
Establishment of Military Courts in Pakistan and its Effects on Trichotomy of Powers: International and Domestic Standards

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Throughout the constitutional history of Pakistan, the military being an additional unavoidable stakeholder played an inevitable role. Military's constitutional authority and its intervention in political system were repeatedly justified on the pretext of internal and external challenges that left the civilian democratic rule tattered. This article brings to light the followings issues: necessity and constitutional authority of military courts, effects on the civilian courts and the trichotomy of powers, effects on the dispensation of justice and right to fair trial, compatibility with international and domestic standards, and suggests how to constraint military's influential role without effectuating overall performance of military.

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Introduction

Like the US constitutional model of separation of powers and system of checks and balances, the Constitution of Pakistan, 1973 envisages trichotomy of powers whereby all the state organs, namely, the legislature, the executive, and the judiciary divide the governmental authority. Through division of powers, each branch exercises its sovereign authority within its constitutionally assigned sphere and at the same time remain subject to a reasonable control from the other state organs so as to avoid excessive use of authority and its undue intervention in the other state organs. However, the constitutional history of Pakistan elucidates that the role of military is an unavoidable additional stakeholder that inevitably impacts the democratic system in Pakistan. Military's intervention has been justified on the pretext of turbulent socio-political atmosphere further marred by terrorism in the recent past. Military has directly ruled Pakistan for more than three decades¹ and drastically entrenched its authority into the civilian governments. Besides its interventions in the civilian governments and transformative preservation of its authoritarian regime, military has significantly influenced the judicial branch which consequently validated military takeovers and supported its affiliated interests. To further entrench its authority, military has constituted its own judicial mechanism, parallel to the conventional judicial fabric, which is now extended to the civilians' trials. This state of affairs has adversely affected the democratic transition, trichotomy of powers, and the administration of justice to a great extent.

1. Military Courts in Pakistan – a Brief History

The establishment of military courts for the civilian trial through 21st Amendment to the Constitution is not a novel concept. In the previous decades, the governments have authorized military courts with the authority to trial civilians. Establishment of military courts by the civilian governments in April 1977 and 1998 were struck down by the judiciary because the Constitution does not have any room for these courts.² After 1977 elections, Zulfikar Ali Bhutto had constituted 'Summary Military Courts' under Article 245³ in response to the agitation of the opposition parties against the alleged rigging in general election, which threatened to create a law and order situation. The provincial governments of Sindh and Punjab were unable to handle the situation. The government also made certain amendments to the Army Act, 1952. Invoking the Article 245 for helping in the governance maybe referred to the establishment of military rule through the civilian government. Article 245 also ousted writ jurisdiction of the High Courts. Consequently, individuals were deprived to protect and enforce their fundamental rights as guaranteed under Article 199 of the Constitution of Pakistan, 1973.

This initiative of the Government was challenged in Sindh and Punjab High Courts.⁴ Both courts declared government's action unconstitutional and declared that the government cannot invoke Article 245 to reign through armed forces. Similarly, during his second term as a Prime Minister, Nawaz Sharif

permitted the establishment of Military Courts in Sindh by an Ordinance.⁵ The government invoked Article 245 and called armed forces to assist the civilian government. The Ordinance authorized Chiefs of the Armed forces and Brigadiers to constitute as many courts as required including the courts of appeals. Section 3 of the Ordinance authorized Military Courts to try civilians within three days. An appeal against the decision could be made to the courts of appeal convened under Section 3 of the Ordinance, which was required to decide the appeal within three working days. In terms of appeal, Section 8 (5) of the Ordinance ousted jurisdiction of all other courts including the High Courts and the Supreme Court.

This act of the Government was challenged in *Sheikh Liaqat Hussain and others v. Federation of Pakistan*⁶ the Court declared Military Courts to be unconstitutional having no legal effect. The Court observed that neither the government nor the armed forces could act beyond the limits and scope of the Constitution. Nevertheless, two convicts, who were awarded death sentences, had already been executed by military. The Court directed that the terrorism related cases be referred to the Anti Terrorism Courts (ATCs) constituted under the Anti-Terrorism Act, 1997. The Court also directed the ATCs to dispense with the case within seven days of institution. Ironically, both efforts to establish Military Courts were followed by military coups. One of the fundamental issues associated with Military Courts was the issue of jurisdictional conflict with the ATCs and ousting of the superior courts' jurisdiction in Appeal matters was another serious issue. Authorizing Military Courts at the expense of already established judicial system is not considered to be a sound decision in the democratic transition.

Likewise, General Zia, after third military intervention of October 16, 1979, initiated various policies and reforms at the expense of the civilian government and judicial autonomy. By virtue of Second Amendment to the Constitution, Article 212A was incorporated whereby Military Courts were established for the trial of offences under the Martial Law Regulations. These courts were given retrospective effect and were deemed to have taken effect on July 5th, 1977. Moreover, these courts had also ousted jurisdiction of the other courts including the High Courts, where the matter was within the jurisdiction of the Military Courts.⁷ Resultantly, more than one hundred Military Courts were established and decision made by these courts got immunity from civil courts.

In the same manner, on July 28, 1991, the government established Special Courts for the trial of heinous offences. By virtue of Twelfth Constitutional Amendment, Article 212B was incorporated for a period of three years, in order to ensure speedy trial. This amendment authorized the Federal Government to establish as many special courts as the government deemed necessary and the federal government has to determine their jurisdictional limits accordingly. The Federal Government was further authorized to appoint judges for these special courts. The Act also authorized the Federal Government to appoint a person as a judge to the Special Court without any legal qualification and with security of tenure till the effectiveness of the said Article. These Special Courts had also ousted jurisdiction of civilian courts, including Superior Courts.⁸

2. Recent Developments and the Scope of Military Courts

In Jan 2015, after brutal attack of six terrorists on the Army Public School (APS), Peshawar on December 16, 2014, that witnessed massacre of about 150 lives, the government legalized military courts' trial of the suspected terrorists for a period of two years. The All Parties Conference (APC) consented modification to the Army Act, 1952 so as to extend its jurisdiction for speedy trial. On January 7th, 2015, Parliament passed 21st Constitutional Amendment⁹ with *sunset clause*, whereby Military Courts shall cease to effect after two years of its commencement. From February 2015 to March 6th, 2017, Military Courts have convicted 274 persons. Eleven Military Courts have been constituted across Pakistan: three each in Punjab and KP, two in Sindh, and one in Baluchistan.

By virtue of the 21st Constitutional Amendment, various Acts¹⁰ have also been incorporated into the first schedule of the Constitution, in order to ensure them exemption and safeguard from the operation of Article 8 (1) and (2) of the Constitution, which invalidate laws and enactments of Parliament violating Fundamental Rights protected under the Constitution. Further, Amendment to the Army Act, 1952 authorized Military Courts to try civilians including individuals, groups, organizations, or sects for the offences related to violence and terrorism. This Amendment brought forth a very broad genre of offences into the domain of Military Courts: attack on the military officials or their installations, position and transportation of explosives and firearms, use of vehicles for terrorist activity, offences causing death or serious injuries, creating terror and insecurity, threat to the state's security, or general public, funding or receiving funds for any of the aforementioned purposes, waging anti-state war, or attempt to commit any of the aforementioned acts.

Additionally, by virtue of these Amendments, certain offences were incorporated in Protection of Pakistan Act, 2014, to which Military Courts' jurisdiction was extended. Provided, if these crimes are suspected to have been executed by any organization or terrorist group by using name of any religion or sect: crimes against minorities, killing, kidnapping, or attacking important personalities such as government officials, judicial authorities, foreign officials, media personnel, social workers, and tourists, attacking energy facilities, transportation, and educational institutions, and crossing of territorial limits of the state for any of the aforesaid offences.

The 21st Amendment to the Constitution explicitly articulated "*sunset clause*" that military courts shall cease to effect after the expiry of two years, i.e., January 6th, 2017. Nevertheless, on the pretext of national interest and the existence of grave and unprecedented threats to the integrity of Pakistan, Parliament, by virtue of 23rd Constitutional Amendment, extended functioning of these courts for a further period of two years.¹¹ Similarly, the Army (Amendment) Act, 2015 (II of 2015), which was repealed on January 6, 2017 was further extended for two years.¹² This Act incorporated certain procedural reforms: An accused arrested under this Act shall be provided grounds of arrest within twenty-

four hours,¹³ right to engage counsel at the trial of the accused,¹⁴ provisions of the QSO, 1984 were extended to this Act¹⁵, and in case of any conflict with other laws this Act shall prevail.¹⁶

3. Procedure Adopted by Military Courts

One of the controversies regarding Military Courts is the lack of procedure's disclosure. Neither the Government nor Military disclose the procedure being adopted by Military Courts, in order to prosecute cases. The authorities are also reluctant to share names of the accused person being charged by Military Courts. Similarly, there is no disclosure of information with reference to time and venue of trials that consequently diminish the prospects of public access to such proceedings. On April 2, 2015, Military Courts convicted seven persons for committing undisclosed offences, six to death and one life imprisonment. The Supreme Court Bar Association challenged these convictions and alleged that the right to fair trial is not protected that is contrary to the Fundamental Rights protected under the Constitution. According to the Government and Military Officials, the trial's procedure is identical to that of courts martial as provided under the Army Act. So far as configuration of these courts is concerned, Military Court is normally comprised three to five serving officials, not necessarily possessing legal qualification.

Like regular civilian courts, the Army Act has the same criteria for evidence and proceedings before Courts Martial. Furthermore, the Federal Government was allowed to transfer proceedings pending before any other court to a Military Court for the prescribed offences. The Amended Military Act allowed in-camera trials and punishment for the offences at anyplace. Similarly, an accused has the right of appeal to Military Appellate Tribunal against death sentence and imprisonment exceeding three months. The Appellate Tribunal is presided over by a military officer of Brigadier rank, the Chief of Army Staff, or any of his authorized officials not necessarily possessing legal qualification. The tribunal is empowered to omit, reduce, or increase the punishment. Any decision of Military Court which is upheld by the Appellate Tribunal of Military is final, ousting appellate jurisdiction of civilian judiciary including High Courts and the Supreme Court.

4. Justifications for the Establishments of Military Courts

The establishments of military courts are mainly justified on two grounds: speedy trial and failure of civilian courts to convict suspected terrorists. Throughout the historical analysis of military courts, speedy trial is a common feature for constitution of Military Courts, despite the fact that the Anti Terrorism Courts were directed by the Supreme Court to conclude cases within seven days. ATCs were meant to try cases of heinous nature without any delay, in order to shift burden of work from the criminal courts, which are already burdened with the civil and criminal cases. After APS attack, the civilian courts were severely criticized by

the public representatives, parliamentarians, military officers, and media personnel for not convicting terrorism suspects.

The opponents of the civilian courts criticize civilian courts for lengthy trails, overloaded dockets, lingering proceedings, and lack of will to convict the responsible persons for terrorist attacks. These opponents of the civilian courts argue that the Military Courts are the best options for the prosecution of terrorists, in order to overcome potential terrorist attacks. Nevertheless, the proponents of the civilian courts considered some other factors for the lack of convictions of the individuals charged with offences of terrorism: defective prosecution, lacunas in investigation, and insecurity to the witnesses. Unlike military officers, civilian judges and their families are facing relatively greater risks of threats and violence. Despite the inability of the government in providing security to the civilian judges, the prosecutors and the witnesses, blame the civilian judiciary for not convicting the terrorism suspects. The government, at the cost of reforms and security to the civilian judiciary, constitutionalized the establishment of a parallel judicial system, administered by people without legal wisdom and caliber. A system, where individual's right to fair trial has no value and where more than ninety percent convictions are based solely on the confessions of the accused persons, is prioritized over the civilian courts.

5. The Impacts of Military Courts on Fair Trail

Military Courts have adversely affected the Fundamental Right to have fair trial by an autonomous, unbiased, and competent court irrespective of the nature and magnitude of the alleged crime. *Geoffrey Robertson* denied the existence of Military Courts in strict sense.¹⁷ The Protection of Pakistan Act 2104 was aimed to extend the authority of military and police officials in certain specified offences. This Act allows detention of an accused for 90 days, which is contrary to the prevailing law in Pakistan. This Act is in contrast with the general principle of law that an accused is considered innocent unless proved guilty and where prosecution is responsible to prove its case beyond any shadow of reasonable doubt. Contrary to the general principles of law, any person arrested under this Act is considered guilty unless he proves himself innocent. Furthermore, trial of an accused by a special judge in a special court without complying with the prerequisites of fair trial is against the spirit of Article 10-A of the Constitution of Pakistan, 1973.

6. Incompatibility with International and Domestic Standards

The laws whereby military courts are allowed to trial civilians in Pakistan are not compatible with international standards, which ensure a fair trial by impartial and autonomous courts. These international standards have been derived from various sources: firstly, the international treaties such as ICCPR¹⁸, to which Pakistan is a signatory, provide fair trial procedure. Article 14¹⁹ allows individuals to a fair and public trial, which is applicable to all courts including Military Courts.²⁰ The Human Rights Committee of the UN has also stressed on avoiding

civilian trial in Military Courts due to rising concerns about the lack of fair and impartial administration of justice.²¹

Secondly, Draft Principles²² confines Military court's jurisdiction to its personnel only and confers right to fair trial of the civilians by an impartial civilian court. Thirdly, there are regional human rights treaties²³ prohibiting civilian trial by Military Courts.²⁴ Exceptionally, the European Court of Human Rights allows civilian trial by Military Courts where the former can not undertake a particular case and the Military Courts ensure minimum standards of fair trial.²⁵

In Pakistan, Military Courts are not fully independent and impartial and do not meet the indigenous and international standards of fair trial. Similarly, there are some prerequisites for judicial competence and independence and Military Courts do not comply with those requirements: the judges of Military Courts are not independent from military hierarchy, they have no security of tenure, and they are not required to have legal qualification, legal training, or legal wisdom. Justice also demands public trial except certain exceptional circumstances that allow in-camera hearing. The Army Act does not allow public trial and the government, through an amendment, allowed Military Courts to conduct in-camera trial.²⁶

Similarly, the Army Act bars appellate jurisdiction of the superior courts over decisions of military courts. In recent cases²⁷, the Supreme Court highlighted that the Superior Courts can assume jurisdiction over the decisions of military in the existence of any of the three situations: an act without jurisdiction, *mala fide*, or *corum non iudice*. The international standards, however, confine Military Courts' authority to ruling in the first instance and appeals are tickled by the civilian courts.²⁸ Moreover, Military Appellate Courts, which are comprised of officials without any legal education and legal wisdom, do not comply with the international standards.

Likewise, judgments of Military Courts are not complied with the domestic as well as international standards as they lack detailed reasoned judgments. In 2012, the Supreme Court directed Parliament to modify the Army Act, in order to meet, at least, the minimum standards, ensuring fair trial and to make decisions accessible to general public. Nevertheless, these directions are not yet implemented. So far as death penalty is concerned, military courts are empowered to impose death sentences. However, the imposition of death sentence without complying with the minimum standards of fair trial set forth under Article 9 and 14 of the ICCPR is considered to be infringement of the Article 6 of the ICCPR, which ensures right to life.

In Pakistan, more than a dozen petitions have been filed in the Supreme Court challenging the validity of the civilians' trial by Military Courts by virtue of 21st Constitutional Amendment and Amendments to the Army Act. The petitioner contended that these amendments not only violate right to fair trial and judicial autonomy but also are contrary to the trichotomy of powers protected and recognized by the Constitution of Pakistan, 1973. Previously, the Court has declared the establishment of these military courts unconstitutional and observed that Military Courts had not provided any mechanism for invoking Appellate

Jurisdiction of the Superior Courts. The establishment of Military Courts, without subordination to the Supreme Court, amounts to a parallel judicial system, which is contrary to the existing judicial mechanism established by the Constitution. The Court further observed that divergence from the principles of trichotomy and standards of fair trial shall not be compromised on the touchstone of the doctrine of state necessity.²⁹

In South Asia, Pakistan is an exceptional country that allows civilians' trial through Military Courts. Unlike Pakistan, the rest of the region is making arrangements for Military Courts in order to ensure fair trial and to make procedure of these courts identical to the procedure followed by regular courts.³⁰ Keeping in view the above arguments for the justification of military courts and their implications, it can be concluded that Pakistan has been facing so many challenges including terrorism and law and order situation. The civilian government, time to time, allowed Military Courts to try civilians for alleged heinous crimes leading to terrorism. Recently, the government, by virtue of 21st Constitutional Amendment established Military Courts to speedily try the civilian suspects of terrorist activities. Considering the integrity and security of the country, Military Courts were allowed to function for two years. These courts, however, remained short of fair trial procedure and could not comply with the international and indigenous standards of fair trial procedure. Further, these courts were administered by officials without having legal qualification and expertise.

Despite the government's commitments to bring reforms to the civilian judiciary, the government extended Military Courts for a further period of two years. The constitutional arrangements whereby Military Courts were allowed to perform functions have also ousted appellate jurisdiction of civilian courts, including the Superior Courts. The impugned decision of the Appellate Military Tribunal gets final authority and can be challenged only on the grounds of jurisdictional defects, mala fide, or corum non iudice. The introduction of this parallel judicial system is adversely affecting the government's tripartite system and judicial autonomy. In order to repose trust in civilian judiciary, the government should bring about reforms in judicial system. The government should also make arrangements for the security of civilian judges, prosecutors, and witnesses of the terrorism suspect cases. Moreover, the Military Courts should be brought into the purview of civilian judiciary. An individual, whose trial has been concluded by Military Courts, should have a legal right to challenge the impugned order in the civilian courts. The military courts should be administered by officials having legal qualification and expertise, who could provide legal reasoning to their decisions so as to make sure that justice is not only done but manifestly seen to have been done.

7. CRITICAL APPRECIATION

To conclude, the doctrine of separation of powers prevents concentration of powers in one authority, that would lead to the exploitation of powers and tyranny as warned by Acton's dictum: power tends to corrupt and absolute power corrupt absolutely. Keeping in view the prospects misuse of powers, the

democratic systems distribute state authority into three organs: the legislature, the judiciary, and the executive. This concept was originated in the USA; however, the application of this doctrine has not been efficiently worked in Pakistan. The executive branch of the state enjoyed authoritative control in both Presidential as well as Parliamentary form of governments. The trichotomy of powers envisaged by the Constitution of Pakistan has failed to work in its true letter and spirit.

Despite the fact that Pakistan's founding father declared parliamentary form of government; the executive power has either been vested in the office of the head of the state or government. The Constitution of Pakistan, 1973 and 13th, 14th, and 18th Amendments to the Constitution vested the executive authority in the Prime Minister. Nevertheless, the executive authority has been shifted to the president by virtue of 8th and 17th Amendments. This oscillation of the executive authority between the parliamentary and presidential form of government has further obscured the conceptualization of separation of powers. Generally speaking, a parliamentary form of government which is headed by the prime minister, the executive is formed by the Prime Minister and his Cabinet. Nevertheless, a parliamentary form of government, having a presidential chief executive, undermines the legislature's ability to keep surveillance on the executive.

For more than three decades, Pakistan had been directly ruled by Military. The civilian governments failed to govern firmly and honestly in their respective tenures. Additionally, the legislature and the judiciary were no more than rubber-stamps for most of Pakistan's history. Likewise, the provincial autonomy provided by the Constitution, which upholds a Federation, had never been actively realized and enforced in Pakistan that consequently led to discontent in the federating units. A significant cause that contributed in the secession of East Pakistan's wing was considered to be deprivation of its people's due share in government and economics resources. The ruling elites had never paid considerable attention to the implementation of the provincial autonomy in its spirit even after the tragic loss of Pakistan's eastern wing. Autocratic systems of federalism could be reflected well in the former Soviet Union and the Federal Republic of Yugoslavia. The downfall of the federation in the latter was significantly due to the lack of democratic norms in its federation.³¹

Pakistan's history is evident of short periods of civilian rule after very long periods of military's rule. The civilian rulers have shown autocratic tendencies as opponent of a tyrant is the outcome of the despotic regime it has succeeded from such tyrant.³² After getting authority, such opposition to the dictator cannot automatically become democratic. Liberalization does not itself lead to democracy rather there are various considerations for the democratization: regular, transparent elections, and political leadership's accountability. In Pakistan's perspective, ensuring parliamentary form of government, there is need of active and sustainable mechanism for the distribution of the governmental authority, where each organ is fully capable of exercising sovereign authority in its jurisdictional sphere, with a

reasonable control from the other state organs, in order to avoid potential exploitation of authority and unnecessary emergence of the executive powers.

The underlying objective of separation of powers is to foster institutional surveillance, which ultimately helps overcome potential abuse of authority. Lack of its institutionalization creates prospects of tyranny either in the shape of traditional dictatorship, military rule, or authoritarianism in the guise of democratic rule. In Pakistan, there are a number of precedents where the decision-making authority has been in the hands of one person both in the civilian as well as in the military regimes. In the like circumstances, the authority has been exploited and the power grabbed by the executive could not be hindered. This tendency continued because the authority has traditionally been concentrated and the mechanism of checks and balances, which could serve as a safeguard against misuse of authority, could not be asserted in various cases.

It is high time to learn from the past experiences. The developing democracies are passing through a transition of democratic journey. Rationalizing the concept of separation of powers in Pakistan's perceptive, where the Constitution envisages trichotomy of powers, is worth-considering. Like other constitutional democracies, in Pakistan, governmental authority is distributed among the state organs for ensuring optimum sovereignty and reasonable control against each other to avoid misuse of authority. Similarly, in constitutional democracies, a mechanism of checks and balances is inherently implicit. Judiciary is empowered to exercise checks on Parliament, in order to review laws and declare those laws null and void if those are conflicting with the Constitution, serves as a basic check on any potential misuse of government's authority.

In the past, judiciary was reluctant to exercise its power of review. Nonetheless, with the appreciation of judicial activism, judiciary is increasingly exercising this privilege. Likewise, judiciary is authorized to keep control on the executive. Nevertheless, some of the judicial checks in the form of *suo motu* on the executive actions are considered controversial. The recent trend towards judicial autonomy is a positive step with reference to institutionalization of checks and balances, provided that judicial impediments should not transcend into judicial imperialism. To fully realize independence of judiciary in a more sustainable manner, application of two considerations must be ensured: de-politicization of the superior judiciary and elimination of graft at all levels by introducing judicial reforms. To further institutionalize the system of checks and balances, two key instruments need to be reshaped: constitutional reforms, clearly elaborating each branch's jurisdictional sphere, and reforms in the accountability mechanism.

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