

# ISAS Insights

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## Pakistan Reinforces Resolve to Fight Terror

*The latest validation of anti-terror military courts in Pakistan, through a divided but decisive verdict by the Supreme Court, has sparked a debate on the complex issues at stake. However, the people and the Army are likely to support the robust dispensation of justice in terrorism-related cases.*

Sajjad Ashraf<sup>1</sup>

In a much-awaited decision, Pakistan's Supreme Court (SC) has ruled, in an eleven-to-six decision, that the parliament has full powers to amend the Constitution unless the amendments impinge on its salient features. The SC defined these salient features as: democracy, parliamentary form of government and the independence of the judiciary.<sup>2</sup> Two amendments challenged through multiple petitions were the 18<sup>th</sup> and the 21<sup>st</sup>. The former was enacted during the term of the previous government (2008-2013) when a whole range of changes instituted earlier by military rulers was annulled and several new adjustments were made especially with regard to federal-provincial relations.

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<sup>2</sup> The News, Islamabad, 6 August 2015.

It was, however, the status of the 21<sup>st</sup> Amendment, brought in earlier this year in the wake of the terrorist attack on the Army Public School, Peshawar, in December 2014, which remained a subject of speculation and anxiety. Over 150 children and teachers were killed in that incident, and that had galvanised the nation's resolve to fight terrorism. The attack was one significant point when the Army, in the face of civilian inaction, took anti-terrorism matters into its own hand. The Amendment related to changes in the Army Act and allowed the military courts to try civilians 'claiming or are known to belong to any terrorist group or organization using the name of religion or sect', provided their cases were referred to the military courts by the Federal Government.<sup>3</sup> In fact, the SC, while considering the judicial challenge to the military courts, had suspended the death sentences awarded to convicted terrorists. Now that the SC has validated the two constitutional amendments that were challenged; this lifts the moratorium on implementing the death sentences passed earlier.

Prime Minister Nawaz Sharif, during one of his rare appearances in parliament, stated that the Supreme Court's verdict upholding the establishment of military courts to try hard-core terrorists was a testimony to the supremacy of the Constitution and parliament. Admitting that there had been differences over setting up the military courts, Mr Sharif reiterated that the extraordinary times, when the country was facing a spate of terrorist activities, needed extraordinary steps.<sup>4</sup>

The setting up of military courts is now considered a necessary tool to fight terrorism that has plagued Pakistan for over a decade and a half. Pakistan has lost over 58,000 people in terrorism-related incidents since 2003.<sup>5</sup> In addition, thousands have been killed in sectarian- and target-killings that also border on acts of terrorism.

The 900-page judgment and the dissenting notes on various issues demonstrate a deep divide over the questions ranging from defining terrorists to how they should be dealt with by the state and the legality of steps which the government should take in tackling the menace. In answer, the SC chose the middle ground.

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> <http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm>.

Some judges including Jawwad S Khawaja, who has now assumed office as the new Chief Justice of the Pakistan Supreme Court, had ruled that the 21<sup>st</sup> Amendment in relation to the setting up of military courts “is liable to be struck down”,<sup>6</sup> and was an infringement of the rights of the people. Justice Khawaja is clear that the powers to make laws and amendments to the Constitution are not absolute and untrammelled and are subject to the limitations imposed by the Constitution itself. In that sense, the judge observed that “the parliament is not supreme”.<sup>7</sup> This is *the* matter which the SC adjudicated, and six judges felt that the Constitution itself places limits on parliament’s ability to pass laws and make amendments.

Reflecting the complexity of the issues involved in the highly-polarised Pakistan, another Judge, Justice Qazi Faez Isa, who was earlier the Chief Justice of Baluchistan, has held that the categorisation of terrorists by using the name of religion or sect is not reasonable. According to him, terrorism is an act in violation of law. Therefore, the terrorists should be prosecuted with the full vigour of the law, regardless of any definition.<sup>8</sup>

In upholding that the 18<sup>th</sup> and 21<sup>st</sup> Amendments did not violate the basic structure of the Constitution; the Pakistan Supreme Court relied heavily on case law in Pakistan itself and in many other countries. As many as 32 countries, the Court was told, had actually incorporated amendatory restrictions in their constitutions, and in five other countries, including India and Bangladesh, implied restrictions had been judicially acknowledged and enforced.<sup>9</sup>

Having inherited the British constitutional dispensation, the Pakistani advocates and judges in this case relied heavily upon cases decided by the Indian courts. Much reliance was placed on the judgment in the Kesavananda Bharati V State of Kerala case (1973), in which India’s Supreme Court placed limits within which the Parliament could restrict property rights. The court, in a landmark 7-6 decision determined that the Indian Constitution contained a basic structure, and although the

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<sup>6</sup> The News, Islamabad 6 August 2015.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> <http://jang.com.pk/pdf/Text-of-detailed-SC-judgment-on-18th.pdf>

Parliament had "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution.<sup>10</sup> In fact, the courts in India have passed a series of judgments setting limits on the Parliament's authority to alter the basic structure of the constitution. The most famous of these is the eventual annulment of 39<sup>th</sup> Amendment, enacted in August 1975 in the wake of the presidential promulgation of Internal Emergency at the behest of the then Prime Minister Indira Gandhi.<sup>11</sup>

Most critics of the 21<sup>st</sup> Amendment do not appreciate that Pakistan's criminal justice system has been unable to cope with the nature and number of crimes committed in various forms. Most terrorists remain at large, and when they are caught the civil prosecution system has proved to be weak and powerless in prosecuting them. A 2011 US State Department Report considered Pakistan to be incapable of prosecuting terror-related suspects, as 3 out of 4 suspects were acquitted.<sup>12</sup> Many times, an activist judiciary has come in the way of punishing criminals.

The state of prosecution in civilian courts is such that, in 2014, out of over 205 terrorism-related cases in Rawalpindi and Islamabad, only 10 convictions could be obtained. Since 2007, the anti-terrorism courts have freed over 200 alleged terrorists. The security agencies believe that a large number of them re-joined terrorist outfits.<sup>13</sup> Even Malik Ishaq of Lashkar-e-Jhangvi, facing several terror-related cases, as one of Pakistan's most wanted criminals, was released for want of evidence. He was recently killed in a police encounter, along with his two sons.

The SC's decision, while admitting the weaknesses of the civil criminal justice system, has advised the government to improve the system during the two-year window for the military courts allowed by the 21<sup>st</sup> Amendment.

As expected, the decision has drawn mixed reaction. Some, like the Pakistan People's Party (PPP), appreciated the fact that the Court had accepted the parliamentary

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<sup>10</sup> [https://en.wikipedia.org/wiki/Kesavananda\\_Bharati\\_v.\\_State\\_of\\_Kerala](https://en.wikipedia.org/wiki/Kesavananda_Bharati_v._State_of_Kerala)

<sup>11</sup> [https://en.wikipedia.org/wiki/Thirtyninth\\_Amendment\\_of\\_the\\_Constitution\\_of\\_India](https://en.wikipedia.org/wiki/Thirtyninth_Amendment_of_the_Constitution_of_India)

<sup>12</sup> <http://tribune.com.pk/story/243274/pakistani-courts-let-3-out-of-every-4-terror-suspects-go-us-state-dept/>.

<sup>13</sup> <http://www.dawn.com/news/1151583>.

authority to legislate and to amend the Constitution. The SC, during the PPP regime (2008-2013) under the then Chief Justice Iftikhar Mohammad Chaudhry, had taken an activist stance and acquired extraordinary powers of judicial review. Other leaders of parliamentary parties have also hailed the decision.

However, jurists' bodies and civil society organisations considered that the validation of military courts to function, in the presence of a civilian-courts structure, to be a blow to human rights and the rule of law in Pakistan. The six dissenting judges, in their notes, held the view that the 21<sup>st</sup> Amendment was incompatible with the right of fair trial and the independence of the judiciary. The International Commission of Jurists (ICJ) Asia Director Sam Zarifi thinks that "the court has missed an important opportunity to reverse the militarisation of justice in progress under the guise of combating terrorism and to reinforce independence of the judiciary in the country".<sup>14</sup> Some have labelled the decision as a resort to "doctrine of necessity" under which almost all military takeovers in Pakistan were legalised by the SC. For the liberals, such recourse remains a bane in Pakistan's judicial history.

While it can be argued that the trial of civilians by military courts is incompatible with international standards, as this amounts to setting up a parallel judicial system, critics do not appreciate that Pakistan's failing criminal justice system necessitated the establishment of military courts. The fear amongst the civilians is that, unless there is a perceptible drop in terrorism, the life of these courts might be extended.

In fact, even while allowing the military courts, the SC has strengthened its own position by assuming an oversight role. The SC has ruled that the decision to select a person under the Army Act for trial in a military court is subject to judicial review both by itself and the High Courts on grounds such as *coram non judice*, meaning proceedings outside the presence of a judge, being without jurisdiction, *mala fides* or malice in law.

More importantly, orders of the military court – decisions or sentences awarded – have been made subject to judicial review on the grounds that are earlier listed at referral.

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<sup>14</sup> The News, Islamabad. 6 August 2015.

Given Pakistan's failures in tackling terrorism, the review processes, which the SC has reserved for itself and the High Courts, can lead to frustrating delays in eliminating terrorism. Also, given the corrupt nature of politics, interest groups and bureaucratic manipulations, the procedures can be made cumbersome to bring the process to a halt. In the backdrop of civilian leadership's earlier-dithering, the Army and the people of Pakistan will not take kindly to any impediments to the effective dispensation of justice and closure of cases. How, the review process unfolds holds the key to Pakistan's fight against terrorism in the short-run.

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