

Military Courts: Credibility and Capacity Implications for Superior Judiciary of Pakistan

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Abstract: *Pakistan is going through turmoil of terrorism. The State is doing what it can to eradicate this menace and in so doing established Field General Court Martial commonly known as Military Courts in the wake of barbaric attack on Army Public School in December 2014. However, it is not the solution to the long-standing problem motivated and nurtured by various factors like political, religious etc. Instead drastic changes are required to amend and update the existing criminal justice system including legal framework, training for judges, prosecutions, protection of witnesses as well as prosecution/defense. This will pave a way for reforms and improve the security situation in Pakistan instead of challenging the credibility and capacity of the superior judiciary. In this way, violence can be countered by respecting Fundamental Rights and following the due process of law. Also, this will enable the state institutes to cooperate in a better way.*

Key Words: Military Courts, Procedure, Supreme Court, Peshawar High Court.

Introduction

The approved apprehension of terrorism, indeed, is the harsh reality of the prevailing global political phenomenon. This menace has posed threats not only to the states individually, but has managed itself to infiltrate deeply into society as well. In this backdrop, perhaps no-other terrorist incident had echoed the Khyber Pakhtunkhwa like the one happened at Army Public School (APS) in Peshawar (Chandran, January 2017). On December 16th, 2014, Tehrik-i-Taliban Pakistan (TTP) brazenly attacked APS and, left around 149 people including 132 school children and school staff killed and 121 seriously injured (Bilal Hassan, 2018).

In response to such barbaric massacre, both the National Assembly and Senate of Pakistan unanimously empowered military courts as part of “20-point National Action Plan” to deal the civilian terrorist offences as well. For the purpose, the Pakistan’s Constitution 21st Amendment and amendments to the “Army Act, 1952” paved the way to expand the military courts jurisdiction over the civilians (Dawn, January 2015).

Nevertheless, it is very hard to find a holistic approach for the punishment of the terrorists. In addition, although political representative and other vital state institutions of Pakistan seemed on the same page, when it comes to punishment of the terrorists especially after APS horrific attack, but as Eric Lambert – an American academician – noted that “determining punishment for criminals has remained a controversial issue” (Zubair, 2019). To such extent, the establishment of military courts under 21st constitutional amendment to deal with terrorists or their facilitators proved the mixed support from different quarters of civil society. In this regards, superior judiciary of Pakistan in Particular had shown reservations on the procedure of military courts criminal justice system and consequent terrorist penalization (Shah, 2018).

Ever-since the 21st constitutional amendment is enforced; it seems that military courts and superior judiciary of Pakistan are at constant struggle of supremacy against each other; instead of promoting speedy criminal justice or eradicating terrorism as per the mentioned amendment. Superior judiciary of Pakistan, especially after first extension of military courts in January 2017, is consistently suspending the later verdicts of death penalty on the basis of vague procedure and irony of no-right to fair trial clause. Under such circumstance, the credibility and capacity of Pakistan’s superior judiciary is slackening, since most of the time is consumed in reviewing the military courts death penalties.

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Military Courts: Constitutional Supremacy or Policy Failure

Following attack on APS, in January 2015, Pakistan's parliament (both houses) unanimously passed the bill thereby establishing military courts to speed-up the trial of terrorists. The military courts also placed their position in other vital anti-terrorism policies of Pakistan particularly the "Pakistan's National Action Plan (NAP)". Moreover, while setting aside the legal and ethical differences, operation Zarb-i-Azb success as Pakistan's primary strategy of counter-terrorism was also expedited by military courts [Dawn, 2019].

During the first two years period (January 2015 to January 2017) of military courts, as media reports revealed, 270 cases were tried; around 160 were awarded the punishment of death penalty (in practice small number were given death sentence); and, the remaining to prison. Hence, the conviction rate during first tenure of military courts was 90 per cent [Omar, 2019].

However, apart from the political and legal reservations, the 21st amendment itself contained the sunset clause "providing for the closure of military courts by January 7, 2017" [Reema, 2019]. In late 2016, the parliament on the matter of military courts extension or its legal closure seemed completely irresponsible i.e. there were hardly any political debate [Ali, 2018]. Surprisingly, on January 9, 2017 the Prime Minister Office, in a press release announced that Mr. Nawaz Sharif, the then Prime Minister in the wake of domestic and regional security gave extension to the military courts for further two years [Dawn, 2019].

"With a view to further strengthen the gains made through counter-terrorism operations ... the military courts have played an extremely important role at a very crucial juncture of one action against extremism and terrorism and translated the actions under operation Zarb-i-Azb to meaningful and tangible national gains. The Federal Government has already initiated consultations for constitutional amendment to continue the military courts for a period which is agreed by all the political parties represented in the parliament" (PM Office Press Release, January 9, 2017) [Chandran, January 2017].

The return of military courts for second term in early 2017 was also welcomed by a section within Pakistan for the following reasons. There was/is the general perception that regular courts or superior judiciary of Pakistan is not fool-proof; constitutional and judicial loop-holes can easily release the suspects; take too much time; and militants can easily threaten the judiciary personnel allowing them to escape from conviction [Yaseen, 2017]. Moreover, they consider military courts as an institution dispensing justice at a rapid pace; and death penalties will be fruitful in conveying a strong message towards the militants thereby hindering them to pursue any violent course in future.

On the contrary, other people argue that terrorism remains sustained despite of military courts establishment. Death penalty by military courts or military trials is counterproductive in preventing suicide attacks, since these terrorists do not necessarily care about their lives. As a counter-terrorism strategy, this section emphasizes on strengthening the existing institutions through pragmatic legal and political processes and reforms. Moreover, wariness regarding fairness, misuse and without charge arbitrary detention were/are also existing among people [Nasir, 2015].

Politically, the ground for second term of military courts was also favoring the extension of 21st amendment for further two years. No doubt, Mr. Nawaz Sharif, the then Prime Minister, was under pressure since the Panama scandal was under process in the Supreme Court of Pakistan. At that instant, committing any political adventurism especially against the establishment's interest was not in favor of PML-N. Alongside Panama, though insurgency was come-down a little, still TTP and other state proxies were "continue to remain a potent force" [Chandran, January 2017]. Last but not least, Mr. Nawaz Sharif biggest headache, as ever, was east and west volatile borders of Pakistan which require the establishment upper hand in policy formulation. Any changes in the political behavior of Afghanistan and India can directly involve Pakistan establishment in political process of the country [Bilal Hassan, 2018].

It is very difficult to comprehend the assessment of military courts credibility as there is no official data available regarding the criminals or terrorists' cases heard and tried so far. However, in November 2018, military authorities informed National Assembly that military courts had to further decide 185 terrorism cases before the completion of its second term [Akbar, 2015]. Similarly, in late 2018, Defence Mr. Minister Pervez Khattak in response to MNA Mr. Mohsin Dawar question wrote to National Assembly that since the execution of Zarb-i-Azb military operation, total of 717 cases had referred to military courts by Interior Ministry. The minister noticed that "of the total cases, 185 were still under process and they had to be decided by March 30, 2019 when the two year term of the courts would expire ... a total of 478 cases had been decided; total of 284 convicts had been awarded death sentences and 56 of them already been executed ... 192 convicts had been awarded rigorous

imprisonment, two accused acquitted and 54 cases dropped due to technical reasons – which meant that the conviction rate of the case was more than 60 per cent”(Omar, 2019).

Superior Judiciary Stance of Military Courts: Efficacy, Legality and Utility

The parliament of Pakistan amended the Constitution following the Army Public School children massacre in Peshawar. On January 28, 2015 a plea against 21st amendment was accepted by three-judge bench of Supreme Court for regular hearing from both federal and provincial governments against its legal status [\[Khan, 2018\]](#). Four possible options were put under consideration that whether or not: first, strike down the 21st constitutional amendment as whole; second, refer the amendment to parliament with reservation against military courts establishment; third, petition should be dismissed against the proposed amendment; fourth, “to enlarge the jurisdiction of Article 199 against the military court verdict and get the power to review the military courts verdicts on the basis of mala fide” [\[Malik, 2015\]](#).

However, on August 5, 2015 the 17-member full Court of the Supreme Court, in a clear majority of 11 to 6 vote dismissed the petition against the establishment of military courts. Though, military courts enforcement was upheld by Supreme Court, but was also subjected to judicial review (Supreme Court Judgment, August 5, 2015) [\[Hasnaat, 2015\]](#).

The Supreme Court verdict of military court approval marked extreme criticism both from within judiciary and civil societies. Human Rights activists, lawyers and even judges like Asif Saeed Khosa, Qazi Faiz Isa, Dost Muhammad Khan [\[Iqbal N., 2015\]](#).

Internationally, the response to establishment of military courts was even harsher. International Court of Justice (ICJ) while examining the performance of military courts stated that legally Pakistan had clearly violated the political commitment to legal obligations of fair trial and, impartiality and independence of the judiciary since the secret proceeding of military courts are under process; utility of superior judiciary seems abating; and, instead of boosting political and public confidence on superior judiciary, the efficacy of Pakistan justice system defamed (ICJ, June 2016).

Indeed, like any other system, Pakistan also has the legal duty to safeguard its population against terrorists’ attacks, and terrorist attacks when occur can be investigated, prosecuted and a duty to bring perpetrators to justice. However, for the long-term achievements, the counter-terrorism Measures should be legitimate and lawful in order to attract vast support from society and state vital institutions [\[Wasim, 2019\]](#).

Superior judiciary maintained that country’s policy must not sacrifice the culture and spirit of the rule of law and principles. In the name of “speedy trial” and the secret proceedings in military courts, the rights of accused should not be compromised. Instead, the existing institutions of country should be trained in technical and effective staff and other resources which in consequent can bolster the fair administration of judiciary (International Commission of Jurists, 2019). There is crying urgency in altering the behavior of civilian judiciary of Pakistan as well. The endemic challenges of prolonged and delayed trials require special attention; and, allegations and perceptions that civilian judgments are controlled or influenced by external factors need to be addressed.

Military Courts and Civilian Judiciary: Capacity and Credibility or Limitations

Both the capacity and limitation of Supreme Court in past and present has dwindled. However, the role of High Courts in Pakistan while reviewing military courts verdicts and convictions proves credible.

In early 2016, military courts approved the death penalty of 16 convicts. The families of convicts challenged the military courts verdict in Supreme Court on the ground of violating their right to fair trial. Asma Jahangir argued before Supreme Court five-Judge bench that military courts or Supreme Court on behalf of military courts should share complete evidence, complete record of the case and ensure freedom to be accused for engaging counsel of his own choice (Chandran, January 2017). Many petitioners also alleged that ill-treatment, torture and disappearance tactics have been used with the convicts; and, particularly in two cases, and the petitioners claimed that at the time of arresting the convicts by law enforcement agencies, they were under the age of 18 means children (International Commission of Jurists, 2019).

The Supreme Court, in August 2016, dismissed all the petitions in its judgment without putting the details of allegations under consideration. The Supreme Court judgment itself questioned the capacity of civilian judiciary and limitations of military courts especially the former right of review jurisdiction (Ali, 2018).

Though, majority judges in Supreme Court and High Courts of Pakistan do not believe in the academic theory of justice, still, the former judgment of August 2016 put an end to the basic essence of fundamental rights concept. The Supreme Court failed to inquire that why all the convicts had confessed to their respective alleged crimes; logically, how it was possible; “or why the safeguards guaranteed under Pakistani law to ensure confessions are voluntary were not adhered to in military courts proceedings” (Dawn, 2019). Interestingly, the Supreme Court judgment argued that “since the statement purported to admit guilt were recorded by a magistrate and were not retracted, they stood proved” (Shah, 2018). Again, the Supreme Court argument failed to describe the nature of proceeding and confession, since military courts trials are conducted secretly.

Contrary to Supreme Court, the High Courts of Pakistan especially Peshawar High Court had played a remarkable role in reviewing the death penalties awarded by military courts; amid the so-called ‘might and right’ writ of establishment had kept under check and balance for the first time since inception. The most prominent among Peshawar High Court suspension orders against military courts terrorist death penalties, was the October 2018 ruling where more than 70 convicts’ death sentences verdicts were suspended (Omar, 2019). The court stated that the convicts who were tried for terrorism related charges by military courts have to be released. The court judgment came in wake of less evidence against the accused and maintained that military courts have conducted the proceeding in bad faith.

The Peshawar High Court verdict confirms the existence of mal-practices, for-instance, violation to right of fair trial standards obliged by international law and constitution of Pakistan. The judgment also raised questions that: why fair trial basic principles were compromised for speedy justice; why state failed to prove the accused guilt before impartial and independent tribunals; and, why state perpetrated the violations of gross human rights in the judicial process (PHC Writ Petition 536-P, 18 Oct, 2018).

The Peshawar High Court termed the military court verdicts non-satisfactory and suspended the death penalties on the following basis:

Firstly, the detail judgment of Peshawar High Court raised concerns against the competence of defense counsel of convicts. Even according to the Army Act, the accused has the right of engaging civilian or private defense lawyer at their own expense (ICJ, *Military Injustice in Pakistan*, 2019). The judgment also asserted concerns that there is no clarity of counsel communication technique with the convicted person; what language was used; and, whether accused were given the opportunity to consult with counsel confidentially. Peshawar High Court maintained that the defense lawyer was just a dummy and characterized the military trials as the “complete prosecution show”, since the convicts fundamental and legal rights to free choice of defense counsel were violated (Zubair, 2019).

Secondly, Peshawar High Court judgment raised concern that it is possible in all cases that “the primary source of evidence was confessional statement by the accused” (Shah, 2018). A detail of unlawful confessions of the convicts in the military courts was described by court judgment which pointed that: the handwriting, tone and style of all defendants confessional statements were same; after recording the accused confessional statements they were kept again by military authorities; some confessions were made years after the convicts were arrested; and, the convicts were incarcerated before and after confessional statements recording and were deprived of their rights to access their lawyers, families and other relevant people (Ali, 2018).

The constitutional and legal jurisprudence of Pakistan incorporates the details of recording accused confession. Confession recording demands the mandatory precautions in which magistrate must has to observe and to ensure the evidentiary worth of it, its legality and voluntariness. Applying these measures on the military courts’ cases, Peshawar High Court put reservations that these laws of confessions had been flouted in former proceedings.

Thirdly, Peshawar High Court questioned the enforced disappearances or missing person and their trials in the military courts. The judgment highlighted the secret detention of accused before military courts for many years, since many of them were taken by military agencies as far back as 2009 (Omar, 2019).

In short, the judgment questioned the faded military proceedings, arbitrariness in death sentencing, and secrecy dough starting from registration or enforced disappearances of the accused to final judgment. In the light of these arguments Peshawar High Court suspended the death penalties and argued that the convictions were made on ‘no sound evidence’, ‘bad faith’ and “based on malice of facts and law” (Shah, 2018).

Critical Appraisal

Why Military Courts are Accessed with Suspicious?

Legal status of civilian trial by military tribunal? The rationale of military courts envisages the trials of military offences committed by security forces-army only. The jurisdiction of military courts restricted them from trying civilian offences or other violations against the law and fundamental rights.

The standards of the military courts stemmed from several sources. Many international treaties especially International Covenant on Civil and Political Rights (ICCPR) to whom Pakistan is also party bounds military courts to certain obligations [\(UNCHR, 2005\)](#). Similarly, United Nations Human Rights Committee repeatedly prohibited countries from trying civilian cases by military courts (Amnesty International, 2014).

Other sources which provided guidance on the matter of military courts include American Convention on Human Rights; Protection of Human Rights and Fundamental Freedom European Convention; African Charter on Human and People's Rights; and, United Nation Commission on the Promotion and Protection of Human Rights (UNCPPHR). In 2006 UNCPHR adopted the 'Draft Principles Governing the Administration of Justice through Military courts' where principle 29 directed the states to avoid civilian trial through military courts and emphasized that "the jurisdiction of military courts must be restricted solely to specifically military offenses committed by the military personnel" (ICCPR, 2008).

In this backdrop, the 2003 judgment of African Commission on Human and People's Rights (ACHPR) in *Ghazi Suleiman v. Sudan* case holds special importance. The ACHPR on the verdict of Sudan's military court established under Presidential Decree which was administered by army personnel including three active military officers stated that "civilians appearing before and being tried by a military court presided over by active military officers who are still under the military regulations violates the fundamental principles of fair trial" (ICJ, *Military Injustice in Pakistan*, 2019). In relevance with Pakistan's military tribunal judgments, the ACHPR remarks against Sudan's military court verdict provides the insight to former tribunal as well, which stated that "military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with officers who are under the purview of ordinary courts" [\(ICJ, Military Injustice in Pakistan: A Briefing Paper, June 2016\)](#).

Vague Proceeding and Fair Trial Rights under Military Courts: Both the constitution of Pakistan and International Conventions direct military courts to adopt the culture of regular/civilian judiciary i.e. impartiality and independence and, must respect the norms of guaranteeing fair trial rights as mentioned in ICCPR Article 14 (Omar, 2019). The Pakistan's military courts' verdicts of death sentences, as mentioned by Peshawar High Court judgment, were not independent; proceedings failed to justify the right to fair trial; and, vague confessional statements neglected the constitutional and international standards of fair trials.

Military Courts Judges Competence Questioned: The Pakistan Army Act, 1952 section 103 implies that seasoned and senior lawyers, judges and officers of military branch for legal services can provide assistance and advice to military court operations, but cannot be the part of the bench hearing cases (Omar, 2019). The judges appointed to military courts are mostly acting military officers who are part of military executive itself; hence, they are not independent of military obligations. Moreover, they lack legal and judicial training, even sometime military appointed judges without law degree, and do not necessarily have any security of their job tenure which is the pre-requisite of judicial independence and competence (Wasim, 2019).

Violation of the Public Hearings in Military Courts verdicts is a dilemma before constitutional norms: The prerequisite of fairness demands the open trial and public hearings with exception of prescribed circumstances. In today's contemporary world, in camera recording facilitate the fairness of trials, however, still it requires the fair conduct of recording. The constitutional standards of closure of hearing command that at least the presence of bare representative to ensure fairness (Dawn, 2019).

Ramifications/ Repercussions

The question of governance in Pakistan's counter-terrorism strategy is solely dependent on civil-military equations. The surrender of fundamental freedoms against opaque proceedings of military courts and Supreme Court willingness started a new chapter of civil-military relations. Our political leadership is witnessing injustice not only silently but from Nawaz's to Imran's governments had Also made efforts to extent the military courts' tenure. Parliament of Pakistan ignored actual challenges of terrorism and adopted and legalized the 'exceptionalism' strategy - military courts which in longer-run

always proved counterproductive. The rationale of exceptionalism doctrine, according to International Commission of Jurists, provides legal forum to departure of judicial norms and human right protections, rather glorify the violence or threat (Akbar, 2015). These inappropriate measures of counter-terrorism, after sometime, became permanently embedded into country's legal norms which further pushed the lack of accountability - actual cause behind insurgency - into darkness.

The enforcement of 21st and 23rd constitutional amendments to curb the menace of terrorism has shrunk the role of political institutions in formulating anti-terrorism policies and laws. Currently, the counter terrorism strategy and decision-making process have alienated the political leadership and aggrandized military role in Pakistan's political arena. Since the basic tenant of violence describes the promotion of political disturbance whether imposed by sectarian groups or terrorists, the core issue of curtailing terrorism should not be addressed by firing from military shoulders.

There is a democratic confusion that how many judicial systems are functioning in Pakistan. Along with democratic and power confusions of different legal systems, with the establishment of military courts the concept of equality before law prescribed by Islamic penology has received a serious setback. This dilemma of uncertainty represents the ineffectiveness of political and military leadership where actual reasons are skipped by execution or addition of another system into already existing one.

The approval military courts have further expanded the Army footprints into country's political and civil affairs. Emotions of APS attack should not be exploited for the purpose of vigilant interests. The military courts, though has forged the atmosphere of 'threat' against violence, but still, the counter measures in its basic essence is violence itself. In contrast, change in civilian perception against terrorism need to be altered to achieve the productive and effective goals.

Military Courts had Escaped the Judicial Reforms

A real solution to prevailing tumult of terrorism. The emotional enthusiasm of military courts was effective in dispersing speedy justice to alleged terrorist and had reduced extensively the terrorist attacks. However, it eliminated the concept of judicial process and reforms, which otherwise can overcome the real challenges. Not only Pakistan, but almost majority of South Asian States is facing such dilemma of policy confusion. Instead of addressing the judicial reforms, they looked at military for the eminent solution of political and religious violence which "may end up denting the institutions meant for delivering justice".

Conclusion

There is frustration in Pakistan, how to deal with terrorism and crimes. However, military courts which came into existence after inhuman attack on APS Peshawar is not the way to tackle insurgency, since there exist no overnight solutions to the crimes forged by decades of political and religious neglects. To ensure quick and smooth justice, the criminal justice system requires extensive reforms and rethinking. Instead of challenging the scope, credibility and capacity of civilian judiciary and constitutional jurisdictions, the training of investigators, lawyers and judges demand special attention. Similarly, violence should not be the strategy to counter violence because it is usually achieved on the cost of fair trial and fundamental rights.

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