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## The 21<sup>st</sup> Constitutional Amendment and the Establishment of Military Courts in Pakistan

### *Abstract*

*The judicial system of Pakistan has failed to provide in time justice especially in current challenging era. The ongoing war on terror and specifically the attack on army public school Peshawar united both the political leaders and military establishment in Pakistan. They passed a twenty points' national action plan and in response agreed upon the establishment of military courts in Pakistan. For this reason, the 1973 constitution was amended and the military courts were legitimized for two years. In March 2017, the tenure of the said courts was again extended for the duration of two years by the parliament. Military courts were, however, criticized by many people and dubbed it as the fifth military coup in Pakistan. There was criticism on its procedure regarding violation of the fundamental rights and the right to appeal against these courts. The paper is an attempt to highlight the worth and limitations of military court in terms of providing in-time justice and its impact on terrorism. This tries to answer a number of questions including the reasons to its establishment and flaws in current judicial system. It will highlight the success or failure of these courts on evidences from its first tenure and need for further extension.*

**Key Words:** 21<sup>st</sup> Amendment, Military Courts, Pakistan, Terrorism

### **Introduction**

This is not the first time that military courts were established under the 21<sup>st</sup> constitutional amendment. In the past, military and civilian government have too established these courts. In 1970s Zulfikar Ali Bhutto established such courts. While in 1999 Nawaz Sharif established special courts. Both those special courts were challenged in the Superior Courts of Pakistan, in cases namely Darvesh M. Arbey v. Federation of Pakistan. (PLD 1980 Niaz Ahmad vs Province of Sindh). Those courts were declared unconstitutional on the ground that both the civil and military governments should remain under the constitutional limits. Chief Justice Ajmal Mian declared these courts established by Nawaz Sharif as unconstitutional and of no legal affect. He argued that a parallel judicial system cannot exist in a country. The military courts that were established under the 21<sup>st</sup> amendment also challenged in the

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Superior Courts. However, this time, the courts upheld the constitutional amendment however, right was given to challenge the conviction in the superior courts. (Akbar, 2016)

Military courts were established to deal terrorist cases after the tragic incident of army public school in Peshawar in December 2014. Both the political leadership and the military came on one page and military courts were given powers to give sever punishment to those who are involved in heinous terrorist cases. (Hanif, 2017)

After the terrible attack on army public school in Peshawar, a 20 point “National Action Plan”, was issued. The government of Pakistan empowered the military courts to try civilians for terrorism related activities as a part of National Action Plan. (National Action Plan, 2015)

#### **Laws Amended under the 21<sup>st</sup> amendment**

The 21<sup>st</sup> amendment established military courts for terrorists who waging war against Pakistan. The duration of these courts were initially for two years which later on extended. It changed the following articles and acts:

- Amendment of Article 175 of the Constitution
- Amendment of Pakistan Army Act, 1952
- Amendment of The Pakistan Air Force Act 1953
- Amendment of The Pakistan Navy Ordinance, 1961
- Amendment of The Protection of Pakistan Act, 2014. (Text of 21<sup>st</sup> amendment, 2015)

Under The National Action Plan military courts had intended to eradicate terrorism in its short term policy while in long term the reformation of judicial system of Pakistan. The national assembly passes the Criminal Laws (amendment) Act, 2016, but it did not addressed terrorism related offences. (Int. Commission of Jurist, 2016)

#### **Cases under military courts**

Military courts are dealing the following cases:

- Criminals involve in attacking military personals
- Kidnapping persons for money civilian and military
- Using vehicles for terrorists’ attack
- Causing death or injury
- Keeping weapons intended for terrorist acts
- Creating insecurity in Pakistan
- Receiving or providing funds for terrorist activities
- Waging war against the state
- Offenses against minorities
- Attacks or assaults on government officials, foreigners and media personnel
- Attacking on gas pipelines, aircrafts and airports and educational institutions
- Illegal crossing national boundaries for terrorist activities. (Pak Army Amended Act, 2015)

#### **Prominent Cases under Military Courts**

The most important cases under military courts were the Army Public School, Peshawar, massacre, attack on a bus at Safoora bus, killing of Sabeen Mehmood, a prominent activist, attack on Raza Rumi, journalist, Bannu jailbreak, attack on Parade Lane Mosque, Rawalpindi, killing of foreign tourists at Nanga Parbat base camp, attack on Shia pilgrims in Mastung, shooting down of helicopter in Orakzai Agency, attack on a PIA aircraft in Peshawar, bombing

Marriott Hotel, attack on airport at Karachi, sectarian murders and attacks on polio teams and educational institutions.

The first trials began in February 2015 and the first convictions were announced two months later. The judgements were held in camera. Most of the cases were held in detention centers. (Sajjad Sayed, 2016). In 2017 a number of terrorist involved in heinous offenses were awarded death sentences by the Military Courts.

### **Rationale for the establishment of Military Courts**

It is said that extraordinary circumstances require extraordinary measures. In this connection military courts were established for reducing the aggressive flow of terrorism which has swept Pakistan. (Saddeqi, 2016)

The most important reason for the establishment of military courts was the failure of civil judiciary to curb terrorism. The government and the establishment too failed to curb terrorist activities. Terrorists were given relief where they were convicted. Terrorists were encouraged by the lengthy procedure of judiciary. There was always poor presentation of the terrorist cases. Besides, forensic facilities, inadequate evidence and witness fearing were also challenges for civilian courts as well as anti-terrorist courts to convict the accused. (Baber, 2017)

The slow, lengthy and complicated procedure of the civilian courts was also one of the reason. On the other hand, military courts performed well in term of speedy process and execution of terrorists. (Bhutto, 2017). This was also a good option for the government to punish those who are involved in heinous crimes. (Saddiqi, 2016)

The civilian judges and their families were always threatened so they were hesitating to deal terrorist cases or to punish the terrorists. Government was unable to provide them security. So military courts were the best option, which is claimed that they enjoyed great security. (Int. Commission of Jurist, 2016). Civilian judiciary is hesitating to deal with terrorist cases. The criminals are not punished timely. Politicization of judiciary is also one of the problem. This politicization had destroyed the image and credibility of judiciary which is one of the important pillar of the government. (Nawab, 2017)

### **Approaches to Military Courts**

There are two approaches to the establishment of Military Courts; one is idealist approach while the second is pragmatic approach. From the pragmatic point of view, military is justified is a better institution based on its performance. For example, military institutions like Hospitals run better than government hospitals. In the 1990s there were power theft and low recovery of electricity bills. This job was given to the army and as a result the bill collection increased and power theft decreased. On the other hand, according to pragmatic view, the army has been fighting it since 2001 —Balaoch insurgency increased and army have been trying to tackle the problems mostly without success. The military and Para military forces have been unsuccessful in putting an end to the insurgency. Keeping idealism aside, even pragmatically it makes no sense to hand these functions to the army. (Herald, 2017)

### **Arguments against Military Courts**

The establishment of military courts is a question mark on the performance of civil judiciary of Pakistan. It's a parallel judiciary with the existing courts. This parallel system will definitely affect the performance of existing courts. Special Courts are not a good option for federation. This an irreversible miscarriage on the part of judiciary. The people of Pakistan will not able to enjoy the fundamental rights as laid down in the 1973 constitution. They will be categorized as 'jet-black' before they are brought to trial. They will be deprived of due process. There will be no assumption that they are innocence. There is no right of appeal to any appellate court. The darkest side of military courts is that; a military officer is working a judge which is a clear violation of the fundamental rights. This is a short cut method to justice, can lead to injustice. (Qazi, 2015)

Geoffrey Robertson is of the opinion that military courts are not courts at all. This is an extension of an executive order which is not acceptable in this modern stage. The most important thing is that these courts are not impartial and independent. (Robertson, 1999)

Military courts do not justify the standards of Geneva Convention. As the decision of the supreme court have impacts on the rule of law, democracy and human rights. So this is also a challenge for Supreme Court that it will

accept or reject petitions against the 21<sup>st</sup> amendment. Developed democracies have adopted tough rules regulations to curb terrorism. These rule are even against the basic societal values. (Rizvi, 2015)

Right to appeal is a fundamental right but this provision was restricted for convicts of military courts. There are military appellate tribunals under military courts. There is one provision for convicts that the decision can be reviewed in civilian courts.

In February 2015 the law was further amended through a Presidential Ordinance and military courts were given retrospective powers. Military courts were empowered to try those cases which occurred prior to the amendment. The Ordinance was enacted as law in November 2015. (Pak Army Amended Act, 2015)

Normally in judicial decision there is always a detail judgement. There is explanation and rationale of the judgement. But the military courts are lacking this provision. The convicts are not aware from the verdicts of the cases. Media and family members have no access to the proceeding of these courts. It is not possible to made public the decision of court. According to United Nation, basic principles on independence of judiciary, the person appointed for the judicial office must have appropriate knowledge and qualification in law. Military court's judges are military officers. There is no such qualification for them which are the basic requirements of a judge.

Confession rate is very high in military trials. In 2016, 135 out of 144 people "confessed" to their crimes. Suspects are mostly in the custody of military and they have no access outside. Due to pressure they confessed their crimes. Military courts developed mistrust in the civil judiciary. There is also lack of information on military trials. There are cases where people below the age of 18 are arrested. Laws which are related to terrorism are superseded by the 21<sup>st</sup> amendment. Pakistan is the only country in South Asia where military courts has given such powers. (Dawn, March 3, 2016)

It is argued that the due process of military courts is the violation of fair trial and violation of the rights of suspects. It is also a weak claim that these courts reduced terrorism. Even when these courts were in operation, many tragic attacks took place in the country. Ensuring justice — will require major rethinking of Pakistan's political and security strategy as well as significant reform of the criminal justice system. But the government failed to introduced reforms instead of military courts. (Omer, 2017)

## **The Second Tenure of Military Courts**

In January 2017, military courts were given extension on the plea that it has reduced terrorist activities and all the cases were dealt through due process. But the fact is that the extension of military courts is a democratic tragedy and miscarriage of justice. It is matter of grave even politicians felt the need of military courts with strong arguments. This is a failure on the part of political leadership to stand with true principles and democratic spirit of the constitution. The 23<sup>rd</sup> amendment extended the tenure of the military courts instead of judicial reforms and rescuing a broken judicial system. Both the Bar and the Bench failed to make this constitutional move unconstitutional.

The tenure of the military courts was extended to summer 2019 and this was the law of the land for civilian accused. This is the responsibility on the part of political leadership to reform criminal justice system instead of introducing military courts.

Ambiguous promises of the politicians will never assimilate a broken justice system. Further extension of the military courts is also a question, that: will 2017-2019 be a repeat of the lack of progress on judicial reforms witnessed over the last two years, or will the right kind of changes be effected? (Dawn, March 18, 2017) Some of the politicians and legal experts criticized the government for extension of military courts. They stressed for legal reforms. But unfortunately, the government did nothing in this regard. (Eleazar, 2017). It is necessary to note that the present terrorists' activities hit the country. After the success of operation Zarbe Azab, operation Radd-ul- Fasad has started to eliminate remaining criminals. The people of Pakistan also expect from their leaders' judicial reforms for speedy justice. (Shaukat, 2017)

The concept of extension of military courts reflects the gravity of situation. Military courts convicted and executed a small number of people and terrorisms is still existing in the country but this is reality that there is considerable decrease in the terrorist attacks in the past two years. (Ashraf, 2017)

### **Military Courts the only Solution?**

In the present scenario it has proved that in Pakistan military courts and democratic leaders have no capability to eradicate terrorism. There is a dire need to empower the civilian courts so that to enable the people to get speedy justice. Unless and until the common people get justice, they will never contribute in strengthening of democracy. If the democratic institutions are strong, governance will be improved and ultimately it will defeat terrorism and extremism. (Bhutto, 2017)

After September 11, 2001 Pakistan is facing a war like situation. More than 70000 Pakistanis, including security forces and civilians have been killed. To deal with the situation, it is understandable to adopt extraordinary measures. One such measure is the establishing of military courts. But military courts alone cannot control the situation. A comprehensive policy is needed for controlling terrorism involving both the civilian and military leaders, institutions and processes. (Rizvi, 2015) The extension of the tenure of military courts is opposed by a large number of people. The main argument is that government and military leadership should adopt national consensus on the strategy to deal with terrorism. (Ashraf, 2017) National police is playing a key role in combating terrorism. Reformation of police is needed to combat crime. We should strengthen civilian institutions. (Herald, Jan 2017) Middle East Institute in Washington scholar Arif Rafiq, is of the opinion that Pakistan should improve its judicial system to truly defeat terror. Parallel initiative in the form of military courts without to reform the civilian judicial system is baseless. (Masood, 2014)

### **Conclusion**

The main argument in the establishment of military courts is that the judicial system of Pakistan has failed to provide timely justice and to strengthen the criminal justice system. In normal situation military courts are not justifiable. But in Pakistan it is justifiable because of the worse situation specially the attack of militants on the army public school where 150 children were brutally killed. Keeping in view the situation military courts convicted a number of persons involved in heinous crimes. The main argument in the extension of military courts was to achieve long term objectives to eradicate terrorism. Now there is a need of the hour to strengthen the existing institutions so that justice, democracy and human rights prevail and flourish instead of drastic changes in the existing system.

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