
Supreme Court Judgment in 21st Constitutional Amendment and Pakistan Army (Amended) Act 2015 Case - Implications for National Security of Pakistan

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Abstract

There is no exception to the proposition that both national security and enforcement of fundamental rights carry prime significance to ensure sovereignty of any nation. However, conduct and responsibilities of the security and judicial organs of the states have not been observed in sink with each other. Instead of complementing each other, they have been found confronting each other. They have been observed egoistic and considering the other as less loyal to the state or violator of the constitution. This is an unpleasant trend, which is required to be controlled by confidence building measures and augmenting each other in the larger national interests. The delicate balance between the national security and enforcement of fundamental rights, more specifically safeguards as to arrest and detention, right to fair trial and due process, protection against double jeopardy and dignity of man, cannot be made except with the mutual understanding and respect for each others domain as well as realization of collective responsibility towards national security and inalienable rights of the people to be treated in accordance with law and enjoy the protection of law. This balanced approach has been observed to a certain extent in the judgment delivered by the Supreme Court on August 5, 2015 in the cases against “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015”. The Supreme Court neither declared the said amendments ultra vires the constitution nor did it forego its right of judicial review in a fit case; and thereby recognized Parliamentary supremacy and role of the Armed Forces in the national security and to exercise judicial powers within the limited scope while acting in aid of civil power and the judiciary, without supplanting it. It is now imperative for all the state organs and their subordinate functionaries to act justly, fairly and in accordance with the

space created in law to ensure peace, stability, integrity, unity, respect, tolerance, fraternity and order in the society. It is only enforcement of the law and not merely the legislation which may pave the path for restoration of peace and meet the challenges of faced by the national security of Pakistan.

Introduction

Ever since the declaration of War on Terror (WOT), the government had taken substantial measures, including amendments in the existing criminal laws and enactment of new laws, to control and eliminate the nuisance of terrorism. However, the government's efforts did not succeed to address the issue to the hilt. Suicide bombings and indiscriminate killings of innocent citizens, attacks on Armed Forces and military installations, targeted killings of officials of the police, Law Enforcement Agencies (LEAs) and other government departments remained a matter of routine. In order to check growing terrorism, military operations including *Rah-i-Rast*, *Rah-i-Nijat*, *Al-Mizan*, *Zarb-e-Azb* etc were launched in the South and North Waziristan Agencies, other parts of FATA and PATA as well as specific areas of Punjab, Balochistan and Karachi. The government being apprehensive of its responsibility to restore peace and maintain law and order in the country had been utilizing various means and options including capacity building of the LEAs and judiciary as well as legislative measures, besides employing the Armed Forces in aid of civil power. This mechanism worked to a certain extent but the pending cases of high profile terrorists in the Anti-terrorism Courts (ATCs) with low rate of conviction and moratorium on execution of capital punishment encouraged the terrorists to continue anti-state and terrorist activities. Operation *Zarb-e-Azb* was achieving its targets to clear the national soil from the militants and enemy aliens; but fall out of the said operation was also expected. However, it was not perceived that it would emerge against the innocent children of Army Public School Peshawar, who did not have any malice, hatred or enmity against any person, with such a magnitude. They were pursuing their desire for brighter career, service to the humanity and the nation.

It was 16th of December 2014 when the terrorists attacked Army Public School Peshawar and killed 151 children and staff of the school while injuring similar number of their fellows. The massacre of the innocent children enraged the whole nation irrespective of the caste, creed, religion and political or social affiliation. The political parties and the government had always been negotiating different options including mediation, reconciliation and dialogue with militant groups involved in anti-state and terrorist activities as well as strict punitive and legal measures to eradicate terrorism from the country. These efforts had been temporary and remained inconclusive; hence did not bear fruit, until the carnage

of innocent school boys and staff of the Army Public School Peshawar on 16 December 2014. The political parties united at a multi-party conference organized at Peshawar on 18 December 2014 and expressed their unanimous resolve to eliminate the scourge of militancy, terrorism, radicalization and extremism from the country as well as establish speedy trial courts.¹

This Article explores the reasons and objects of the “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015” and the rationale and wisdom of the Supreme Court in upholding the said amendments. The judgment depicts divergent views of the learned judges but demonstrates firm commitment of the judiciary to uphold the right to exercise the power of judicial review without compromising independence of judiciary. The judgment is a combination of judicial restraint, exercise of judicial power and recognition of parliamentary supremacy; while directing the stake holders to ensure justice, fair play and rule of law, and protect fundamental/human rights as enshrined in the Constitution. The Supreme Court validated trials of civilians by court martial with the direction to ensure “due process” and “fair trial”, and also encouraged the ATCs to follow a proactive approach to deliver justice within the bounds of “Anti-terrorism Act 1997”. Finally the Article high lights the implications for national security of Pakistan as a consequent of the said judgment and a conclusion.

“Constitution (21st Amendment) Act 2015” and “Pakistan Army (Amendment) Act 2015”

Terrorists’ assault on APS Peshawar was a direct attack on the national security of Pakistan for two reasons. Firstly, the school was directly under the control and supervision of the Armed Forces, who were overseeing the affairs of the school and deployed in the near vicinity. Secondly, the children were future of Pakistan, who had to take the charge and discharge their obligation towards national security, integrity and unity of the country. Enraged on the catastrophe, the nation realized that the main cause of continued hostilities against the armed forces and innocent citizens was collapse of the criminal justice system, which could not deter the terrorists of committing the acts of terrorism. Therefore, the government decided to chalk out National Action Plan (NAP) and realign different organs of criminal justice system of Pakistan. The government negotiated a consensus for establishment of military courts for speedy disposal of a large number of cases of terrorists pending investigation, adjudication and execution before the police, ATCs and superior judiciary, as a consequence of appeals or writ petitions. Though the politicians recognized failure of the criminal justice system to bring the terrorists to justice and expressed their resolve to establish military courts, but with half-hearted consent; while the legal

fraternity and judiciary remained serious of the establishment of military courts to try terrorism cases.² Although there had been reservations by some human rights groups, religious and political parties and the legal fraternity on the establishment of the military courts and the discrimination of terrorists on the basis of 'religion' or 'sect', yet the government managed to get the "Constitution (21st Amendment) Act 2015" and "Pakistan Army (Amendment) Act 2015" passed by the two houses of the Parliament, which received the assent of the President on the 7th day of January 2015.³ Preambles of both the amendments are similar and suggest that there was grave and unprecedented threat to the security and integrity of Pakistan from the terrorists who had raised arms against the country. They had formed armed groups and militias using the name of religion or sect and were funded by the foreign and local actors. Both the amendments shall remain in force for a period of two years only and shall have the following effects:-

- a. Article 8 of the Constitution ordains that any law inconsistent with or in derogation of the fundamental rights shall be void; however, among others, the laws specified in the 1st Schedule of the Constitution shall not be hit by this principle. The 21st Amendment, included the "Protection of Pakistan Act 2014", the "Pakistan Army Act 1952", the "Pakistan Air Force Act 1953" and the "Pakistan Navy Ordinance 1961" in the said schedule, so as to bring the said laws out of the operation of Article 8 or the jurisdiction of the High Courts to issue writ for any violation, which *prima facie* is inherent in the said laws.
- b. The second amendment was made in Article 175 of the Constitution, which deals with the establishment and jurisdiction of courts as well as independence and separation of judiciary from the executive. However, the 21st Amendment added a proviso in the Article to the effect that the provisions of Article 175 shall not affect trial of any person under the above mentioned laws, provided "he claims or is known, to belong to any terrorist group or organization using the name of religion or a sect." This implies that if any terrorist with the said characteristics is tried by a court martial, consisting of military officers who belong to the "executive", the judiciary will not consider such trial or exercise of judicial functions by the military

officers as intrusion in its independence or jurisdiction. Rather they should be treated as part of judiciary established under Article 175, exercising jurisdiction and performing judicial functions as conferred by the constitution and the relevant military law or/and the Protection of Pakistan Act 2014.

- c. Simultaneously, sub-sections (iii) and (iv) were inserted in Section 2(1)(d) of the “Pakistan Army Act 1952.” The amendment brought the civilians who “claim or are known to belong to any terrorist group or organization using the name of religion or a sect” within the ambit of the Act. As a consequent thereof, civilians who possesses these attributes and raises arms or wages war against Pakistan, or attacks the Armed Forces, law enforcement agencies or any installation may be tried by court martial and punished as if he is a person subject to the Act. Similarly, if any such civilian is accused of abduction or causing death or injury to any person or deals in any manners with explosives, fire-arms, suicide jackets, he may also be subjected to trial by court martial. If any civilian is charged with using or designing any vehicle for terrorist acts or money laundering to promote the said crimes or committing any act to over-awe the state or the public or creating terror or insecurity in Pakistan or attempt to commit any of the said acts within or outside Pakistan, may also be amenable to court martial. In addition to the above, all the scheduled offences except at serial iv, xiv, xviii, xix, xxi and xxii, under the Protection of Pakistan Act 2014 may also be tried and punished by court martial, if committed by any civilian using the name of religion or sect. The amendment clarified that irrespective of the place of offence, any of the above mentioned offences allegedly committed by the civilians in the given circumstances would be triable by the court martial, if so approved by the federal government.⁴ The federal government is empowered to accord sanction for prosecution and trial of a fresh case or order for transfer of any under trial case from an ordinary criminal court or ATC or special court to the court martial.

Section 60 of the Act which deals with punishment was also amended to the effect that persons tried and convicted by courts martial may be awarded any of the sentences mentioned in the Act and any other law, which may include Islamic laws, PPC, POPA etc. In order to clear the mist, the provisions of the PAA were also given overriding effect; and in case of conflict, the same were to prevail to the extent of inconsistency.⁵ The Government further amended the “Pakistan Army Act 1952” through the “Pakistan Army (Amendment) Ordinance 2015” by adding provisos before the explanations, whereby arrests, detentions and custody of the accused civilians with the Armed Forces, Civil Armed Forces and LEAs before promulgation of Pakistan Army (Amendment) Act 2015 were given legal protection, if the offences allegedly committed by the accused persons constituted an offence under the newly inserted Section 2(1)(d)(iii) or (iv) of the Pakistan Army Act 1952. All Acts done in good faith by any person acting under the said sub-sections were also protected against any suit, prosecution or other legal proceedings. The ordinance further authorized the authority convening the court or the court martial itself to make such order at its discretion for the protection of witnesses, president members and other officials concerned with the court proceedings.⁶

Reaction to “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015”

A mixed reaction had been observed with reference to the establishment of military courts. Advocate Yasin Azad, ex President of the Supreme Court Bar Association opined that military courts could neither strengthen the judicial system nor could be established without amending the constitution.⁷ Justice Salahuddin Mirza (Retired) suggested the government to establish ‘a military prosecuting agency’ or ‘appoint military observers or advisers’ with the prosecuting agency in lieu of military courts, which may not address the issue.⁸ The Human Rights Commission of Pakistan also articulated its reservation on the convening of military courts to try the offences of terrorism and agitated decision of the politicians to support the idea. The commission also refuted that ‘speedy justice’ had neither been fair nor speedy in most of the cases; and stressed upon the need to improve and fortify the existing mechanism of investigation and prosecution, which required scientific investigative techniques instead of resorting to torture and coercion, as well as protection of judges, prosecutors, lawyers and witnesses.⁹ Sindh High Court Bar Association disapproved establishment of the military courts on the plea that the federal government could not establish criminal or civil courts in any province, as this subject had been excluded from the Federal List.¹⁰ Another constitutional petition had been filed praying the Supreme Court to declare 21st Constitutional Amendment as an

act of high treason under Article 6 committed by the members of the Parliament as they amended the constitution on the dictates/pressure of the Armed Forces rather than protecting the constitution.¹¹ Mrs Asma Jahangir also expressed her reservations about the establishment of military courts but regretted if the same could be successfully assailed in the apex courts, in the backdrop of popular support and public pressure in favour of the military courts which motivated and compelled the Parliament to amend the constitution and the Pakistan Army Act for the avowed purpose.¹² Maulvi Iqbal Haider supported establishment of the military courts on the plea that the criminals involved in brutalities and heinous crimes against the humanity may not be brought to justice unless prosecuted and indicted before such courts.¹³ A significant majority of human rights activists and lawyers had expressed their concerns about the establishment of military courts and lifting of moratorium on death penalty.¹⁴ Their grievances were converted into constitutional petitions before the apex court.

Contours of the Supreme Court judgment in “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015”

A total of fifteen petitions challenging “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015” were filed in the Supreme Court. Having given anxious hearing for about five months to the stake-holders, on 5th day of August 2015, the Supreme Court delivered a split judgment with the majority of 11 to 6 in favour of “21st Constitutional Amendment” and the “Pakistan (Amendment) Act 2015”. Resultantly, subjection and trials by courts martial of hardened criminals and miscreants committing acts of sabotage, subversion, terrorism, waging war, raising arms against the state, killing innocent citizens, civil armed forces and armed forces personnel, police and LEAs officials, challenging writ of the government etc in the name of religion or sect were validated; and stay granted by the apex court on the 16th day of April 2015 against execution of the six deaths awarded by courts martial stood vacated.¹⁵ Main judgment was authored by Mr Justice Sheikh Azmat Saeed which was concurred by seven other judges; while the Chief Justice wrote a separate judgment, which was endorsed by Justice Iqbal Hameed ur Rehman, with additional notes by Justice Saqib Nisar and Justice Umar Ata Bandial. Justices Jawad S. Khawaja, Asif Saeed Khosa, Ejaz Afzal, Ijaz Ahmad Chaudhry, Dost Mohammad Khan and Qazi Faez Isa delivered dissenting judgments.

Mr Abrar Hasan, pleading for Pakistan Bar Council, argued that classification of terrorists on the basis of “raising arms and insurgency using the name of religion or a sect” and excluding other terrorists (organizations) posing threat to the peace and security of Pakistan was against the spirit of Articles 4 and 25 of the

Constitution and suggested to refer the matter back to Parliament.¹⁶ Mr Abid Zuberi, representing Sindh High Court Bar Association, argued that trials of civilians by military courts would abridge their fundamental right of access to justice, right to engage counsel of own choice and fair justice.¹⁷ Mrs Asma Jahangir, appearing for Supreme Court Bar Association, contended that the sunset clause in the 21st Amendment itself suggests reluctance of the Parliamentarians to grant unbridled powers to military.¹⁸

Mr Khalid Anwar appearing for the Federal Government contended that 21st Amendment was enacted in the wake of undeclared war against violent non-state actors who were operating as armies; while ‘military tribunals’ which fall within the pale of ‘such other courts as may be established by law’ employed in Article 175, had been established to create a balance ‘between war time powers and peace time powers’ in favour of the need for security.¹⁹ The Attorney General for Pakistan, contended that the armed forces are required to act “in aid of civil power” whenever there is “threat of war”; and in case the war is declared or there is fear of war, armed forces, in terms of Article 245, may constitute military courts for trial of any person engaged in threat of war or actual war against the state, or acting against the defence of Pakistan or is a threat to the defence of Pakistan in the time of war. He also canvassed that Article 245 read with Entry 1 and 55 of the Federal Legislative List empowers the Federal Government to legislate for establishing military courts for the “defence of Pakistan” during war.²⁰ He also contended that irrespective of the fact whether the Pakistan Army (Amendment) Act, 2015 preceded the 21st Constitutional Amendment, the provision of Article 8 (3) (b) (i) and the word ‘specified’ used therein shall have effect being a present perfect tense and in terms of the provisions of Section 5(3) of “the General Clauses Act, 1897.”²¹ He further contended that the Pakistan Army (Amendment) Act, 2015 had provided another forum of trial and extended jurisdiction of courts martial to try terrorist waging war against Pakistan and the extension of such jurisdiction is in line with the scheme of the Constitution.²²

Justice Azmat Saeed writing the majority judgment upheld the “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act, 2015” by declaring that the same were *intra vires* the Constitution, as the Parliament is vested with the legislative power i.e. either to make laws or amend the Constitution within the limits prescribed therein²³. He disregarded the petitioners’ contention that the impugned amendments were intended to establish parallel judiciary or compromise its independence or violate fundamental rights enshrined in Article 10A or 25 of the Constitution.²⁴ On the contrary, he concluded that trial of civilian terrorists under the Pakistan Army (Amendment) Act, 2015 was based on intelligible criterion and valid classification; and that “existence and validity of courts martial is acknowledged

and accepted by the Constitution in so far as they deal with members of the Armed Forces or other persons subject to the said Act".²⁵ Similarly, he concluded that the dictum of the Supreme Court in *Sh. Liaquat case*²⁶ may not be applied in the instant case as the Armed Forces have not been called to act "in aid of civil power" as envisaged in Article 245(I). He concluded that in a deteriorating law and order situation leading to "insurrection, mutiny, open armed rebellion against the state wherein state territories are lost to the miscreants" and state institutions lose their sanctity, 'threat of war' would be imminent. He ruled that the offences allegedly committed by the said terrorists had direct nexus with the defence of Pakistan and the legislature was competent to help the government "to act in defence of Pakistan to provide for the trial and punishment of offences which have a direct nexus with defence of Pakistan committed by civilians by court martial under Pakistan Army Act, 1952."²⁷ However, he conceded his brethren on the issue of judicial review, being a settled law.

Justice Jawwad Khawaja, while endorsing judgment of Justice Qazi Faez Isa held that the Supreme Court has the power to review and, where appropriate, strike down any Constitutional Amendment passed by the Parliament; and that 21st Amendment is liable to be struck down.²⁸ Justice Asif Saeed Khosa endorsed the exercise of judicial review power of the superior judiciary but surrendered independence of judiciary in favour of sovereignty of Parliament on the plea that it is only sovereignty of Parliament which may guarantee true democracy, without which "independence of judiciary may be nothing more than an illusion."²⁹ He observed that maintenance of law and order is the domain of the executive; while ensuring that the order is maintained through proper application of law falls within the precinct of the judiciary. He recalled that "it is the justice which ensures peace and tranquility in the society and any dose or measure of injustice for the sake of order is nothing but counterproductive as it feeds disorder rather than curing it". According to him, justice is a value which affects other values in the society by "determining and regulating how other values are ensured and put to practice." He emphasized that "mature nations seldom sacrifice justice at the alter of expedience."³⁰ Justice Khosa also drew a distinction between war and insurrection and cautioned that if the said interpretation is accepted, it may oblige "the captured insurgents to claim the internationally recognized status and protection available to prisoners of war."³¹ He concluded that in the absence of any direction by the Federal Government to the Pakistan Army to establish military courts for trial of civilians in the backdrop of "threat of war" contemplated under Article 245(I), the Army could not try the civilians.³²

Justice Sarmad Jalal Osmany was of the opinion that being a nation at war, and the fact that "desperate times call for desperate measures", extension of courts martial jurisdiction to try the insurgents or turncoats, who are not

ordinary criminals but desperate individuals who intended to destabilize the government and enforce their own brand of Islam, was justifiable in law.³³ Justice Ejaz Afzal Khan held that “Pakistan Army (Amendment) Act 2015” is ultra vires the constitution as it negotiates independence of judiciary.³⁴ He was also conceded by Justice Ijaz Ahmad. Justice Dost Muhammad Khan regretted that the government did not take requisite measures or evolve any strategy to provide security to the judges, prosecutors, investigators or other official of the Anti-terrorism courts, their families and witnesses or provide exclusive accommodation to house the said courts, or build capacity of the investigative, prosecuting or forensic laborites, which are neither equipped with modern forensic equipment nor employed with qualified staff to collect the request evidence for production before the Anti-terrorism courts and ensure convictions and sentence in accordance with law.³⁵ He perceived that the trials of civilians before the military courts were conducted summarily and in camera where minimum standards of justice and due process had not been observed.³⁶ He asserted that trial of civilians apprehended during combat against the Army by the courts consisting of Army officers shall militate the principle that ‘no one shall be judge in his own cause’. He also described references/recommendations of trials of civilians by a team of the federal government officials as encroachment on the powers of judiciary; thus violative of Article 190 and 203 of the Constitution.³⁷

Justice Umar Ata Bandial while agreeing with Justice Azmat Saeed justified trials of the terrorists by military courts and dispelled the notion of militants’ probable right to claim enforcement of rights as the prisoners of war under the 3rd or 4th Geneva Convention. He concluded that belligerent civilians fighting against own state are liable to be treated in accordance with the laws of war and tried under the military tribunals.³⁸ Justice Qazi Faez Isa did not approve 21st Amendment or Pakistan Army (Amendment) Act, 2015 inter alia on the grounds that the arguments of the learned Attorney General regarding establishment to military courts under ‘threat of war’ had already been rejected in Liaquat Hussain case at page 581-582.

Reaction to the Supreme Court judgment in “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015”

A mixed reaction by the legal experts, politicians and general public was observed. The prime minister described the judgment as historic; while Raja Muhammad Irshad, Senior Advocate Supreme Court described the decision as having testified that criminal justice system of the country had failed to deliver. Therefore there was a need, on the basis of the ground realities, to bring the terrorists within the purview of court martial and award them condign punishments.³⁹ “International Commission of Jurists (ICJ)” described the verdict

“a blow to human rights and the rule of law in Pakistan”, “put Pakistan at odd with international obligations.” and that “the court had missed an important opportunity to reverse the militarization of justice in progress under the guise of combating terrorism and to reinforce independence of judiciary.”⁴⁰

Implications for National Security of Pakistan

“21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015” may be analyzed on different contexts and parameters. Notwithstanding contours of the Supreme Court’s judgment, it is an admitted fact that judiciary has always been against the establishment of military courts mainly on the ground that military courts are not part of the judiciary established under Article 175 of the Constitution; hence cannot substitute, supersede, replace or take over the judiciary.⁴¹ However, the amendments in Article 8 and 175, through the 21st Amendment, have paved the path for an exception to the accepted notion and consensus of judiciary regarding trials of civilians by military courts or courts martial. But it is evident that the Supreme Court was cognizant that the superior judiciary has inherent powers of judicial review which also extends to the military courts and the courts martial, notwithstanding ouster of jurisdiction of the High Courts or the Supreme Court under Article 199 and 184(3) of the 1973 Constitution. Therefore, such courts cannot escape the power of judicial review of their decisions.⁴² Accordingly, it perceived establishment of military courts not as an intent to ‘supplant’ the judiciary but as a constitutional mechanism, in compelling circumstances, to assist the judiciary in the administration of justice within the meanings of action “in aid of supreme court” and action “in aid of civil power”, whereby executive and judicial authorities are to act “in aid of supreme court”; while the armed forces may be called in aid of civil power.⁴³ This perception has helped build confidence and respect of the two organs of the state rather than bringing them in conflict with each other. This approach helped strengthen the state organs striving for national security and restoring peace in the country, disturbed by the militants, terrorists and extremists, being supported by the anti-national forces. This mechanism may also help the judicial officers to discharge their judicial functions in a competitive environment to the benefit of the society in an attempt to restore peace and eliminate terrorism, through fair administration of justice. However, the success and benefits of this interim arrangement of administration of criminal justice to combat the menace of terrorism and strengthen national security shall remain under the shadow of criticism and subject to scrutiny by the superior judiciary, until it delivers in accordance with law, following the principles of due process and fair trial, which may even lead to acquittal and even dismissal of a case at the pre-trial stage.

The 21st Constitutional Amendment has for the first time included the military courts as part of the overall criminal justice system. Failure of the conventional criminal justice system has long been debated and lamented by not only the ordinary citizens but even by the judicial experts. Although various stake holders like police, prosecution branch and judiciary keep on shifting the blame for this failure; however there is no difference of opinion as far as its failure is concerned. The substitute of military courts has not been accepted as a penance by the Legislature but has also received approval of the apex court of the country. The idea of dispensation of criminal justice through military courts has long been the fancy of government and the general public, who has expressed dissatisfaction on the existing judicial system as it supports the powerful and conquers the crushed and the suppressed. In the former tenure of Mr. Nawaz Sharif, military courts were established through the Ordinance, which was later struck down by the Supreme Court. However, this time, the government came up with a well prepared approach, with a constitutional cover to the military courts though with a sunset clause. The fact however stands established that the military courts have come to exist with a constitutional cover and further sanctified with the approval of the apex court of the country.

Establishment of military courts is an intrusion into the domain of judiciary and the legal fraternity along with the superior judiciary is well cognizant of it. However, it is generally agreed that this intrusion has taken place due to the failure of judiciary to dispense speedy justice and win confidence of the masses. It is a general observation that the terrorists get scot free from the courts and courts fail to punish them on a plethora of excuses and legal lacunas. On the contrary, general perception of the masses with regard to military courts is that they will not spare the terrorists; and this approach will help curb the menace of terrorism. Except for the legal fraternity and the accused terrorists, there is hardly any dissenting voice against the military courts. Even majority of the honourable judges of the apex court upheld establishment of military courts on the grounds of Parliamentary supremacy and necessity of the military courts to deal with an extraordinary situation in the country. The apex court thus impliedly accepted failure of conventional judicial system in handling the extraordinary situation due to war on terror. This tacit failure of the perception of judiciary will definitely lead to self-introspection to overcome the challenges faced by it. It is in this realm that immediately after the APS Peshawar massacre, the Chief Justice of Pakistan convened an extraordinary meeting of the Chief Justices of the High Courts and emphasized the need to accord priority to the trials of terrorists and conduct the proceedings without unnecessary adjournments. Similarly, the Federal Judicial Academy organized training workshop for judges, prosecutors and investigators on the legal framework

against terrorism. It also emphasized the participants to critically examine the Anti-terrorism Act 1997 so that the terrorists are brought to justice. Justice Qazi Faez Isa urged judges of the ATCs to explore the tools available to them in the Anti-terrorism Act 1997 which are not available to the ordinary players of the criminal justice system. Thus the establishment of military courts has given a competitive environment to judiciary, who has already started its journey for self analysis, self-improvement and self-actualization so as to meet the challenges faced equally by the judiciary and state organs striving for national security.

The pace maintained by military courts for disposal of terrorists' cases in comparison with ATCs and ordinary criminal courts so far is exceptionally encouraging. Out of 190 cases assigned to the military courts by the federal government since 29 January 2015, 61 cases have been decided. 7 accused had been awarded imprisonments while 48 were awarded death sentences. Out of the said terrorists, 8 were executed during December 2015, after they had exhausted right of appeal before the Military Court of Appeals and mercy petitions to the Chief of Army Staff and the President. Trials and executions of the rest of the accused and condemned prisoners are in process at various stages and are likely to conclude within couple of months.⁴⁴ The delay in execution has been caused due to compliance of legal formalities and petitions filed by some of the accused/convicts, which are pending adjudication. On the other hand, fast pace of the military courts has been allegedly characterized by secret and fake trials, denial of right to fair trial and due process which envision right to counsel of own choice, family meetings and open trials. Military courts have also been condemned for trials of juveniles including one Haider Ali, who was convicted on the charges for attacking the Armed Forces and other terrorism offences. His petition was dismissed by the Peshawar High Court on 14th day of October 2015 and he invoked jurisdiction of the Supreme Court where his appeal is pending decision. The military authorities refuted the allegations as baseless. They canvassed that as a matter of policy, no juvenile is being tried by court martial. Case of Haider Ali is of tainted and doubtful identity, who never claimed to be juvenile at any stage of trial. Despite ruling of the Peshawar High Court that being a special law and having overriding effect, even a juvenile may be tried by a court martial, Army authorities had decided not to try the juveniles so as to avoid legal complications. However, ruling of the Supreme Court would be followed in his case. They also contended that military Authorities had never kept the trials secret with intent to deny any legal right to the accused. Secrecy, if any, was meant to ensure security of the court officials, witnesses and the accused himself, which is legally permissible. The accused in all cases had been represented by defending officers as required under the Pakistan Army Act 1952. Every accused has a right to engage a counsel of his choice if he can afford to

engage. Advocate Hashmat Habib is defending an accused who was convicted in a case under FIR no. 808/2011 in Malir at the Military Court of Appeals. Due to security reasons media and general public cannot be given access to the courts but the accused are given the right to cross-examine the witnesses through the defending officers and make any statement in defence or mitigation of sentence. They also explained that conviction rate by courts martial is exceptionally higher than acquittals due to careful and thorough investigations; while weak cases are discarded and accused set at liberty at the pre-trial stages rather than putting them to trial.⁴⁵

Conclusion

The split judgment in the “21st Constitutional Amendment” and “Pakistan Army (Amendment) Act 2015” case may be appreciated in the sense that it has not only demonstrated independence of judiciary but also independence of judges, who exercised long awaited and expected judicial restraint viz-a-viz judicial activism which had cropped up as a culture and right in the judiciary. The judgment determined resolve of the judiciary that any effort to win over judges or to seek unanimous judgment may not bear fruit. The apex court not only recognized supremacy of Parliament but also declared itself to be the custodian of constitution and final arbiter in any constitutional or legal controversy; and frustrated the efforts and desires to withhold exercise of judicial review power in the wake of the proviso and explanation added in Article 175 through the 21st Constitutional Amendment⁴⁶ or maintain the pace of judicial activism to transgress the domain of other organs of the state beyond the limits prescribed by the constitution. The Supreme Court also recognized that maintenance of law and order is the baby of the executive but to ensure that the order is maintained through proper application of law and no injustice is caused in the pursuit of peace shall remain the responsibility of the judiciary. It may be appreciated that it is inescapable that the government continues to implement the policy and National Action Plan against terrorism evolved through consensus and maintains confidence of all the stake holders and the public, through their participation in decision making/execution mechanism and confidence building measures. Consistency in execution of death penalty awarded following due process and fair trial as well as reformation of the existing criminal justice system, which undoubtedly is a combination of police, law enforcing and prosecuting agencies, judiciary, prisons and lawyers’ community, should be emphasized by all the stake holders. On the other hand, military judges must ensure that justice is not only done but seen to have been done. They are required to dispel notion and apprehensions of secret and fake trials. Military authorities must demonstrate free, fair and impartial virtues of courts martial, which are akin to jury trials, by

giving controlled access to the media, families and counsels of the accused, if they can afford to their fees, to attend the trials. This is how the judicial and national security organs of the state may move forward in a coordinated manner towards the accomplishment of a common goal of peace and national security, taking the Parliament and judiciary into confidence. However, all the stakeholders should be cognizant of the time limit prescribed to achieve the desired objectives, lest to seek peace through justice loses its spirit or the sun rises after the sun set.

Notes and References

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- ** Ishtiaq Ahmad Choudhry, Professor and HoD of the Department of Peace & Conflict Studies, National Defence University Islamabad
- 1 See “Nisar seeks people’s help in anti-terror campaign”; “multi-party body focusing on criminal justice system”; “55 convicts to be sent to the gallows in a few days”; “PAT takes to the road against terrorism”; *DAWN* Islamabad, December 22, 2014, pp 1, 2 and 5. Also see “President briefed on decision to end moratorium”, *DAWN* Islamabad December 19, 2014, p.1; “Lawyer belonging to ruling party appointed head of legal reforms committee”, *DAWN* Islamabad, December 23, 2014, p.3.
- 2 “Zardari cautions against misuse of military courts”; “MQM outlines proposals for counter terrorism policy”; “Military courts accepted due to unusual circumstances: JP”; *DAWN* Islamabad, December 28, 2014, pp.1, 3.
- 3 PLD 2015 Federal Statutes 1 and 3 respectively. The enactments were described as Act I and II of 2015 respectively.
- 4 PAA Section 2(1) (d) (iii). Further Provisos have been added after this proviso through the Pakistan Army (Amendment) Ordinance 2015 (Gazette of Pakistan, Extra-Ordinary No M-302/1-7641 dated January 15, 2015, as will be discussed in the subsequent paras. The Ordinance was passed as the Pakistan Army (Amendment) Act 2015 by the Parliament on 11 November 2015 and assented by the President on 17 November 2015. The Act was published as Act 19 in Gazette of Pakistan, Extra-Ordinary, Part 1, dated 19 November, 2015,
- 5 Sections 3 and 4 of “the Pakistan Army (Amendment) Act 2015”.

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- 6 This amendment was on the pattern of Section 21 H of the Anti-terrorism Act, 1997. The Ordinance had effect for 120 days where after it was extended for another 120 days until 22 October 2015 by resolution of the National Assembly on 22 June 2015, in terms of Article 89(2) of the Constitution. The Ordinance was passed as the Pakistan Army (Amendment) Act 2015 by the Parliament on 11 November 2015 and assented by the President on 12 November 2015.
- 7 “Military courts cannot try civilians”, *DAWN* Islamabad, January 3, 2015, p.19.
- 8 Justice (R) Salahuddin Mirza, “setting up of military courts”, *DAWN* Islamabad, December 28, 2014, p.9.
- 9 “HRCF concerned over military courts move”, *DAWN* Islamabad, December 27, 2014, p.3.
- 10 Tahir Siddiqi, “SHCBA opposes military courts, plans to challenge 21st amendment in apex court”, *DAWN* Islamabad, January 15, 2015, p.5.
- 11 *Jang* Rawalpindi, January 20, 2015, p.1.
- 12 “Asma questions rationale of military courts in Gilgit-Baltistan”, *DAWN* Islamabad, January 15, 2015, p.3.
- 13 Nasir Iqbal, “SC asked to reconsider 1999 verdict against military courts”, *DAWN* Islamabad, December 28, 2014, p.1.
- 14 For discussion on Moratorium, see author’s article published in *PLJ 2015 Magazine* as Lieutenant Colonel Hafiz Zafar Iqbal “*Need to resolve the issue of moratorium on death sentence*”, and also available at www.
- 15 Decision of the Supreme Court on 18th and 21st Amendment of 5 August 2015 is available at Jang.com.pk/pdf/text-of-detailed-sc-judgment-on-18th.pdf, accessed on August 7, 2015. The case is entitled as *District Bar Association Rawalpindi v Federation of Pakistan* and published at *PLD 2015 SC 401*. Also see “Military Courts Legal: SC”; “Main points of the verdict”; “Apex court retains power to review sentence”, *DAWN* Islamabad, August 6, 2015, pp 1 and 5; “A difficult decision and ICJ terms SC judgment a blow to human rights”, *DAWN* Islamabad, August 7 and 8, 2015 at pages 8 and 3, respectively.
- 16 *Ibid* District Bar Association Rawalpindi case, Para 33 of CJ’s judgment and Para 6 of Justice Osmany’s judgment.
- 17 *Ibid*, Para 32 of CJ’s judgment and Para 9 of Justice Osmany’s judgment.

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- 18 Ibid, Paras 36-39 of CJ's judgment and Para 7 of Justice Osmany's judgment.
 - 19 Ibid, Paras 30-31 of CJ's judgment and Para 8 of Justice Osmany's judgment.
 - 20 Ibid, Paras 41-43 of Justice Khawaja's judgment. Also Para 14 of Justice Osmany's judgment.
 - 21 The section suggests that a law or act shall come into force from the start of the day i.e. 0000 hrs.
 - 22 District Bar Association Rawalpindi case op cit, Para 124 of Justice Azmat Saeed's judgment.
 - 23 Ibid, Paras 120 and 180 of Azmat Saeed's judgment.
 - 24 Ibid, Paras 165-166.
 - 25 Ibid, Paras 127 and 165-166 of Azmat Saeed's judgment.
 - 26 PLD 1999 SC 504.
 - 27 District Bar Association Rawalpindi case op cit, Para 145 of Azmat Saeed's judgment.
 - 28 Ibid, Para 122 of Justice Khawaja's judgment.
 - 29 Ibid, Paras 34, 51, 52 of Justice Asif Saeed Khosa's judgment.
 - 30 Ibid, Paras 57-58 of Justice Khosa's judgment.
 - 31 Ibid, Para 62 of Justice Khosa's judgment. In order to draw the said distinction, he placed reliance on Corpus Juris Secundum and American Jurisprudence (2nd Edition) 1975).
 - 32 Ibid, 62 of Justice Khosa's judgment.
 - 33 Ibid, Para 8 of Justice Osmany's judgment.
 - 34 Ibid, Paras 66-69, of Justice Ejaz's judgment.
 - 35 Ibid, Paras 47-49 of Justice Dost Muhammad's judgment.
 - 36 Ibid, Paras 54-55 and 62 of Justice Dost Muhammad's judgment.
 - 37 Ibid, See Paras 62-63 of Justice Dost Muhammad's judgment.
 - 38 Ibid, Para 19 of Justice Bandial's judgment.
 - 39 "Military Courts Legal: SC", *DAWN* Islamabad, August 6, 2015, pp. 1, 5.

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- 40 Nasir Iqbal, "ICJ terms SC judgment a blow to human rights", *DAWN* Islamabad, August 8, 2015, p.3.
- 41 See for example: Niaz Ahmad Khan, Darwesh M. Arabey, Sh Liaquat Hussain cases (PLD 1977 Karachi 604, PLD 1980 Lahore 206, PLD 1999 SC 504 respectively); Watan Party v Federation of Pakistan (PLD 2011 SC 997 (1115).
- 42 This view of jurisdiction and superintendence over courts martial and executives' decision has been adopted and ratified by the Supreme Court in a series of cases including Mr Shahida Zahir Abbasi, Sh Liaquat Hussain and Watan Party cases reported in PLD 1996 SC 632, PLD 1999 SC 504 and PLD 2011 SC 997 respectively.
- 43 Articles 190 and 245 of the 1973 Constitution of Pakistan.
- 44 These figures were taken from Judge Advocate General's Department of the Army on February 17, 2016. A condemned prisoner has right to petition to the Chief of Army Staff and the President in terms of Army Rule (Instruction) 319A and Article 245 of the Constitution read with Rule 104 of the Prisons Rules 1894.
- 45 Discussion with Judge Advocate General Pakistan Army on 17 Feb 2016.
- 46 Through the said amendment, application of the principle of separation of judiciary from executive and trials by courts martial of persons committing acts of terrorism in the name of religion or sect were permitted.