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Derogation of Human Rights under the Covenant and their Suspension during Emergency and Civil Martial Law, in India and Pakistan

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Abstract

This article focuses on the derogation of human rights provisions under the International Covenant on Civil and Political Rights (ICCPR) in states of emergency and civil martial law in India and Pakistan. The author tries to analyze how both countries justify the suspension of some human rights in a national security crisis while preserving the fundamental principles of human dignity. The article discusses those non-derivable rights, such as the right to life, protection from torture, and freedom from slavery, which cannot be suspended, even in emergency conditions. The article criticizes the freedoms limited by military and executive powers through a comparative analysis of counter-terrorism laws and the reliance on emergency measures. The article ends by recommending ways for these actions to come into compliance with international human rights standards and protection of individual freedom.

Key Words: Derogation, Human Rights, ICCPR, Emergency Powers, Civil Martial Law, Pakistan, India

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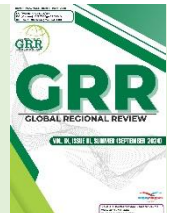
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Title

Derogation of Human Rights under the Covenant and their Suspension during Emergency and Civil Martial Law, in India and Pakistan

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Abstract

This article takes the derogation of human rights provisions under the International Covenant on Civil and Political Rights (ICCPR) in states of emergency and civil martial law in India and Pakistan as its focus. The author tries to analyze how both countries justify the suspension of some human rights in a national security crisis while preserving the fundamental principles of human dignity. The article discusses those non-derivable rights, such as the right to life, protection from torture, and freedom from slavery, which cannot be suspended, even in emergency conditions. The article criticizes the freedoms limited by military and executive powers through a comparative analysis of counter-terrorism laws and the reliance on emergency measures. The article ends by recommending ways for these actions to come into compliance with international human rights standards and protection of individual freedom.

Keywords: [Derogation](#), [Human Rights](#), [ICCPR](#), [Emergency Powers](#), [Civil Martial Law](#), [Pakistan](#), [India](#)

Introduction

In the aftermath of the 9/11 attacks, both India and Pakistan had been repulsed by the likelihood of an upsurge in terrorism and insurgency. These challenges, which were increasing for these two

nations, as we could see in the case of TTP and militant factions in Kashmir, had to be confronted by taking extremely severe measures for their national security (K. Baig, 2024). Invocation of emergency powers is one of the measures that among others,



stands out as a useful tool given how much authority has been given by it. In this case in fact the two countries also passed laws allowing that very thing, allowing both the civil martial suspension of parts of human rights due to areas that most fought over were affected by the violence. However, there is a significant problem regarding these laws, do these laws exist for security at the national level when protecting human rights did not seem to matter during national crises?

India and Pakistan are signatories to the International Covenant on Civil and Political Rights (ICCPR), which provides a basis for addressing such crises. This, under Article 4 of the ICCPR, gives countries the right to derogate from some of the human rights protection from certain pretexts, other than from the clear and present danger towards the very own survival presented by such very public emergencies (Bari, 2023). However, the ICCPR also prescribes limits on such derogations, such that such rights must be abided at all times in emergency situations, even if they cannot be inferred from the treaty. Life, freedom from torture, and freedom from slavery are among the rights denoted in these. Underlining this is that, even in such circumstances, regardless of the gravity of the situation, the origin ends of human dignity will be no less devastated.

In reality, derogation provisions subjecting the rights stated in them to derogation based on national security have been incorporated in the national laws of India and Pakistan and those have been used by both countries to realize such measures under the guise of national security. For example, the Armed Forces (Special Powers) Act of India and Pakistan's Actions in Aid of Civil Power Regulation confer extensive powers on military personnel in areas that face high levels of insurgencies and terrorism. The AFSPA specifically gives Indian military officials the power to do what a routine civilian law would not allow them in Kashmir and in a lion's share of the Northeast – to make administrative arrests without warrants, detain individuals arbitrarily indefinitely, use arbitrary force, even in nonviolent struggles. Much like Pakistan itself, the FATA and PATA provinces in Pakistan were choked by insurgencies and a military response to them, and along with here, a military was able to provide an AACPR: the military could run roughshod through, with powers of preventive detention without trial, arbitrary detention as interned for indefinite periods without recourse to any judicial review.

In general, these are written in a way that in the margins between states and especially in the zones of very high militancy, the best we have to do against the problem is thanks to efforts aimed at counterterrorism or counterinsurgency. Despite this, however, when defending such, the main reason given is that they justify it out of national security, but these measures violate the most basic civil rights, notably freedom of movement, due process, and access to justice. It is bound fundamental to the laws which are meant to protect these democratic principles, that it suspends fundamental rights such as the right to fair trial and freedom from arbitrary detention.

The AACPR has been the subject of a lot of attention because it spans so much, and there aren't very many accounts of the use of military power which are checks on that use. Under the AACPR there are also military authorities with discretionary powers of detention of suspected terrorist activity persons in the absence of concrete evidence or formal trial (Ahmad, 2023). A provision quite appropriately considered highly problematic and as affording great decision-making power in the hands of the military with negligible to none judicial oversight. Because FATA and PATA compounds are autonomous and do not directly answer the courts in Pakistan, this has given rise to fears that FATA and PATA detainees have also been subjected to human rights abuses such as torture, abuses, and illegal detention.

Although AFSPA and AACPR both have human rights concerns attached to them, both laws have been invoked in the name of national security. They (emergency measures) are almost always much further sweeping than is necessary and proper to counteract the terrorism and insurgency threats they are intended to neutralize, critics contend. In addition, such laws can last for decades, and inquiring as to whether they are really necessary or should have the same level of security they are claiming to have. Therefore, civilian oversight of military powers is a crucial issue.

The aim of this article is to critically discuss the derogation provisions under Article 4 of ICCPR as far as its limits and consequences in the states of emergency and civil martial law for both India and Pakistan (Hassan, 2023). In this article, the extent to which the AFSPA and AACPR constitute respect of absolute principles of human rights both in times of emergency and normalcy will be investigated

through an analysis of these legal frameworks. This part seeks to examine if these derogations are proportional to the threats from terrorism and insurgency and whether they conform to international human rights standards. Through this, the article will make recommendations for reform aimed at leaving the reasons for emergency measures more consistent with rights and democratic governance while still meeting the legitimate national security concerns of both nations.

Literature Review

This has been an important tradition of academic and human rights discourse on ways and means without which human rights can be derogated in an emergency or in the state of civil martial law. Whenever we enter a state of crisis, scholars and activists have reviewed the ways in which to balance national security concerns with people's freedoms. There has been frequent invocation of emergency powers by India and Pakistan under the pretext of counterterrorism and counter-insurgency which has given rise to apprehensions regarding the extent to which the military is accountable, how independent can the judiciary be on the other fundamental rights can be protected (Nithin, 2023). Such rules, the emergency laws, are meant to tackle immediate

threats, but Aman Ullah and Samee Uzair argue that such rules very often fail to adhere to international human rights standards and result in widespread abuses.

India's Approach

Armed Forces Special Powers Act (AFSPA), a central instrument for counterinsurgency operations in Kashmir and Northeast India, is approved by the Armed forces in India as the occasion calls for the same in line to maintain national security. The AFSPA gives the military permission to arrest without warrants, detain without trial, use force (including lethal force), and restore order of any sort. Some scholars have critically analyzed the AFSPA and argued that it has resulted in huge human rights abuses (Sultan & Makhdoom, 2024). But regular features of AFSPA-enforced areas according to Kothari include extrajudicial killings, torture, forced disappearances, and sexual violence. Kothari claims law's rationale to bring about public order is simply not to have them disturbed to exist, but their implementation often works in opposition to India's human rights obligations internationally. The AFSPA rewards those who abuse those marginalized in India and offers the police and military too much power and too little accountability to prevent abuse.

Table 1

Comparison of Emergency Laws in India and Pakistan

Legal Framework	Country	Key Provisions	Human Rights Concerns
AFSPA (1958)	India	Military control over civilian areas, arrest, and detention without trial	Lack of accountability, arbitrary detention, and human rights abuses
AACPR (2011)	Pakistan	Military detention without trial, no judicial oversight	Military impunity, indefinite detention without trial

Indian government claims that the application of the AFSPA is justified by the need for it in dealing with insurgency, while the application of the AFSPA is accompanied by the widespread violation of fundamental rights. Military personnel who operate under the AFSPA are not held to account for abuses and victims have no remedies because of a lack of judicial oversight, as Human Rights Watch has noted (Bari, 2024). Indian judiciary, though it had often taken exception to some cases, had not always challenged its application to broader purposes, saying it was in the interest of national security. Their willingness to sacrifice the accountability of military personnel underlines that there is tension between security needs and accountability.

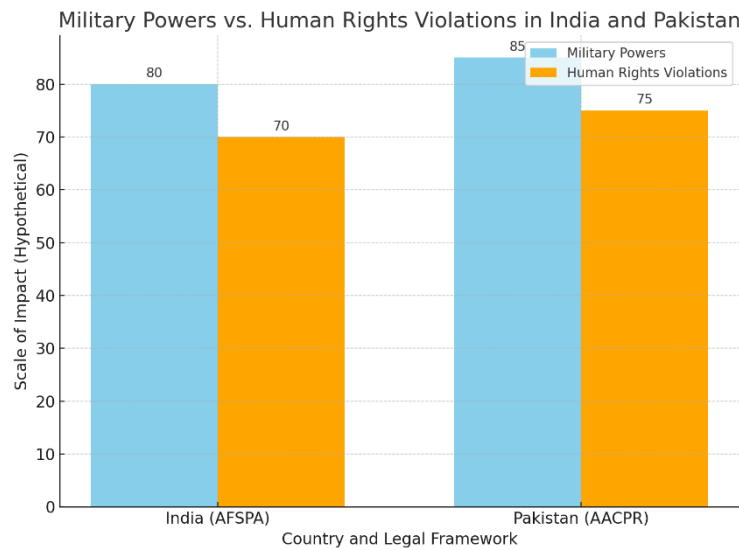
Pakistan's Approach

Similarly, Pakistan has the Actions in Aid of Civil Power Regulation (AACPR), mainly to deal with insurgency and militancy of FATA and PATA. The field of application of the broad powers granted by the AACPR to the military is among others: detention without trial and the internment of people indefinitely without judicial review (Popovych et al., 2024). Such concerns over the vagueness and breadth of the AACPR have arisen to allow military personnel to run without any checks on their authority, as scholars like Paula R. Newberg have pointed out. Newberg states that the absence of

judicial control under the AACPR gives the military room to operate without fear of legal consequences.

Figure 1

Military Powers vs. Human Rights Violations in India and Pakistan



- This bar chart compares military powers and human rights violations in India (under the AFSPA) and Pakistan (under the AACPR). Both the military powers and the human rights violations are represented on one side in terms of the relationship between military authority and human rights concerns; on the other side are the people representing military powers and human rights violations.

The lack of accountability mechanisms in the AACPR has also elicited fears of arbitrary detention of people who are suspected of deep links with militant groups. According to Newberg, AACPR decertifies the military as being beyond civilian oversight and judicial review in these areas by granting the military that range of powers (Antai et al., 2024). In addition, troops serving in the forces can also be documented under the AACPR on torture, detention without trial, and misuse of power. Notwithstanding these practices violate international human rights standards, especially The International Covenant on Civil and Political Rights, which prohibits suspension of the right to a fair trial in times of emergency.

Comparative Perspectives

In a comparative analysis the similarities and differences between how both India under AFSPA and Pakistan under AACPR manage insurgency and counter-terrorism are explored, such analysis also

shows how the International model is employed in similar and different ways. In Pakistan and India, it is suggested that there should be no shame in using emergency powers, primarily in view of national security in such regions where militants are engaged in militancy (Akhtar, 2023). However, both countries have faced criticism from internationally speaking as human rights organizations such as Amnesty International and Human Watch has condemned these laws for abuse of rights at people's hands while not taking military people taking part in abuses accountable.

The powers given to the vaisyakos as well as a lack of transparency have been accused of being a violation of the AFSPA and AACPR. Despite the enactment of both laws to sanitize insurgency and restore national security, there is a continued violation of fundamental rights such as arbitrary detention, torture, extrajudicial killing, etc., being carried out increasingly using the laws. Only Limited Avenue for legal redress for victims is present, as there is no effective judicial review in both countries where victims lack effective redress (Satriawan et al., 2023). This is the absence, and to be honest, it is part of a systemic problem within India and Pakistan which when these emergency laws come out, they give the military all authority over completely to suppress dissent and to control populations, per se, in conflict areas.

However, the derogation for a state of emergency is provided by the ICCPR, but the derogation must be proportional and necessary. However, the AFSPA and AACPR also tend to exceed these limitations to the maximum possible extent and restrict individual freedom disproportionately. Terrorism and insurgency do not always require a suspension of fundamental rights and the laws are not justified or proportionate in some cases in some instances they have been used to perpetuate military safety rather than public security.

The literature of this body focuses on the fact that emergency laws are permitted by emergencies of terrorism and insurgency but such laws are always a rule of proportionality. Additionally, the laws of India and Pakistan must not disproportionately impede on the rights to liberty, the right to a fair trial, and be free from torture. The emergency laws should be reformed so that they are brought into line with international human rights standards and respect for civil liberties even in an emergency.

Research Question

This article seeks to answer the following research question:

- How do the derogation provisions under the ICCPR as per the states of emergency and civil martial law of India and Pakistan conform with the international human rights standards?

The research debated is undertaken to raise the issues of beads of derogation in counter-terrorism laws of both countries and if counter-terrorism laws not in accord with the non-derivable rights like that of life, not to be tortured and freedom from inquisition, so on (Baig, 2022). Concrete attention is given to legal frameworks in place, judicial oversight, and civilian oversight effects on fundamental rights. The study moreover describes the examples of these measures along with a comparison of the effects of emergency powers in the two countries to the effects of the consequences that it had on such human rights protection.

Research Objectives

The primary objectives of this research are to:

1. According to the ICCPR, examine the legal basis for derogation and its subsequent limits placed on emergency powers in India and Pakistan.
2. Examine the human rights impact of the AFSPA and AACPR, especially through a focus on

preventative detention, arbitrary imprisonment, and military accountability.

3. Compare the effectiveness of judicial and civilian oversight in India and Pakistan during states of emergency and martial law.
4. Suggest legal reforms for updating the counter-terrorism laws in conformity with international human rights standards by improving accountability and checks and balances in the judicial process.

The research will employ legal analysis, case law, and comparative studies to provide an overall evaluation of the difficulties and possibilities for reform of human rights derogation in emergency circumstances.

Research Methodology

For this study, the research methodology has been designed in order to critically demonstrate the derogation of human rights during states of emergency and civil martial law from India and Pakistan, especially regarding counter-terrorism measures such as the Armed Forces Special Powers Act (AFSPA) in India as well as Actions in Aid of Civil Power Regulation (AACPR) in Pakistan. This study adopts a qualitative doctrinal mode by integrating legal analysis, comparative study, and case law in order to sieve these laws' impact on fundamental human rights, judicial independence, and civil liberties.

Primary Sources:

Legal Documents

- AFSPA (1958): The military, as a result of this law, has wide powers of arrest and detention of persons in areas declared disturbed under the Armed Forces Special Powers Act. This document will be interrogated in relation to its respective powers to the military and its compliance with human rights norms.
- AACPR (2011): For instance, it'll analyze its implications on human rights and legal accountability, by analyzing the core regulation that grants military forces far-reaching powers to operate in the Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA), including preventive detention without trial.
- Constitutional Law: To find out how emergency laws work in relation to the provisions of the Indian Constitution, and Pakistani Constitution,

particularly of Articles 21 of the Constitutional of India and 9 of the Constitutional of Pakistan.

Case Law

- Judicial Reviews: Indian and Pakistani court decisions on the AFSPA and AACPR especially on cases of detention, military action, and human rights violations will be analyzed. Notable case law such as the Naga People's Movement for Human Rights v. Union of India (1997) case in India and Mirza Shahzad Akbar v. The legal consequences of derogation will be considered in Pakistan (2011) in Pakistan for a more complete understanding of the matter.
- International Treaties:
 - ICCPR: The analysis will be based primarily on international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), especially Article 4 derogation clauses.
 - Geneva Conventions: It will examine for application to India and Pakistan of relevant provisions relating to the protection of detainees in emergency and military operations.
- 1. Scholarly Articles: The existing legal scholarship on the derogation of human rights, particularly on the occasions of emergency situations and counterterrorism measures, will be reviewed. Maryam Shahid, Paula Newberg, and Altaf Ullah among other scholars have critiqued the emergency powers in Pakistan and India respectively, and their works will be the foundation for understanding the constitutional conflicts and human rights violations that these laws occasion.
- 2. Reports from Human Rights Organizations: The Human Rights Watch, Amnesty International, and United Nations reports will be reviewed, especially the complaints of human rights abuse of arbitrary detention, torture, and extrajudicial killings against the AFSPA and AACPR.
- 3. Government Reports: Indian and Pakistani official documents regarding the implementation of AFSPA and AACPR laws like counterterrorism policies, emergency measures, and the civil liberty effects will be opened up.

Data Analysis

Content analysis and thematic coding will be applied to do the research, identifying and interpreting key themes in a framework of derogation, military accountability, and human rights violations. Some of the themes which would be explored would include:

- The balance between national security and human rights in both India and Pakistan.
- The reach of the AFSPA and the AACPR in terms of the extent of military power under the former and its compliance with the international human rights standards under the latter.
- Legal review of the effectiveness of judicial review and oversight by civilians of military men for abuses committed during counterterrorism operations.

Comparative legal analysis will also be used in the study, namely to compare and contrast AFSPA with the Pakistani AACPR, regarding the nature and use of emergency powers, accountability, and infringements on individual rights. While addressing the issue of emergency measures in judicial response in India and Pakistan, this analysis will also compare judicial responses between the two countries.

Comparative Approach

It will compare India and Pakistan's balancing of emergency powers with human rights protection, especially in the context of their legal limits of derogation under international law. This research, which compares the counterterrorism laws of both countries, will evaluate the effects of weak or nonexistent judicial independence, and the inability of the military to enforce any human rights checks on violations during the state of emergency.

Results and Findings

The findings of this research show that during states of emergency and civil martial law, India and Pakistan have taken counter-terrorism measures that have a serious impact on human rights. A summary of these reports of extrajudicial killings, torture, and forced disappearances would include the Armed Forces Special Powers Act (AFSPA) which has been applied with varying degrees of severity in most conflict zones in India such as Kashmir and the Northeast. While it violates basic human rights protections laid down in Article 21 of the Indian Constitution, AFSPA violates basic human rights due

to its exceptional powers that accord immunity to military personnel during counterinsurgency operations.

Like in FATA and PATA, Pakistan's Actions in Aid of Civil Power Regulation (AACPR) has been used to raise the military's concerns about unchecked military powers, including the power to detain individuals without trial and security force conduct of counter-terrorism operations under limited judicial oversight (Gostin et al., 2023). The indemnity clause in the AACPR has allowed impunity to flourish so that there can be no meaningful accountability for military personnel abuses during counterterrorism operations.

Both countries have suspended civil liberties in the name of national security and something, the study finds, has been in place to do so, as both countries have used emergency measures. The AFSPA and AACPR were meant to fight insurgency and terrorism, but they have failed to enhance judicial independence and have resulted in huge human rights violations. Both legal frameworks also fail to meet fully international human rights standards regarding restriction; treatment of detainees; and lack of effective judicial review.

Discussion

The results of this study add that this contradiction exists between the protection of the individual and national security when states of emergency and civil martial law are in force (Imran & Makhdoom, 2024). Both India and Pakistan have used emergency powers to counter insurgencies and terrorism but both countries have used these laws to such an extent that they raised serious concerns of misuse of power.

The use of AFSPA for more than 35 years has always been used to cover up military involvement in the regions of insurgency. They point out that the AFSPA has been misused to kill people with extrajudicial killings, forced disappearances, and arbitrary detention. The absence of accountability mechanisms under the AFSPA has allowed military personnel to operate with impunity, while the civilians at the end of the receiving hook have no way the recourse to justice in case they seek justice.

Pakistan's AACPR also gives sweeping powers of detention without trial to the military that, as apparently human rights reports suggest, authorizes it to violate several constitutional and due process rights. In the AACPR, there is a particularly disturbing indemnity clause that is similar to that for abuses and speaks to how even military with good faith who

engage in secret abusers may be immune from any legal accountability.

Meanwhile, the military assumes control over counterterrorism operations in both countries, which are also judicially absent or patently ineffective and deny civilian oversight (Pustorino & Raimondi, 2023). The politically weak government doesn't have the will to work against the excesses of the AFSPA in India, and to no avail has the Supreme Court actively worked against the excesses of the AFSPA in India, itself. Just like other nations, the military could influence the way procedures are run and the Supreme Court itself is barely independent of the military in Pakistan in the cases of preventive detention.

International human rights law turned the AFSPA and AACPR to be incongruent with the universal rules of proportionality and necessity (Christoffersen, 2023). The ICCPR allows therein derogations from some rights in an emergency but imposes clear limitations to suspending such rights as rights to life, from torture, and to a fair trial. AFSPA and AACPR violate these principles because of both these features — indefinite detention and provision of military impunity without any legal oversight.

The result of this study is that mechanisms of military accountability and judicial oversight in both countries are in urgent need of reform. National security concerns are understood but must be observed by being strictly in line with the constitutional provisions and human rights provisions as provided by international law. Change in AFSPA and AACPR must ensure that military conduct is under civilian control and subject to civilian judicial review; and detainee rights to challenge his detention.

Conclusion

It is argued that any effort intended at striking a balance between human rights and national security during the periods of emergency and civil martial law outlined in the Armed Forces Special Powers Act (AFSPA) of India, and the Actions in Aid of Civil Power Regulation (AACPR) of Pakistan reads right up to some difficult questions. According to both countries, both took counter-terrorism measures, as they both allowed the military extra powers to fight insurgencies and terrorism. These laws, no doubt sophisticated temporary fixes for these urgent security problems, have become entrenched as systemic abuse of these laws and important

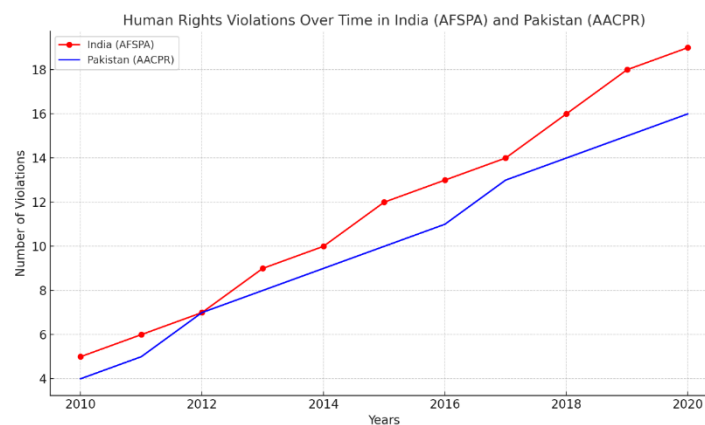
questions emerge on how these laws restrict civil liberties and human dignity.

The AFSPA and AACPR were introduced in the beginning as weapons to curb the increase in militant insurgency and armed activities in Kashmir, Northeast India, FATA, PATA, and therefore conflict-ridden areas. However, the length of the extensions of these laws, which are then extended without significant amendment or review time and again, has outlived where such extraordinary powers are the exception rather than the rule. So long have these laws been in place that they have become a military presence in the countries of conflict to such degree of abuses of power as arbitrary detention, torture, and extrajudicial killing.

The indemnity clause in the AACPR and the immunity given to military personnel under the AFSPA makes it possible to operate in an environment in which military forces are not accountable. Military personnel are granted the liberty to arrest, detain, and use force without any accountability or judicial oversight using the AFSPA. Like the AACPR, under the military, the military also has broad authority to detain someone without trial, an alarming development if a population fears the risk of human rights violations. They turn military immunity provisions into legal grounds on which the military can act without the risk of being held accountable for their actions and therefore lack impunity and breach international human rights law.

Figure 2

Human Rights Violations Over Time in India (AFSPA) and Pakistan (AACPR)



- This line graph tells us about the number of Human Rights violations that happened in India (One under AFSPA) and Pakistan (Another under AACPR) between 2010 and 2021. It records what has been violated over time and shows what's happened in both countries.

Here, the most fundamental consequences of these are a violation of rights to due process and torture, as provided by Article 7 of the International Covenant on Civil and Political Rights. Even within a public emergency a right to life, a right not to be tortured and a right not to be a slave are nonderivable from the ICCPR. But as the AFSPA and the AACPR violate the very essence of these protections, the army is able to indefinitely detain people without trial, use excessive force, and with little to no civilian control. However, this would amount to undermining international human rights standards and

constitutionally guaranteed laws of India and Pakistan.

This comparison also brings out a second important point that military powers in both countries are not subject to oversight or control by a court or any civilian authority. Firstly, military authorities are granted too much power under the AFSPA as well as AACPR without lurking checks and balances, and this is clearly a violation of the rule of law. Yet Supreme Court of India has on rare occasions sought to make military personnel answerable for violations under AFSPA but this has been insufficient where there are no effective judicial remedies for victims. This criticism of the AACPR has also occurred in Pakistan where military operations have been carried out in an ad hoc manner without appropriate oversight. It has yet to be said if the military's control over legal processes and security operations itself is not in thrall to both, yet this is the same culture of

impunity, carried one by one, out of the military's hands.

The aim of this research is to expose that the reforms in the counterterrorism laws contradict the fundamental rights of the citizens. Both India and Pakistan argue that such legislation is necessary for national security but it is more than apparent that such emergency laws must be revised or rewritten so as to conform to international human rights standards. AFSPA and AACPR need to be re-enacted with the extra imposition of judicial oversight, civilian control, and accountability mechanisms with regard to the powers exercised by military personnel during counter-terrorism operations. But both countries could also help to significantly reduce the risk of human rights abuse by introducing both countries' new independent review boards, transparent processes, and clear legal recourse for victims of military abuse during periods of emergency.

Furthermore, the reforms must entail proportionality in the use of military powers, and so counter-terrorism measures should be provided in only as much and by means most necessary, and in

compliance with international norms. Whether or not it is crucial to national security, the violation of human rights systematically, violation of the rule of law, and breach of the independence of the judiciary should, at any point, serve as the reason. This will lead to the introduction of a new balance between security interests and fundamental rights, new and legal counter-terrorism laws, and emergency powers that will not violate human dignity.

Emergency powers can be used in the furtherance of national security but must be invoked under the auspices of democratic government, human rights protection, and international law, and in all cases, in the end. Alignment of counterterrorism laws with these principles will strengthen India and Pakistan's most critical element - its public - and would ensure the fundamental rights of the citizens of both countries. However, it is only through reforming their legal system extensively, in order to prevent a repetition of future cycles of impunity and human rights violations flowing from their counterterrorism measures that these countries will be able to achieve this.

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