An Alien’s Call for Divine Violence/Destituent Power: Where do We Begin to Destitute (security) Law?

Syed Sami Raza
University of Peshawar

“And this destitution is the coming politics.”

Giorgio Agamben, What is a Destituent Power?, 74

Abstract

We know well that in present times security laws are growing fast. To recall history, almost a century ago Walter Benjamin had warned of an unimaginably remote age in which attack on the law would be altogether futile. Do we today live in that age or can we think of an attack on the law as possible? Despite the fact that the modern security paradigm, which began around Benjamin’s time, has recently reached its high point, I think we can still identify ways to depose the security law/paradigm. In this paper, I suggest that in order to depose the paradigm we need to identify and depose its key elements or linchpins. Accordingly, I identify two such key linchpins: a) alienage or the juridical category of aliens, and b) indemnity or the provisions of indemnity for the law enforcing agencies. Tracing the genealogy of these key linchpins in British colonial and post-colonial or post-WWII security laws, I offer a critical legal analysis of how they stand at the core of the paradigm of security and why deposing them can help us get a step closer to deposing the paradigm itself.
Introduction:

On May 17, 2011, a breaking-news regarding a potential suicide bombing attack began to flash on local TV channels in Pakistan. It was claimed that a group of five possibly Chechen suicide bombers, including three women, were trying to enter the city of Quetta, Baluchistan. But that they were stopped at a paramilitary check post on the outskirts of the city in an area called Kharotabad. The news projected that on stopping the group ventured to attack the check-post. However, the news went on, the check-post had already received a radio warning from another check-post about this group of suicide bombers. So just as the group disembarked from a cab, and tried to rush toward the check-post, the news concluded, they were gunned down.

Suicide bombings are not infrequent or unusual in Pakistan. Therefore, many such operations are believed as relief. However, this time something went quite wrong. This was the appearance of a photograph of the last alleged woman suicide bomber taken just before she was killed. In this photograph, which would soon become iconic, she can be seen lying on the ground near a sandbag-covered picket of the check-post stretching her arm upward and apparently pointing to the sky. The photograph presented such a powerful gesture of the injured woman that it put the claims of a successful operation in question. It disrupted the security narrative before it could be constructed and sold to the public. Over the next few days, the operation remained as one of the top stories on local media. The demand for more information about the operation increased. Soon more photographs, short video clips, and interviews of witnesses began to surface. With the breaking of more information it turned out that the alleged suicide bombers were not Chechens—four of them belonged to Dagestan, Russia, and one to Tajikistan. They had earlier traveled to Iran from where they made their way into Pakistan. Moreover, they were all unarmed. And shockingly the last alleged woman suicide bomber to die was eight months pregnant.
On their part, the police and the paramilitary force did whatever they could to stop the collection of information on the operation. The police doctor who performed autopsy on the dead bodies was first threatened, then physically assaulted, and eventually killed. The photojournalist who took this iconic photo, as well as other photos and clips of the operation, was chased out of the city, and came to seek refuge in the capital city of Islamabad. Despite the arbitrary and violent efforts to cover up the operation, the police and the paramilitary force could not do much about the rising demand for more information and the call for justice. The government had initially lauded the operation, but soon felt embarrassed, and announced to set up a judicial inquiry commission. On the other hand, national parliament set up a fact-finding committee. (In a later section I will return to the findings of these committee)

**How the iconic gesture is a call for Divine Violence?** At this stage let us return to the iconic photograph, and ask what do we make of it, and what does it make of us? To put the latter question in other words, how does the photograph affect our political responsiveness? Well, our first impression of it might be quite simple: it captures a helpless injured woman’s call for mercy. But such an impression, we must caution, will find itself entangled in passive, rather perverse frame of meaning-making, partly because interpreting it as a call for mercy would tend to reduce the larger political problem of violence as singular and hence fixed, and partly because it would take away her stance of agency in the face of the spectacle of state violence. In other words, our first impression is doomed to accept her as a bare sacrificial life, unless (the state) decides otherwise.

However, the affective field of vision created by the photograph, especially as the injured (but not necessarily helpless) woman stretches and waves her arm in the fusillade of AK-47 fires, impels us to move beyond our first impression—the call for mercy. We begin to discern the figure of violence in the photograph, which entails affective shock that at once makes us aware of the wave of revulsion, protest and resistance generating within us. Our first impression—the mercy-sympathy-singularity equation—is thrashed. We are impelled to ask ourselves: is she calling
for mercy or for justice, possibly a divine justice. I suggest that it is surely a call for justice, or that is how the affect that it generates reveals that possibility on us. We only need to see how she struggles to gain and assert agency in the face of violence and extreme vulnerability. The photograph captures this final moment in the act of killing when the victim registers her last expression of agency in a simple but powerful and timely gesture. Hence just before her death, which she sensed was coming (perhaps because she was already fatally injured), she transcends her state of helplessness to the state of sovereign subject’s agency—to a form of resistant life, which is aimed at challenging state power by exposing the anarchy and anomy resident in it.

It is equally possible that some of us (the viewers) are not touched by the affective field of vision, and hence unable to move beyond our first impression or discern the figure of agency-resistance and the call for justice. However, even in that case we don’t miss to notice that in her iconic gesture, as she stretches her arm and points to sky, the victim invokes a referent (of justice)—God and His divine justice. This invocation of the divine referent is crucial to notice as it places her gesture in at least two related but mutually exclusive fields of meanings: a) have mercy in the name of God, and/or b) fear His wrath and justice. In other words, her gesture is an imploration-warning not to underestimate the sovereign subject’s agency. However, at this juncture, a question begs how does an invocation of the Divine referent relates to and enables sovereign subject’s agency in our profane world.

In order to give a plausible explanation of the relationship between the invocation of the Divine referent and the profane agency, as well as to move to our more central concern regarding political responsiveness, I wish to engage Walter Benjamin’s concept of Divine violence. Benjamin introduced this concept as the nemesis of state violence. The latter, which he at times also termed mythic violence, includes two kinds of violence: a) violence used for making or constituting law, hence called law-making violence or constituent violence, and b) violence used for preserving the (constituted) law, hence called law-preserving violence or constituting violence. On the other hand, divine violence is the violence that
destroys law (and the forces on which it depends as they depend on it), and along with it its capacity to reconstitute itself. Although Benjamin’s concept of divine violence has not yet submitted itself to a complete understanding, there are important insights that his interlocutors and interpreters have made, which I intend to engage to a) extrapolate the gesture in our iconic photograph and b) illustrate the concept itself through such extrapolation, especially with the purpose of putting it in operation against the mythic law of security.

Any initial extrapolation of the photograph, just as that of Benjamin's concept, essentially begins in eschatology/theology, even as the task is to save them from falling into that domain. From pure eschatological perspective, the gesture in the photograph is an imploration to God to witness her forced abjection and killing, and to avenge her on the Day of Judgment. Hence, as she implores, the symbolic force of it is directed at her perpetrators. There is another possible extrapolations—the one that would come closer to the theological dimension in Benjamin's concept—that the victim implores God to send His wrath (violence-justice) on her perpetrators, here in this profane world. However, both these extrapolations come to face the dilemma of (an indefinite) wait in the dispensation of justice. Despite a believer's faith in the Day of Judgment and in Divine miracles of wrath, Divine justice we know remains either indefinitely suspended or its moment of arrival remains objectively unknowable. From the theological dimension then Divine justice is, to use Derrida's phrase, a justice-to-come.

However, some recent interpreters of Benjamin inform us that, unlike Derrida’s justice-to-come, Benjamin’s Divine violence/justice does arrive. It is rather in the state of being already here. That it strikes out of nowhere, and it is pure means (without ends). Apparently, such interpretation might sound absurd. However, as Slavoj Zizek explains and illustrates, Benjamin’s concept makes more sense today than ever before. Benjamin borrows the theological and linguistic structure of the purely eschatological notion of Divine violence (especially the one in the second extrapolation I give above), and replaces the Divine referent, the big Other, with a profane referent, the people. In other words, he replaces
transcendence with immanence, while the concomitant theological symbolism is not completely given up, just as the name is not given up. Perhaps Benjamin knew, as Zizek conjectures, the value of “theological dimension without which...revolution cannot win.”

Just as Benjamian justice, Divine justice that the victim in the photograph calls for is in the state of being already here, primarily because her ultimate referent is also the people. Let us once again focus on the structure of the field of vision of the photograph. Should we replace the Divine referent with the people, then she would apparently be pointing to sky. However, interestingly, even in this pure visual dimension, we notice that sky does exactly what the Divine would do: it sends down the image (in this case the atrocious image) to affect our responsiveness, or as Benjamin would say, affect us in our solitudes such that we would wrestle with it and take upon ourselves the responsibility of the event. Now should we borrow Lacan’s notion of “mirror stage,” as Zizek does while explaining Benjamin’s concept, then sky would appear to act as a grand mirror stage, where events are staged and sent down in the form of their mirror images. The victim points to this mirror stage, wherefrom the Divine violence will (have) descend(ed) in the form of atrocious mirror images. These images are, in a sense, created outside our world--somewhere on the transcendent stage—and, visually, outside the frame in which victims, perpetrators, and witnesses encounter. The images enable them to step out side the frame, and see their mirror image speak to them. Put differently, the focus on visual dimension teases out the dimension of immanence in the victim’s call for justice, just as it puts to test our own political responsiveness.

In extrapolating the victim’s gesture in the photograph, and engaging the concept of Divine violence, I do not intend to limit our task to mere conceptualization and theory. Rather I’d like to take the task further to praxis, and identify, or perhaps project, a course of action for our political responsiveness. To be sure, I want to identify a site in the dispositif of state/mythic violence, which I think needs the attention of our political responsiveness, and/or where the Divine
violence will have struck. The hint to this site is given in one of the passages of Benjamin on Divine violence:

...on the breaking of this cycle that plays out in the sphere of the mythical form of law, on the destitution (Entsetzung) of law with all the powers on which it depends (as they depend on it), ultimately therefore on the destitution of sate violence, a new historical epoch founds itself.

The site in the dispositif of state violence, which I am trying to identify, is this relationship between law and law-preserving forces. The former captures, as Agamben lately informs us, anomy, and the latter anarchy, while together they form the state power/violence. Benjamin tells us that should we want to herald a new historical epoch then we need to reckon with the possibility of destitution of law, especially, and to begin with, as I’d suggest, the destitution of the relationship between law and law-preserving forces. And Benjamin further assures us that: “If the rule of myth is broken occasionally in the present age, the coming age is not so unimaginably remote that an attack on law is altogether futile.”

Almost a century since Benjamin’s time, we need to ask, do we live in that unimaginably remote age in which an attack on law, to be sure security law, is altogether futile? Especially with the War on Terror, has the rule of myth not expanded, strengthened, and become pervasive, such that we now live under what, Agamben terms, a global paradigm of security? Is this the paradigm that Benjamin had warned us against? Figuring this out will, I think, depends on our ability to pose the following question: is an attack on the law still possible? This is the question of the immanence of Divine violence, and of the right to justice.

Despite the fact that the modern security paradigm that began around Benjamin’s life time, and which has recently reached its high point, I think we can still identify ways to depose the security law/paradigm. In this paper, I suggest that in order to depose the paradigm we need to identify and depose its key linchpins. Accordingly, I identify two such key linchpins: a) alienage or the juridical category of aliens, and b) indemnity or the provisions of indemnity for the law enforcing agencies. My
assumption is that alienage and indemnity provisions enter into a vicious relationship with the notion of security and create the dispositif/apparatus of security in which justice is excluded/externalized. Accordingly, the law-preserving violence of law enforcement agencies remains beyond the purview of justice system.

My above assumption prompts the question why I think alienage and indemnity provisions are at the heart of the security paradigm. Here are some of the initial reasons to begin with: a) aliens are individuals who are juridically most vulnerable, and they have no immunity from the right of the state to juridical derogations, b) they cannot register claims against a state, as they are left to the mercy of the law of nations, which is non-justiciable, c) just anyone can become alien depending on his/her territorial location, d) alienage is only increasing in a globalizing world and also partly due to increased unrest in many countries, and e) law enforcement agencies (including military and para-military) are often shielded by indemnity provisions against any claims of aliens.

What stands out in the Khoratabad incident is the spectacular display of force on the one hand and vulnerability-agency on the other. We notice in the video recording as well as from the statement of a journalist who saw the incident that the victims could have been apprehended, but the operation commander ordered to finish them off. The commander’s order is clearly extrajudicial, a decision on the life and death of aliens. The concern in the wake of this incident is while our law enforcement agencies have come to exercise such powers, how they have come to usurp such powers? My assumption is that it is because of a vicious relationship between identity (here alienage) and indemnity.

It is this aspect of identity that is at the heart of the exercise of power over life and death. The operation officer knew well that he was dealing with aliens (and not just any terrorists—while terrorist is a category that immediately implies the alien identity). This realization prompts him that indemnity provisions will shield his actions, and that his colleagues and high-ups will stand by him (the esprit de corps will prevail over justice). This makes justice external to the security
dispositif/apparatus. Justice is not allowed to penetrate the law enforcing organization. It is thought as a divisive force, a force that will cause mistrust and eventually weaken the organizational coherence and functioning. Today therefore we see how justice lives in the interstices between different organizations/institutions, for instance, the law enforcement, prosecution, executive, legislature, and judiciary itself...

**Alienage, Indemnity, and the Growth of the Paradigm of Security**

Both Benjamin and Agamben conjecture that the paradigm of security begins around WWI. The genealogical account that I give regarding how aliens become one of the central concerns of security will bare out this conjecture. I’ll demonstrate that around this time in the UK the term enemy alien reached its new height. In the US the debate on the rights of alien friends (a term which is almost unknown today) comes to an end. And in the colonial India, the Raj begins to give attention to regulate and register foreigners...

**a. When and How Alienage becomes central to Security Regimes:**

i) **The UK:** 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 the alien from its territories. In this regard judges often made references to Vattel and Blackstone. In the exercise of this sovereign right a state could also arrest the alien or prescribe a specific route for his exit. However, detaining the alien or putting him to any other inconvenience or loss beyond what was inevitable to the fact of expulsion was often protested and

---

1 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.” 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, 2569-260.
could make a state liable at international law. Moreover, alien merchants, on the account of Blackstone, enjoyed express protection of Magna Carta.² ...

With the outbreak of WWI the legal personal status of aliens suffers a major setback from which it does not fully recover. The Defence of the Realm Acts, DORA, (1914-1915) and the Defence of the Realm Regulations, DORR, (1914-1918) virtually replaced the rule of Common Law. The DORA, 1914, authorized trial of British subjects and aliens by martial courts, thus materializing the possibility that was only latent in the mutiny acts of 17th century, and that was once heatedly debated in the Jamaica 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. The amendment, however, excluded aliens from this right to trial by civil courts.³ In other words, unlike subjects who had the right to jury and trial by civil courts during war time aliens had no such right. Furthermore, because aliens did not have 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.⁴ On the other hand, it is worth noticing that the amendment provided such rights to British women subjects married to aliens (Section 8). However, by marrying aliens British women could risk losing their nationality under the British Nationality and Status of aliens Act, 1914.⁵ The March 1915 amendment to DORA was

---

² 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.”

³ 5 Geo. V, c.28, c. 34.

⁴ 5 Geo. V, c. 34.

⁵ 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 are granted their own right to nationality regardless of their marital status.
clearly a law that drew a 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 Registration of Foreigners Act (or Aliens 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 Act, 1919. These Acts also “removed doubts” regarding government’s power to deport. The government could issue orders to deport an alien at any time, and could also restrict the 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 regular detention and judicial system. Moreover, the war also necessitated making the policy of transferring aliens to dominions and colonies, thus creating the initial basis of rendition…

**ii) The US:** In the United States a century-old debate on the rights of aliens comes to an end by the WWI. This debate that began with the Sedition and Alien
Acts, 1798, revolved around the question whether or not aliens enjoyed protections and rights under the constitution. Although the debate mostly affected the rights of white Europeans 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.

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. 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 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.” (Dinnerstein). States that were hitherto vying for immigrant-aliens, 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. 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), 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 legitimate...
The Supreme Court’s response to federal and state legislation in this era, 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.\(^6\)

...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 quoted Blackstone: “At common law ‘alien enemies have no rights, no privileges, unless by the king’s special favour, during the time of war’” (p. 775). 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 is constitutionally subject to summary arrest, internment and deportation whenever a ‘declared war’ exists” (p.775)...

iii) **Colonial India:** By mid-nineteenth century, the 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 India had to be territorially delimited and its subjects legally identified. 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.” Accordingly, laws passed in 1857, 1862, and eventually with a comprehensive *Foreigners Act* in 1864.

Let us highlight certain provisions of this act. First, the act provided that anyone who was not a natural born subject of Her Majesty or 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 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 foreigners were already subject to the penal code 1860 for any crime committed. So the purpose of the act seems not to aim to stop crimes, but to put check on the free movement in the country. 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 power to issue orders in writing asking any foreigner to remove himself from any British territory and while removing himself 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 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 provide for indemnity to actions of the police or administration. The act also did not 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 begins to drastically
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 greater disadvantage. All aliens were suspected enemy aliens. 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 or many aliens would not be even 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 the war, three Imperial Conferences (1918, 1921, and 1923) took place. In these conferences the power of the state to exclude an alien from entering, traveling and residing was accepted without any reservations by 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 the fact that it as the Imperial war that had created and/or exacerbated the category of aliens (which now included enemy aliens, refugees, stateless people, and asylum seekers) and that at the end of the war they were restricting, oppressing and humiliating them...

---

According to Lord McNair and Watts there was hardly any distinction between subjects and aliens in the British Empire prior to WWI. Lord McNair and Watts, *The Legal Effects of War*. 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.
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 or 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, 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 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. While these rules were set up for a war emergency, at the end of war the nationalist colonial legislature appropriated them into a permanent peacetime law—the Foreigners Act 1946.

On November 13 Sardar Vallabhai Patel introduced the Bill. 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 (Art. 15): “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.”

b) How Alienage and Indemnity become central to the Present Security Regime

i) The UK: In 1971 the British government replaced the Aliens Department of the Home Office with the Immigration and Nationality Department. By then the word “alien” sounded quite anachronistic and loaded with history of discrimination and violence…

One of the foundational laws of security and terrorism in the UK was the NIEPA, 1973. The object of the Act was to deal with “certain offences, the detention of terrorists, the preservation of the peace…”8 Under this Act the Secretary of State could order to place an individual in “interim custody” for a period of 28 days. Before the expiry of that period an appointed (quasi) judicial commission would decide on the release or extension

8 It is worth noticing that these offences that are classified as scheduled offences were given priority or overriding effect over non-scheduled offences, just as anti-terrorism laws and trials enjoy overriding effect over other laws and trials. (Sections 2 and 3 read: “Where an indictment contains a count alleging a scheduled offence and another count alleging an offence which at the time the indictment is presented is not a scheduled offence, the other count shall be disregarded.”)
from custody of the individual on the basis of “the protection of the public.”\textsuperscript{9} It is also important to notice that only seven days before the commissioner first heard the case was the detainee served with a written statement regarding his terrorist activities.\textsuperscript{10}

The NIEPA, 1973, was amended and reenacted in 1978, 1987, 1991 and 1996. In the last two acts the period of “interim detention” was reduced to 14 days, and the Secretary of State was authorized to issue detention orders only after receiving report from a judicial Advisor. It is interesting to notice that these acts reflected the procedure of detention in the Regulation III of 1818…

In 2001, the Anti-Terrorism, Crime and Security Act (ACS), provided for detention of non-citizens. Under section 23 non-citizens could be indefinitely detained without trial. With a certificate from the Home Secretary a non-citizen could at once become “a suspected international terrorist.” However, this provision of indefinite detention turned out to be inconsistent with the Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950. In December 2004, the House of Lords in \textit{A v. Secretary of State for the Home Department} held that Section 23 was illegal on two grounds. First that it exhibited a disproportionate response to what was “strictly required by the exigencies of the situation” and thus infringing Article 5 of the ECHR. Second that it violated the right of all human beings to be free of discrimination enshrined in Article 14 of the ECHR. Clearly, the Lords were of the opinion that the section discriminated without a rational and objective justification between citizens and non-citizens. The government responded by passing an amendment—the Prevention of Terrorism Act (PTA) 2005. The PTA, 2005, provided for two types of “control order”—the derogating and non-derogating control orders. The derogating control orders could be issued to control individuals who posed serious risk to the public safety. By an order of a high court they could be placed under house arrest for a period of six months, which could also be extended. The non-derogating control orders imposed a combination of restrictions, for instance, curfew, electronic tagging, restriction

\textsuperscript{9} Schedule 1 Part II entry 11 sub-entry 3.  
\textsuperscript{10} Schedule 1 Part II Entry 13.
on association, search of residence, restriction on the use of telephone and Internet. These orders could extend up to twelve months and could be renewed.

Apart from detention-without-trial and control orders, there have been two other ways of detaining aliens in the UK. One was called “pre-charge detention”, which was provided in the Anti-Terrorism Act, 2000. Under it a person could be held for forty-eight hours. In 2003, the Criminal Justice Act increased pre-charge detention to fourteen days. Then in 2006, the Terrorism Act further increased the period to twenty-eight days. Another way of detaining aliens has been for much shorter time for the purpose of questioning and body search on borders, seaports, and airports. This type of detention, which reflected stop and search detention under the NIEPAs, is allowed for nine hours...

ii) The US: The legal status of aliens in the post-WWII United States somewhat improved, partly due to the sense of relief in the victory and partly due to severe criticism of internment camps. However, the broader legal discourse and case law allowed for wide latitude to government to impose a singularly heavy regulatory burden on alienage. The Supreme Court repeatedly ruled that a) government possessed plenary power over the exclusion of aliens (Kleindienst v. Mendel 1972, Fiallo v. Bell, 1977), b) possessed authority to regulate the substantive and procedural incidents of entry or to specify who shall be allowed to enter and with what procedures (Mathews v. Diaz, 1976; Plyler v. Doe, 1982), and that c) the protective provisions of the constitution could not be invoked for the defense of aliens (Shaughnessy v. United States 1953; Landon v. Plasencia, 1982). Aliens thus could be discriminated and excluded on such reasons, which otherwise could not be applied in anyway to citizens. For instance, they could be excluded on the reasons of gender and illegitimacy (Fiallo 19777), political belief (Kleindienst 1972), race (Dunn, 1974), national origin (Faustino 1971), and even age (Nazareno 1975)...

For the most part during this era, the Supreme Court could not develop and articulate substantive constitutional limitations on the government’s plenary power relating to aliens. But there are several inroads in that it made which need
mentioning here. For instance, the Court in *Kleindienst* mentioned that the right of citizens in the entry of a particular alien could deserves constitutional protection, even though the exclusion of a Marxist scholar in that case was upheld. In *Haitian Refugee Center* 1982 the court required of INS to inform aliens of their rights and do not create procedures that inhibit the exercise of those rights, including the right to have a legal counsel. The Court also accepted that the Fifth Amendment partially protected aliens from self-incrimination. In *Brignoni-Ponce* 1975 and *Babula* 1981 the Court declared INS as essentially a law enforcement agency, and therefore within the purview of the criteria of reasonableness of the Fourth Amendment relating to seizures and searches. However, the Court did not clearly explain that the Amendment fully protected aliens. Moreover, since *Yick Wo* 1886, in which the Court had held all aliens as “person” within the meaning of the Fourteenth Amendment, aliens have regularly appealed to that meaning and claimed the protection of the due process (*Plyler* 1982). Similarly, since *Wong Wing* 1896, in which the Court had held that aliens could be entitled to the procedural due process requirements of Fifth and Sixth Amendments, aliens have repeatedly invoked this precedent to claim their rights procedural rights (*Arteaga* 1978)....

From a legal vantage ground, especially that of the law of personal status, the War on Terror drastically affected the alien legal status. The Military Order of November 13, 2001, virtually authorized the administration to use unlimited powers against aliens suspected of terrorism. Later the Patriot Act, 2002, Section 412 authorized the Attorney General to detain foreign nationals who he/she certifies as terrorist suspects without any right to hearing, without a showing that they pose substantial danger or a flight risk...

Interestingly, the War on Terror soon proved to be more than a war on alien legal status. It in fact began to *create* alien legal status. The administration silently expanded the use of its power to certain groups of citizens, especially those of Middle-Eastern, Pakistani or in general of Muslim origin. Even though the administration claimed that citizens were subject to constitutional guarantees of Article III and Due Process Clauses, certain groups of citizens were treated the way
aliens were treated. Thus both aliens and subjects could be indefinitely detained, sent outside on rendition, or permanently incapacitated/terminated. Hamadi, for instance, was detained for over three years before the Supreme Court took up his case. The prosecution did not bring a charge under Article III of the Constitution against him. Although the Supreme Court gave Hamadi the right of habeas corpus, the administration divested him of his citizenship and deported him to Saudi Arabia. Later the administration passed a law (NDAA 2011) that denied habeas corpus to any citizen who is suspected as a “covered person”. A covered person is a citizen whose legal status is equivalent to that of an alien. And with this category of covered person, the administration can effectively turn any legal citizen into a legal alien.

These unlimited powers of the administration against aliens is not constrained by any law, whether international, local or of judicial oversight. It is even beyond the purview of the human rights law, as for quite some time the Bush administration claimed that human rights law did not apply “to the conduct of hostilities or the capture and detention of enemy combatants” because such matters were “governed by the more specific laws of armed conflict.”\footnote{Response of the United States to Request for Precautionary Measures--Detainees in Guantánamo Bay, Cuba, July 2002, 41 I.L.M. 1015, 1020-21 (2002).} ...

On June 28, 2004 the Supreme Court of the United States in \textit{Rasul v. Bush} set aside the decision of the Court of Appeals and ordered that the case be heard again on writ of \textit{habeas corpus}. The decision was a bold assertion at the time because none of the petitioners was American citizen; they were all aliens. The court did not accept the argument of the defense that the writ of habeas was a right available only to citizens. The majority decision in \textit{Rasul} 2004 written by Justice Stevens gave hint of the Courts willingness to concede the right of habeas corpus to both citizens and aliens under the habeas corpus Statute 2241. The Court said: “Considering that 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the Statute’s geographical coverage to...
vary depending on the detainee’s citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts’ 2241 authority.”...

**iii) South Asia**

We know well that the newly independent states of Pakistan and India adopted much of their legal corpus from the colonial state. This included adoption of several security laws including the Registration of Foreigners Act 1939 and Foreigners Act 1946. For a long time both these acts were used to deal with cases relating to the partition and migration...

The Security of Pakistan Act (SPA), 1952, was one of the first major security acts introduced after independence. The Act provided for “special measures”, especially preventive detention, “to deal with persons acting in a manner prejudicial to the defence, external affairs and security of Pakistan” as well as to “the maintenance of supplies and services essential for the community.” It is obvious from the “phraseology” that the legal form of the act was drawn from the Defence of India Act and Rules, 1939…

The SPA, 1952, did not only draw its substance from the Defence of India Act and Rules, 1939, but also from the Government of India Act, GIA, 1935. This fact established its connection with constitutional provisions and made it a formidable piece of security legislation. The GIA, 1935, was one of the first major constitutional acts that provided for preventive detention in the Indian constitutional law. Although in the GIA, the fundamental rights were not guaranteed, there still were certain provisions—those relating to preventive detention—that created the possibility in advance to check any later rights. After the independence when Pakistan (as well as India) began to frame their constitutions, while taking this act as the basis, these provisions were adopted and with them the check on the constitutional right of habeas. The constitution of Pakistan (as well as that of India) guarantee safeguards against arbitrary arrest and detention, except what they call preventive detention. They clearly deny these safeguards to those who are (enemy) aliens. With this clause, it seems that the Enemy Agent Act, 1943, has virtually made its way into these constitutions.

In Pakistan this constitutional provision regarding enemy aliens has recently found new strength in the Protection of Pakistan Act (PPA), 2014, which specifically deals
with the subject of enemy aliens. PPA, 2014, and its earlier version, Protection of Pakistan Ordinance 2013, define “enemy alien” a person who is unable to prove his citizenship of Pakistan and who is suspected of engaging in waging of war or insurrection or depredation, by involving in any of the offences specified in the given schedule. Interestingly, the offences given in the schedule are all those offences that are named under what legally makes terrorism.

The real long-term danger of PPA 2014 is how it creates an understanding of certain persons or subjects of law. How it creates and legally identifies a certain class of people who are rendered susceptible to violence and/or violence against them is rendered silently permissible. And once the law enforcement agencies come to deal with this category, discrimination and violence against them become normalized...

**Alienage, Human Rights, and Legal Reasoning**

...

**Externality of Justice and the Call for Divine Justice**

...

**Conclusion:**

It is quite obvious today that aliens have lost the right to *habeas corpus* in almost all democratic states. With the War on Terror and the resulting *paradigm of security*, we see a heightened tendency to give this loss or denial a legal form, often noticeable in executive orders, statute laws, court decisions, and/or constitutional provisions. In this way, aliens or more technically the juridical category of alien with no right to *habeas corpus* has silently come to become one of the formidable pedestals of the global paradigm of security. In this paper I tried to demonstrate how the juridical category of alien developed, and it later takes the central stage of the current paradigm of security. Moreover, what significance does it carry in sustaining the paradigm. We noticed that the category took a long time to get embedded the in the legal traditions of the UK, the US, and from them in the colonial and post-colonial states of India and Pakistan.
It was around the time of WWI that the paradigm of security begins to grow. One of the crucial factors beneath this paradigm was the legal status of (enemy) aliens. Even though the concept was in use in the legal debates of 18th century in the UK and the US, it comes to attach to security laws by WWI. From there it enters into various security laws and later into constitutional laws and debated in courtrooms. It also gets attention in the international declarations of human rights, such that states are given the right to judicial derogation against aliens who are considered potential security threat...

Recently with the War on Terror it has become a normal state discourse to identify much of the security concerns with the subject of alienage. In fact, it is the existence of aliens that is proffered as the primary or eventual reason in favor of having a security regime. However, with alienage as the central concern of security, a big class of people around the world, which include ordinary travelers, migrants, stateless people, nomads and refugees, face the risk of being identified as potentially enemy aliens. While on the other hand the law enforcement agencies are vested with immense procedural powers along with indemnity to deal with them... We cannot hope to challenge the growing security paradigm unless we challenge the discriminatory juridical category of alienage, especially in matters of criminal justice. It is this category that allows the states to deny access to justice to alien individuals...