

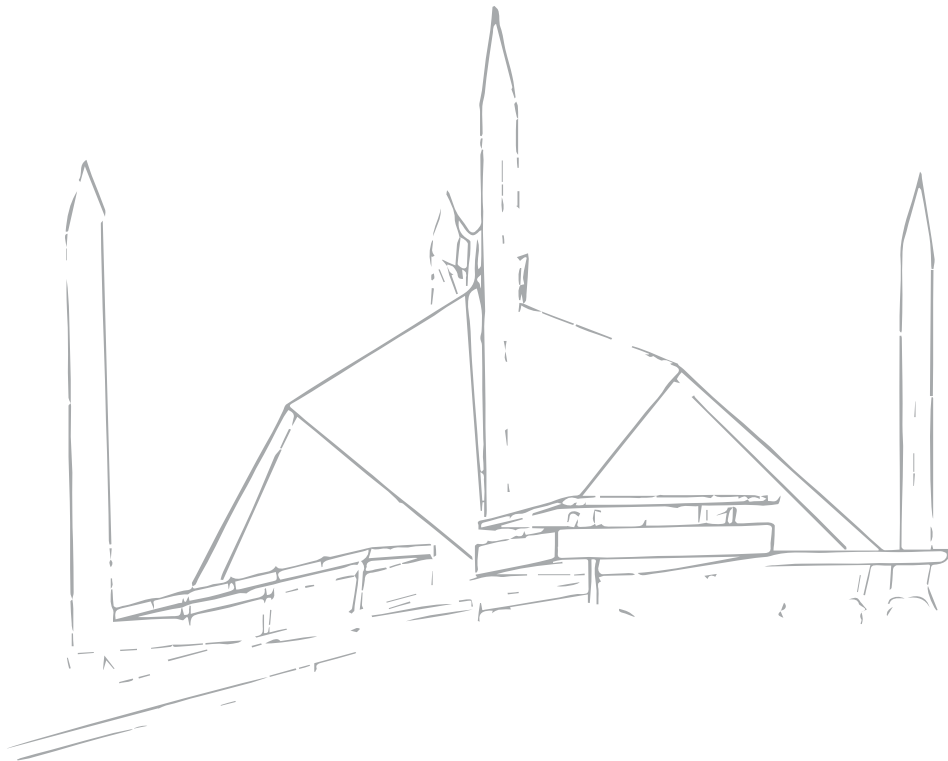


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Abusive Constitutionalism and Military Courts in Pakistan

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Abstract

The article analyses the constitutionality of military courts in Pakistan to determine to what extent it is compatible constitutional scheme of Pakistan. The 21st amendment accepted the military courts conditionally. The establishment of military courts has raised concerns on enforcement of fundamental rights, more specifically safeguards as to detention and arrest, right to fair trial and due process, dignity of man and protection against double jeopardy. These inalienable rights of the people need to be treated in accordance with law and enjoy the protection of law. The judiciary's role is to provide justice according to the constitution and laws of the state same cannot be assigned to any other institution. The role of the Armed Forces to exercise judicial powers necessitated through an unprecedented 21st constitutional amendment is not in aid of civil power and the judiciary but supplanting it. The 21st amendment submerges fundamental rights under national security policies. Military courts work as a detached parallel departmental justice system to the national justice system. This article is an effort to summarily put across the challenging and contradictory viewpoints of military courts and discuss their merits in an object way in the light of constitutionalism by focusing whether from perspective of constitutionalism, the military courts qualifies the test of constitutionality and protection of fundamental human rights or it is abusive constitutionalism.

Keywords: *Constitutionalism, Abusive Constitutionalism, 21st Constitutional amendments, NAP, Military Court, Fair trail*

1. Introduction

“For extraordinary circumstances, extraordinary steps are required.”

Former Prime Minister Mian Nawaz Sharif

“I have been in the Senate for more than 12 years, but have never been as ashamed as I am today and I cast my vote against my conscience,”¹

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Former Chairman Senate Mian Raza Rabbani

In January 2015, Pakistan's Parliament passed the 21st amendment to the Constitution and enacted National Action Plan, empowering military courts to try civilians for terrorism-related offences². In August 2015, in the *District Bar Association Rawalpindi v Federation of Pakistan* (known as the military courts case), a lengthy and far-reaching judgment upholding Parliament's privilege to amend the Constitution, the Supreme Court ruled that the 21st amendment could stand³. The civil society, intellectuals, lawyers and Human Rights observers, notably Human Rights Commission of Pakistan⁴, have voiced their extreme displeasure on the 21st Amendment and the military courts⁵. Legal community of Pakistan has uttered extreme opposition to the amendment and started observing every Thursday as black day to protest the military courts. This amendment has raised concerns over the importance of rights protections in Pakistan's understanding of constitutionalism. Not the first occasion, and certainly not last, the state machinery in Pakistan including Parliament, judiciary and the military, has abused constitutionalism in shape of anti-terror policies that challenge the fundamental rights foundation of the Constitution. The military establishment was strongly following a proposal to prosecute terror suspects in military courts for some years, but the proposal did not fascinate political agreement. All knows that the 21st amendment passed because the military establishment required it and in future things may not stop here. What if military establishment again wants these courts for some specific

¹ Raza Rabbani in tears: Ashamed to vote against conscience, *Dawn* 07 Jan 2015.

² The Constitution (Twenty-first Amendment) Act, 2015.
http://senate.gov.pk/uploads/documents/1420804023_562.pdf
 (accessed 2 September 2020).

³ *District Bar Association (Rawalpindi) v Federation of Pakistan*, PLD 2015 SC 401.

⁴ "HRCP concerned over military courts move", *DAWN* Islamabad, December 27, 2014, p.3.

⁵ Datta, Anil, "Legal experts warn military courts will undermine independence of judiciary"; *News International*, Islamabad, dated 06 January 2015;
<http://www.thenews.com.pk/PrintEdition.aspx?ID=294261&Cat=4&dt=3/15/2015>, (accessed 2 September 2020).

territory of country through a constitutional amendment? Maybe this will be again seen as a tolerable compromise for some stakeholders.

The December 16 attack on Army Public School attack provided the military establishment a strong ground they needed for developing political consensus for establishment of military courts to prosecute civilians. The guardians of the Constitution through 21st amendment whittled down rights protections that might otherwise be protected by the Constitution. The 21st amendment accepts in deed if not in expression that the basic structure of Pakistan's constitution is now essentially not rights based. 21st amendment like some other laws weakens primarily, the capacity of citizens to determine and reinforce their collective and personal security. Instead, the 21st amendment acts as an informal declaration of war against vaguely identified enemy and classifies the state in ways that do not guard the sanctity of citizen or society⁶. The arguments against the military courts are equally conversant in Pakistan's constitutional contests that in trichotomy of power the executive actions must be separated from the judicial responsibilities and same has been decided in 1998 Mirani's case 1998 and Liaquat Hussain's case 1999⁷.

The passage of 21st amendment by abuses of constitutionalism, swiftly had the effect of strengthening non constitutional politics by strengthening the policy outside the realm of law and strengthening the institutions and individuals whose interest even though self-described as coincident with the so-called interest of state. Despite earlier promises that 21st amended has sunset clause and the use of military courts to try civilians was only a "temporary" and "exceptional" measure, after

⁶ Paula R. Newberg (2016) *Pakistan's Constitutionalism in an Age of Terror*, *Asian Affairs: An American Review*, 43:1, 1-15, DOI: 10.1080/00927678.2016.1131083

⁷ See Justice Afrasiab Khan in Liaquat Hussain's case: "...the established of Military Courts for trial of civilians amounts to (a) parallel system for all intents and purposes which is wholly contrary to the known existing judicial system having been set up under the Constitution and the law."

Liaquat hussain and others v. federation of pakistan through Ministry of Law and Justice. PLD 1999 SC 504 SH.

the expiration of the 21st amendment Parliament enacted 23rd amendment in the constitution to renew military courts jurisdiction over civilians⁸. The sun set clause in the 23rd amendment itself suggests reluctance of the Parliamentarians to grant unbridled powers to military courts.

This article is divided into five sections. The first section emphasises on Pakistan's problem of taking reactive response to havoc rather to formulate proactive policies to avoid national disasters. The second section discusses constitutionality of military courts in Pakistan to determine to what extent it is compatible constitutional scheme of Pakistan. The third section is an attempt for appraisal and critical evaluation of 21st amendment from the lens of Supreme Court. The fourth section applies the tests to the military courts of Pakistan to determine to what extent it complies with the fair trial standards. The fifth section critically evaluate the legal 21st amendment in context of abusive constitutionalism and the last part of the article sums up the discussion with recommendations.

2. Reactive approach of National Action Plan instead of proactive policies

The 21st Amendment to the Constitution of Pakistan has once again highlighted our problem of taking reactive response to havoc rather to formulate proactive policies to avoid national disasters. Pakistan's parliament through 21st constitutional amendment empowered military courts to try civilians for terrorism-related offences as part of reactive approach of its 20-point "National Action Plan"⁹, approved by the Government following the terrible attack on the Army Public School in Peshawar. The political leadership of the country woke up, in a unified manner, to eradicate the menace of terrorism. Pakistan parliament has always been slow to enact proactive policies instead deep-rooted problems of religious intolerance and ethnic

⁸ See, The Constitution (Twenty-third amendment) Act 2017. On 30 March 2017, Parliament passed the 23rd constitutional amendment and amendments to the Army Act, 1952, with retrospective effect from 7 January 2017.

⁹ National Action Plan, 2014, <https://nacta.gov.pk/nap-2014/> (accessed 2 September 2020).

behavior are backed by state authorities that sometimes changes into uncontrollable evil. NAP had intended the use military courts as a short-term solution to eradicate the menace of terrorism and to be operational only for a two-year period during which the Government would bring about essential reforms in existing criminal courts system to reinforce the antiterrorism institutions¹⁰.

In Past Civilian governments in Pakistan has enacted laws to create special courts for anti-terrorism, speedy trial courts were established to work without any delay but one can argue that they didn't work, or didn't have time to work, or were never actually meant to work. Few alternatives were also discussed before drafting the 21st amendment but APS attack placed in sharp relief the failures of anti-terror policy and avoided the possibility of taking decisions that could reach the same goals fighting terrorism and seeking peace without abusing state power and amending the Constitution.¹¹ The state authorities has not prevented the worst from happening, but by compromising rights protections it has mistaken to protect the state on the expense of state's vital agenda to protect its citizens¹². Amending the Constitution by limiting rights protection does not fix state's multiply determined terrors. The real change would mean understanding and eradicating the foundations and sources of terror and the reasons it thrives. A wave of the terrorism in Pakistan is backed and based on sectarian violence. This is based on deep rooted problems of religious intolerance, ethnic behavior and class relations, these are not military problems even though military may be involved in solution but cannot take lead in the solving them.

3. Governing the State by Abusive Constitutionalism

Administration of justice through military courts has placed Pakistan in clear violation of its legal obligations and political commitments to respect the right to a fair trial, the right to life, and the independence and impartiality of the judiciary. This 21st amendment has simply found another way to expand the role of the military in state policy. Shifting responsibility of the

¹⁰ Ibid.

¹¹ *Newberg*, p. 4.

¹² Ibid.

justice to an institution whose relationship to law is based on exceptions to both Constitution and law is one thing under a military government but shifting this responsibility to institution is something entirely different in an elected and democratic government. The 21st amendment and Supreme Court judgment has weakened constitutionalism in Pakistan and untie the ways that constitutional change can be justified.

Abusive constitutionalism is the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before¹³, the patchwork structure 21st amendment and August 2015 judgment transforms Pakistan into 'significantly less democratic'. But if it can be argued that Pakistan's security problems are political in origin and nature, it can also be argued that solving these problems cannot happen without a purposely rights-based agreement about the relationship between Constitution, law, and politics¹⁴.

4. 21st amendment from the lens of Superior courts

The Supreme Court ruling in favor of the 21st amendment and earlier a concurrent discussion of the 18th amendment on federalism hewed toward a discussion of parliamentary prerogative and judicial limitations rather than rights. The most important impacts of 21st amendment case in Supreme Court may not have been in determining whether the 21st amendment was constitutional according to right based approach of constitutionalism, but based on three grounds: the prerogatives of Parliament, the responsibilities of the judiciary and the interruptions of conflict in considering civilian law. Supreme Court of Pakistan accepted the government's description of terrorism and based its decision on it to accept the necessity of expanding military court jurisdiction, how can a court determine the truth and relevance of evidence in light of government authority's discretion. Supreme Court held that the military justice system meets the requirements of free and fair trial standards and

¹³ David Landau, *Abusive Constitutionalism*, University of California, Davis Vol. 47:189, (2013)

¹⁴ Newberg, p 11.

if the system is considered free and fair for services personnel, it should be considered free and fair for terror suspects as well.¹⁵

During the hearings Justice Azmat Saeed raised an issue extensively: does war set the direction for law, and is terrorism the same as war? His conclusion was yes backing the government case. "It is the activities of such terrorists that have created the war like situation against the State necessitating its defense by the Armed Forces," he stated, noting that citizens are protected because the higher judiciary can review the decisions of such tribunals, and that the fundamental rights "of the overwhelming majority" of Pakistanis are not affected by such tribunals.¹⁶ However reality suggests otherwise 21st amendment affects the entire polity through the national policies by reducing the rights of masses¹⁷.

Had the Supreme Court declared the 21st amendment unconstitutional, the state agencies in Pakistan could nevertheless have continued many of its existing practices by reworking the amendment, or authorizing military courts through other means or drastically in intentional regime change in each instance making a mockery of constitutional rights protections without explicitly violating the Constitution¹⁸.

5. The Right to a Fair Trial, Opacity of judgments and the Military Justice in Pakistan

In the aftermath of the barbaric Army Public School attack and the newly emerged national political consensus to establish military courts for trial of civilians was cautious but some muted voices termed the 21st amendment against the right to a fair trial.

¹⁵ *District Bar Association (Rawalpindi) v Federation of Pakistan*, PLD 2015 SC 401.

¹⁶ *District Bar Association (Rawalpindi) v Federation of Pakistan*, PLD 2015 SC 401. See *paras*: 145, 159, and 174 of Justice Azmat Saeed's opinion.

¹⁷ International Crisis Group, *Revisiting Counter-Terrorism Strategies in Pakistan: Opportunities and Pitfalls*, Asia Report No. 271, July 22, 2015, <http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/271-revisiting-counter-terrorism-strategies-in-pakistan-opportunities-and-pitfalls.pdf>

¹⁸ *Newberg*, p. 9.

Some saw it as a 'soft coup'¹⁹ as the military justice system blatantly violates fair trial standards it is part of the executive and is neither impartial nor independent. The trials of terror suspects were very private. Even families of the under-trial suspects did not know the date and location of trials²⁰.

The substantive and procedural law of Pakistan recognizes the right to a free and fair trial and its elements are reflected in the constitution and other subordinate legislation. Article 10-A of constitution states that 'for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process'²¹. The main elements of the right to a fair trial such as presumption of innocence, adequate time and facilities for preparation²², counsel of one's choice²³, to be tried without undue delay²⁴, to have the assistance of an interpreter²⁵, to be informed of the charge and cause of the charge²⁶, not to be compelled to testify against oneself²⁷, to examine witnesses²⁸, prohibition of double jeopardy²⁹, taking the age of juveniles into consideration³⁰, and to have one's conviction and sentence reviewed by a higher tribunal according to law³¹ are guaranteed by general and special laws and all these essentials elements of free and fair trial was compromised by military courts in shape of parallel departmental justice system. The independence of judiciary is one of the salient features of Constitution of Pakistan; the preamble to the Constitution

¹⁹ The Express Tribune, 'Roundtable talk: 'Establishment of military courts led to a soft coup' - *The Express Tribune*' (Karachi, 15 March 2015).

²⁰ International commission of Jurists, 'Pakistan: trials of civilians before military tribunals a subversion of justice | ICJ' (Geneva, 15 April 2015) <<http://www.icj.org/pakistan-trials-of-civilians-before-military-tribunals-a-subversion-of-justice>> accessed (2 September 2020).

²¹ Article 10 of the Constitution of the Islamic Republic of Pakistan.

²² Article 10 of the constitution, ss 80 and 340 of the Code of Criminal Procedure (CrPC) 1898.

²³ Ibid.

²⁴ Sec. 344 of the Code of Criminal Procedure 1898.

²⁵ Ibid., Sec. 361.

²⁶ Article 10 of the constitution; and Se. 80 and 340 of CrPC.

²⁷ Article 13 of the constitution of the Islamic Republic of Pakistan.

²⁸ Sec. 241 of CrPC.

²⁹ Article 13 of the constitution, s 403 of CrPC.

³⁰ Juvenile Justice System Ordinance 2000 (XXII of 2000).

³¹ Chapter XXXI of CrPC.

provides that the independence of the judiciary shall be fully secured³². The constitution provides for the 'separation of judiciary from the executive'³³ and the constitution and law has ensured the independence and impartiality of judiciary but the military courts do not meet the basic elements of the right to a fair trial such as trial by an independent and impartial tribunal.

Pakistan had acquired new international human rights obligations in 2010 by acceding to the International Covenant on Civil and Political Rights (ICCPR). Article 14 of the ICCPR states "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."³⁴ The UN Human Rights Committee has made clear that the right to a fair trial before an independent and impartial court under Article 14 of the ICCPR applies to all courts, whether ordinary or specialized, civilian or military³⁵.

The bigger question would be that of due process and ensuring principle of *audi alteram partem* and a written judgment backed by reason, including the essential and critical findings, evidence and legal reasoning, is an essential component of a fair trial. All those involved in the proceedings of the military courts are part of and reliant on the executive branch from appointment till retirement. The military courts are managed by the military management itself; it is hard to be seen as an impartial system by a sensible observer. Civilians tried by military courts particularly seem disadvantaged.

6. Unconstitutional Constitutional Amendment in Context of Abusive Constitutionalism; Constitution (21st Amendment) Act 2015

The 21st Amendment has specifically, made two changes in the Constitution: first in addition of proviso to article 175 and second is inclusion of legislation at entries 6,7,8 and 9 in the first

³² Preamble of The Constitution of the Islamic Republic of Pakistan.

³³ Article 175 (3) The Constitution of the Islamic Republic of Pakistan.

³⁴ Article 14 of International Covenant on Civil and Political Rights.

³⁵ Human Rights Committee General Comment 32 "Article 14 of the ICCPR. UN document CCPR/C/GC 32 Para 22.

seclude of the constitution so certain other secondary legislations³⁶ have been protected from the applicability of the prohibitory clause of the article 8 of the constitution.

Constitutional Amendment as a tool to enforce some policy measures is one kind of problem but on the other hand reassuring military and political strategies via constitutional amendment is another problem. The 21st Amendment also erodes away from Pakistan's already shaky obedience to its own legal standards and to international humanitarian law standard. The military establishment was keenly pursuing a proposal to prosecute terror suspects in military courts for some years, but the proposal did not attract political consensus.

The 21st amendment creates contradictions in policy, law and in the Constitution itself. There is a fascinating difference in language between the Protection of Pakistan Act and the 21st amendment, the PPA focuses on acts that include offenses relating to "crimes against ethnic, religious and political groups or minorities³⁷," while the 21st amendment refers to offenses "by terrorist groups using the name of religion³⁸". In the time of a few months, the emphasis of the problem shifted from acts to intentions, and the object of the amendment became more confusing and puzzling than the PPA³⁹. Needless it to say that it is easier to prosecute observed actions than the ostensible reasons for undertaking them. Quick and unclear legislative drafting frequently, leads to confusing policies and laws, and additional divergence and inconsistencies in the 21st amendment has raised more constitutional questions. The 21st amendment expands Pakistan's upsetting cultures of impunity. This amendment takes a step forward on the road impunity. For example, Article 9 of the Constitution "No person shall be deprived of life or liberty save in accordance with law"⁴⁰ is already limited by the subsequent

³⁶ "The Protection of Pakistan Act 2014 (X of 2014)", "the Pakistan Army Act 1952 (XXXIX of 1952)",

"the Pakistan Air Force Act 1953 (VI of 1953)" and "the Pakistan Navy Ordinance 1961 (XXXV of 1961).

³⁷ Preamble of Protection of Pakistan Act 2014 (X of 2014)

³⁸ Preamble of the Constitution (Twenty First Amendment) Act 2015.

³⁹ Preamble of Protection of Pakistan Act 2014 (X of 2014)

⁴⁰ Article of the constitution of the Islamic Republic of Pakistan.

article 10 (4).⁴¹ It is argued that 21st amendment provides Constitutional cover to military courts that are not already under civil authority as iterated in Article 245. Otherwise, the military would previously be “covered” by Article (8)(3)(a) of constitution⁴², which eliminates the actions of the armed forces from the restraints of fundamental rights shields.

Furthermore, the Constitution of Pakistan is earlier full of attributes that easily alter meanings to suit policy. Public order, Public interest and public morality, reasonable restriction, and the security, integrity and defense of Pakistan all these attributes that can and generally are used to restrict individual liberty and exploit the ambit of state policy.

7. Conclusion

The experience of 4 years tenure of military courts has shown that departure from ordinary legal procedures and safeguards in the name of combating terrorism is counterproductive, as it fuels and feeds the very violence and menace of terrorism it is meant to curtail. There is no justification for trial of civilians by military courts. Solution to menace of terrorism is not to sacrifice and deny essential rule of law principles and deny the rights of accused persons in the name of “speedy trials” through underground proceedings before military courts. Instead, the focus should be on to bolster the fair and effective administration of justice by solidification of police’s capacity of investigation; advance the training of prosecutors for terrorism-related cases; and guarantee protection of judges, prosecutors and witnesses, which are among the important reasons why certain culprits of terrorist attacks have been able to dodge answerability in civilian courts in Pakistan and a comprehensive review of counter terrorism laws, policies and practices to ensure they are well-matched with Pakistan’s national and international legal obligations is much needed.

⁴¹ Article 10 of the constitution of the Islamic Republic of Pakistan.

⁴² Article 8(3)(A) of the constitution of the Islamic Republic of Pakistan.