use of indiscriminate force including mortars and gunship helicopters, artillery and jet areoplanes, and curfew; and also by increasing and expanding the Taliban's power and writ. By the start of 2009, the Armed Forces claimed starting Phase Three of the Operation but to no avail. At last a new peace deal was made in mid-February 2009 with the TNSM which led to a cease fire.

Although overtly a peace deal made and cease fire was effected, on the ground both the Taliban and the Armed Forces were flexing their muscles for another round. The peace deal with the TNSM (also the deals of 2008 both with TNSM and Swat Taliban) was made by members of the provincial government which was practically handicapped in complying with the terms of the deal and the federal government/President of Pakistan were using dilly-dally tactics. Hence both the TNSM and the Swat Taliban accused the government of not complying with the peace deal; and the Taliban made inroads into the neighbouring districts of Dir and Buner.

The government termed the Taliban's inroads violation of the peace deal and was also seen a prelude towards taking over Islamabad, the capital of the country. Different circles also launched an intense campaign through the media. Consequently, a fresh round of armed action, termed Operation Rah-e-Rast, started in April 2009 but officially announced later on 7 May 2009.

This operation was more intense both in tenor and nature and hence greater number of civilians—hundreds thousands of people—were displaced compared to the

previous ones. By the end of June 2009 the security forces claimed success and in the second half of July the internally displaced persons (IDPs) were allowed to come back.

Why the Regulation?

As is evident from the preceding narrative, the crises that started in 2007 led to a series of military operations during 2007–2009 which caused great havoc, forced displacement of civilians, destruction of properties and infrastructure; and also loss of thousands of civilian lives. And the security forces occupied public and private properties in huge number. Besides, per government and security forces' claims, thousands of the Taliban were caught and thousands surrendered.

As the Armed Forces' actions underwent in an area that is a Provincially Administered Tribal Area under the constitution of the country, the central and provincial legislatures and the governments possess no power to make the procedures and rules in this connection, a regulation was required under article 247 of the constitution. Therefore, a regulation titled "Actions (in Aid of Civil Power) Regulation, 2011" was promulgated on 27 June 2011, in order to provide legal protection to the Armed Forces' actions and operations; occupation of the public and private properties; and as to how the imprisoned and surrendered Taliban or the people interned are to be dealt with.

As the Armed Forces can be called for action in aid of civil power under article 245(1) of the Constitution of Islamic Republic of Pakistan by the federal government, there was no legal cover of deploying the Armed Forces into Swat in July 2007 and then in October-November 2007 on the ground of the request of the provincial government and also embarking upon a military operation in October 2007 on the plea or ground that a *jargah* from Swat requested for this. So, to fill this legal lacuna, section 3(2), in Chapter-II, of the Regulation enunciates: "Any existing direction already issued for requisition of the Armed Forces shall be deemed to have validly issued under this Regulation and the Armed Forces already requisitioned shall conduct themselves in accordance with the provisions of this Regulation."

The Analysis

While defining “calling-in-aid of civil power”, it has been stated in the regulation that it “means a direction for the requisition of the Armed Forces made by the Federal Government under Article 245 of the Constitution of Islamic Republic of Pakistan”. Whereas, to validate the actions in aid of civil power article 245(1) of the constitution states: “The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.”

In defining “action in aid of civil power” it has been stated that it “means series of measures that involve the mobilization of Armed Forces, in aid of civil power or their requisition by the Federal Government, including measures such as armed action, mobilization, stationing etc., till such time they are withdrawn by the written order of the Federal Government”.

The regulation authorizes the authorities to “internment” of persons in the “defined area” for which purpose certain terms has also been elucidated. For example the definition of “internment”, “Interning Authority”, “internment center”, “internment procedure”, “Orders of Internment”, “miscreant”, and “Register of Internees”.

It also has been stated in the definitions that “internment means restricting any person to a defined premises during the period the counter-insurgency operation is ongoing in order to incapacitate him from committing any offence or further offences under this Regulation or any other law, for securing peace in the defined area”.

It is evident from the text of Chapter-III of the regulation that even at the time of the use of active force it was mandatory upon the Armed Forces to ensure minimum collateral damages, but the ground reality is a testimony that on the whole the laid down principles were not adhered to. And after the hot time of the operation, too not only the properties and residences of the Taliban suspects were destroyed but also of their relatives and nears and dears; and also of the civilians at large. Besides, relatives of the Taliban suspects were also incarcerated so as to pressurize them to surrender their near and dears wanted to the armed forces in connections with the alleged militant activities or supporting the Taliban etc. Moreover, a number of the Taliban families were exiled from

Swat and were put in a camp near Palai in the Malakand Protected Area (commonly called Malakand Agency) for the purpose just mentioned.

The security forces has grounds for justifying the incarceration of the Taliban's relatives, exiling their families and destroying their properties, viz. the plea of collective responsibility and the use of *jargahs* and as stated, to Anatol Lieven, by Major Tahir: "We have demolished more than 400 houses belonging to Taleban [Taliban] members. Destroying houses in this way is an old punishment among Pashtuns." And also because "seeing their homes demolished" the "local people" may be "encouraged" as it was to give the message that this time the Armed Forces "are really serious about fighting the Taleban". However, none of the mentioned grounds have been authorized by the regulation or by any other law applicable to the area. Such punishments were old practice in the Pukhtun tribal society and social system, but Swat rather PATA, on the whole, never remains that sort of tribal society.

Chapter-VI, titled "HUMAN RIGHTS AND OVERSIGHT", of the regulation has elucidated the steps required in respect of the human rights and that an Oversight Board shall be established for each internment centre. The sections and sub-sections of the Chapter are clear as to how the persons interned under the regulation are to be treated and dealt with; what is the timeframe of the preparation of a report about them by the Oversight Board; and that the persons interned shall not be subjected to and treated in degrading or in-dignified or inhuman or torturous manner. But, although there are no documentary evidences, the circumstantial evidences and the narratives of those got released testify, on the whole, non-compliance of the aforesaid in letter and spirit. It is worth-mentioning that those got released talks of inhuman, torturous and degrading treatment at internment centres, when they talk in private or secrecy, but not in open because of the fear of re-internment and reprisal by the Armed Forces.

Section 9(7) of the regulation states: "The Provincial Government shall prescribe internment procedure." Whereas, in the definitions it has been stated that " 'internment procedures' means procedures to be prescribed by the Provincial Government in respect of the well being, food, health, treatment, religious freedom, visitation by family, counseling and psychological treatment etc, of the miscreants interned".

It however is observed that most of the points mentioned in the definition of the “internment procedures” are not followed, but accordance one source these are not prescribed by the provincial government at all. For example complaints of inadequate food and health facilities are observed; and the facility of “visitation by family” do not exist. Therefore, families of the interned persons don’t know whether they are alive, and if yes where they are and in what condition? This not only creates continuous mental and psychological problems and anxiety for the last few years for the families concerned but also the anomaly and complaint of the missing persons; and hence applications in the higher courts by some of the aggrieved families and agitations, even by females, as well.

An inherent weakness or flaw in the regulation is the date from which it has been stated to “be deemed to have taken effect”, viz. “from 1st February, 2008”. In fact the Armed Forces started the operation in Swat in October 2007 but the regulation has not provided legal cover to what has been done from October 2007 till 31 January 2008. Therefore, the destruction wrought, the orders issued to the people to vacate the villages, occupation of both public and private buildings and residences, people interned and so forth during the said period have not been provided legal cover or backing under article 245(2) of the constitution.

The punishment and prosecution of the accused persons interned under the regulation also seems un-judicious. For example section 17(1) state: “Whosoever commits an offence under this Regulation shall be punished with death or imprisonment for life or imprisonment up to ten years; and may also be liable to fine. The convict shall also be liable to forfeiture of his property.” Whereas, section 18(1) state: “Whosoever commits or attempts to commit any offence under this Regulation shall be proceeded against under the Code of Criminal Procedures, 1898 (Act IV of 1898) or the Anti-Terrorism Act, 1997 (XXVII of 1997), or any applicable law, as the case may be, and shall be handed over to the prosecuting or investigating agency concerned for effecting formal arrest *only after his order of internment has been withdrawn* [italics mine].” The anomalous point in the aforesaid is that a great number of persons have been interned under the regulation from the last years but have not been handed over to a “prosecuting or investigating agency concerned” so far, by withdrawing their orders of internments, to be trialed under the law in the courts nor is this in sight in the near future.

The main finding of this paper is that the “Actions (in Aid of Civil Power) Regulation, 2011” has not been followed in letter and spirit in its entirety by the quarters concerned, which has created and creates misunderstanding, mistrust, abhorrence, and resentment in greater circle of the society especially against the Armed Forces. This, in turn, is likely to ignite and spark unrest, once more, sooner or later, in which case there is likely to be violent reaction against the armed forces as has been observed in respect of the police as a result of the police degrading and abusive behaviour and treatment with the TNSM’s activists after the rising of 1994. Therefore, the main recommendation is that the regulation may be followed in letter and spirit, in its entirety, by the federal and provincial governments and the Armed Forces.

It is to be mentioned here that there are a number of black spots in this law or regulation enacted for PATA, from justice, human rights and legal perspectives but that have not been dealt with in this presentation. Here only the regulation and its implementation position have been analyzed so that the anomalies are removed and the grievances redressed. The law of the country and the law under discussion is required to be uphold and followed in letter and spirit.