

## **Abusive Constitutionalism and the Establishment of Military Courts for the Trial of Civilians under the 21<sup>st</sup> Amendment to the Constitution of Pakistan 1973**

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### **Abstract:**

*The 21st amendment to the Constitution of Pakistan 1973 is frequently criticized because it extended the jurisdiction of the military courts to try civilians accused of terrorism. The proponents of the 21st amendment argue that the reason for this extension is the failure of the criminal justice system of Pakistan to punish the terrorist. The opponents, on the other hand, consider it as an interference of the military in the democratic regime of Pakistan, hence, an example of abusive constitutionalism. Abusive constitutionalism is a mechanism for constitutional changes, either by way of constitutional amendments or constitutional replacements, at the instance of any institution of the state for a particular purpose. The study in hand, through qualitative content analysis, tries to find the answer to the questions like whether the 21st amendment in the Constitution of Pakistan is an example of Abusive Constitutionalism or not? Whether the formation of military courts in Pakistan is an abuse of Constitutional Courts in Pakistan? Whether 21st amendment affects the fundamental rights of the citizen of Pakistan especially the right to a fair trial as guaranteed by Article 10-A of the Constitution of Pakistan 1973? Whether the 21st amendment is making the country less democratic or not? The study finds that formation of the military courts, for the trial of civilians, is offensive to constitutional courts. Moreover, the trial in the military courts violates the standards of the fair trial as established by international conventions on human rights and the Constitution of Pakistan 1973. The study concludes that the 21st amendment to the Constitution of Pakistan 1973 is an example of Abusive Constitutionalism.*

**Keywords:** 21<sup>st</sup> Amendment, Abusive Constitutionalism, Military Courts, Constitutional Courts, Fundamental Rights, Fair Trial

## **I. Introduction**

The trial of civilians by military courts, subsequent to 21<sup>st</sup> amendment to the Constitution of Pakistan 1973, has always been criticized and seen as an interference of the military to destabilize the democratic constitutional institution, substantially the judiciary. It is stated that the 21<sup>st</sup> amendment had undermined the democracy in Pakistan. The trial of the civilians in the military courts is the violation of Article 10-A of the Constitution of Pakistan 1973, which guarantees the provision and protection of the right to fair trial and due process of law in any civil and criminal proceeding. From the very outset, the establishment of military courts for civilians appears to be an example of abusive constitutionalism in Pakistan.

Abusive constitutionalism, as defined by David Landau,<sup>1</sup> is "the use of mechanisms of constitutional change, constitutional amendment or constitutional replacement, to make a state significantly less democratic than it was before" (Landau, 2013). The recent history establishes the fact that the military takeovers and hostile overthrow of democracy are obsolete now, and there is a growing tendency of creating authoritarian or semi-authoritarian regimes through constitutional tools. The changes introduced through these tools are engineered so wisely that they are hardly identified and impossible to be dislodged. The consequential constitutions still look democratic as they contain many elements that are considered the characteristics of any modern democratic constitution. A closer look, however, reveals that they have been potentially designed to weaken the democratic order of the country established by its Constitution (Landau, 2013).

Interestingly the contemporary international regimes for the protection of democracy as well as the domestic constitutional laws of majority of states are ineffective against the threats of Abusive Constitutionalism. The changes incorporated through Abusive Constitutionalism are difficult to be identified as compare to common customary authoritarian threats. The "democracy clauses" provided in international law, although proved effective against the apparently unconstitutional takeovers, are also unsuccessful against the threats of abusive constitutionalism which poses risks that are not effectively dealt with under existing regimes. (Peter D. Feaver, 2003).

The abusive constitutionalism creates a hybrid form of authoritarianism which allows the authoritarian actors to place their loyal person in dominating positions. They are then given the task to weaken the democratic control of political parties and other constitutional institutions which may hold them accountable. The examples of abusive constitutionalism and modern authoritarianism may be seen in Colombia, Venezuela and Hungary where abusive constitutionalism was exercised by way of amendment, replacement and a combination of the amendment and replacement respectively (Landau, 2013).

The rule of law, being substantial to the idea of democracy, includes "supremacy of the constitution, equality before the law and the protection of civil liberties" (Khalid, 2012). Taking into account the broader aspects of democracy, it may be noted that abusive constitutionalism does not always aim to weaken or strengthen the governments, whether elected or unelected (Human Right Watch, 2012). In some states, abusive constitutionalism

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<sup>1</sup> David Landau is Assistant Professor of Law at Florida State University College of Law. He is also serving as the Associate Dean for International Programs.

is also used to restrain the civil liberties and as a mean to empower certain institutions such as the military. Accordingly the military changes its previous recurring strategies of direct taking over of the state with the indirect control by interfering or dominating in policymaking. In most of the countries where democracy is fragile, the military is not confined to their constitutional role of defense and security; instead, they indirectly participate in political decision-making (Deborah, 1994).

Some scholars opine that perfect civilian control is the only way to control the military's direct or indirect interference, including the use of abusive constitutionalism (Way, 2010). In Pakistan, the civilian's control has always been fragile and unable to prevent the military takeovers which ultimately had damaged the democracy and democratic institution in Pakistan. The judiciary has been validating all these military takeovers on the basis of "doctrine of the necessity". However, in the recent past, there is no direct takeover of government by the military, but the indirect involvement of the military cannot be negated. The passing of the 21<sup>st</sup> amendment to the Constitution of Pakistan 1973 and the subsequent establishment of the military courts for trial of civilians in the presence of constitutional courts points towards the use of abusive constitutionalism by way of amendment. The 21<sup>st</sup> amendment was passed with an express promise of revamping and overhauling of the criminal justice system. Still, no initiative has been taken for the reformation of existing criminal justices system of Pakistan.

Given the above discussion, the current research paper undertakes, the analysis of the 21<sup>st</sup> amendments in the context of Abusive Constitutionalism. The research analyzes the effects and implications of the trial of civilians by the military courts on the role of the constitutional courts and fundamental rights of the citizens of Pakistan with particular focus on the right to fair trial and due process of law.

## **II. Abusive Constitutionalism and 21<sup>st</sup> Amendment to the Constitution of Pakistan 1973**

The terrorist's attack on the Army Public School (APS) paved the way for unanimous approval of the 21<sup>st</sup> amendment from the parliament of Pakistan. The amendment brought modification to Article 175 of the Constitution of Pakistan 1973 and inserted the laws of the armed force in the First Schedule of the constitution to exempt the trial in military courts from the application of Article 8 of the Constitution of Pakistan 1973. Article 8 of the Constitution provides that no law in violation of fundamental rights may be made in Pakistan. By placing the trial of civilian in the first schedule, no question as to breach of fundamental rights may be taken as a plea at any forum (Dawn News, 2015).

The content of the 21<sup>st</sup> amendment agitated a strong criticism of international human right organizations, different NGOs working for human rights and the legal fraternity in Pakistan stating that the civilians' trial in military courts is devoid of the standards of right to fair trial. It was seen as a sign of no confidence in the courts established under the authority of the constitution. Moreover, the amendment is introducing a system of adjudication parallel to Pakistan's criminal justice system, which is the violation of the theory of separation of powers and tends to weaken the democratic institutions in Pakistan, particularly the judiciary.

The validity of amendment was challenged in the Supreme Court of Pakistan, which dismissed the petition and allowed the trial of civilians by military courts on the basis

of "doctrine of necessity" to counter the terrorism. The rationale provided for the approval of the 21st amendment was the "existence of circumstances which demand the special measures of speedy trial for offences related to terrorism, waging of war or insurrection against Pakistan" and the "prevention of acts threatening the security of Pakistan". Further by amendment in the Army Act 1952, the military courts were authorized to try civilians accused of terrorism "using the name of religion or a sect" (Iqbal, 2015).

The objectives of the 21<sup>st</sup> amendment are similar to those stated in many other anti-terrorism laws prevalent in the country. The Anti-terrorism Act 1997 (ATA, 1997) aims at "the prevention of terrorism, sectarian violence and for speedy trial of heinous offences". Similarly, the Protection of Pakistan Act 2014 provides, "the protection against waging of war against Pakistan, prevention of acts threatening the security or Pakistan and for speedy trial of [those] offences" (Preamble of Protection of Pakistan Act 2014). Despite the existence of constitutional framework to deal with the trial of the terrorist, a "parallel system" was created with the same objectives.

The question should have arisen that, why there is the need for military courts to try civilians when the Anti-Terrorism Courts were already operational with the same powers and objectives? The suitable response to this incident should have been an overhauling of the Anti-Terrorists Courts and the criminal justice system to ensure the speedy trial and conviction of religious militants and terrorists, but the same has not been focused. Instead, the military courts were given extensions, one after the other, which clearly shows the existence of abusive constitutionalism with the authoritarian regime in Pakistan. To determine, whether a particular amendment or replacement is creating the authoritarian regime, it must be checked whether it is "making the state less democratic or jeopardizing the "basic structure" of the constitution or not?

The Supreme Court of Pakistan lacks uniform precedents regarding the existence of the basic structure in Pakistan's Constitution. The Court has, in many cases, acknowledged that there is a basic structure of the Constitution of Pakistan<sup>2</sup> and denied the same in other cases (Javaid, 2015). In disposing of the consolidated constitution petition filed against the 21<sup>st</sup> amendment, the Supreme Court of Pakistan validated it; however, there were dissenting views as to the existence of Constitution's basic structure. The majority of the judges decided that the current amendment is not against "the basic structure" of the Constitution of Pakistan, hence valid. Six judges of the bench gave a dissenting view and held the constitutional amendment invalid. Justice Qazi Faiz Isa said that "being part of the executive army cannot try the criminal cases; it is only the judiciary who can exercise the judicial powers".

There is a long history of Pakistan's courts declaring army interventions legal based on the doctrine of necessity. It is worth mentioning that the constitutional courts are among the first to be stressed and controlled by authoritarians in power. Paradoxically, this control is not sought by suppression but through extensive reforms aimed to change the

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<sup>2</sup> For example in *Wukula Mahaz Barai Tahafaz Dastoor Vs. Federation of Pakistan*, PLD 1998 SC 1263 and *Syed Zafar Ali Shah Vs. Federation of Pakistan* PLD 2000 SC 869 Supreme Court of Pakistan held that "the Constitution of Pakistan is the supreme law of the land and its basic features, i.e., independence of judiciary, federalism and parliamentary form of government blended with Islamic Provisions, cannot be altered even by the Parliament"

powers and designs of these institutions (Castillo-Ortiz, 2019). The courts, which are primarily responsible for checking these unconstitutional practices, under the authoritarian control, become a tool to evade constitutional restraints and distillate power with the ruling actors. The creation and persistence of military courts, in the shade of constitutional democracy, is an abhorrent step that is against the notion of democratic constitutionalism (International Commission of Jurists, 2016).

### **III. Fair Trial and Military Courts**

The criminal justice system of Pakistan is always criticized and lamented by the general public and judicial experts. The parliament also supported the establishment of the military courts through the 21st constitutional amendment because of the conventional “criminal justice system” failed to provide speedy justice without compromising the fundamental rights of the citizens. This failure is often attributed to untrained judges, the flawed investigation by the police department and poor prosecution. Resultantly, the military courts are now the part of the criminal justice system of Pakistan with constitutional authority and are additionally sanctified after the endorsement of the Supreme Court based on the supremacy of parliament and existence of extraordinary circumstances (Sultan, 2015).

The proponents of the 21<sup>st</sup> amendment argued that only the military courts could curb the menace of terrorism and create deterrence against future terrorist attacks because they do not have the security concerns like the judges of anti-terrorism courts. They argue that “the civilian's courts lack the will to convict terrorist (International Commission of Jurists, 2016). The opponents, on the other hand, argue that empirical data does not support the allegations against the judiciary and particularly anti-terrorism courts. The International Commission of Jurists, (ICJ's) conducted a survey and collected the responses from the prosecutors working in Anti-Terrorism Courts (ATC) regarding the lesser rate of convictions in trials. According to prosecutors the lesser rate of convictions at ATC can only be attributed to defective prosecution, poor investigations, and failure to provide security to the prosecution witnesses, rather than the lack of willingness on the part of civilian judges to convict terrorist. The government is not able to give protection to judges, prosecutors and eyewitnesses of terrorism cases (International Commission of Jurists, 2015). Moreover, the trial at military courts are allegedly fake and secret and infringe of right to fair trial and due process of law, which attracts many other associated rights. Trial by an independent and unbiased court, defence by the advocate of own choice, the right to a public and open trial, the protection against forced confession, self-incrimination and torture, a reasoned and detailed judgment and the right to appeal are the prerequisites of fair trial which are completely ignored in the trials of accused at military courts. The military courts also tried and convicted the juveniles, who usually are given certain exemptions under the general principles of the criminal justice system (Chaudhary, 2017).

Judges of military courts and appellate tribunals are the military officers without any legal training and a law degree. They draw their pays from the military and may be removed at any time from their offices; therefore, they lack independence and impartiality.<sup>3</sup> Moreover the proceeding in the military courts, under Pakistan Army Act 1952, is not held in open courts. The government of Pakistan, passed an Ordinance on 25

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February 2015, and legitimated *hīn-camera* trials of the civilians accused of terrorism at the military courts (Amnesty International, 2017).

The higher rate of the death sentence handed by the military courts has always been a matter of great concern. The standards of fair trial allow the execution of the death penalty only if the trial has been fair enough to afford the accused all possible safeguards. The execution of a death penalty under a trial that does not fulfill the minimum standards of justice is against the "right to the life" as provided and protected by the Constitution of Pakistan 1973 (Amnesty International, 2017). The statements issued by the Inter Military Public Relations wing (the ISPR), in a press release revealed that 90% of the convictions passed by military courts are based on the confession of the accused. This great number of confessional statements suggests the use of physical torture and other ill-treatment prior and during the trial (Niaz A Shah, 2016).

Civil liberties are the fundamental guarantees provided by the constitutions and international Conventions which may not be taken away even if the trial is by military courts. The United Nation's report on "the independence of judges and lawyers" has asserted that "using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism, runs counter to all international and regional standards and established by law" (Knaul, 2014).<sup>4</sup>Therefore the trial of the civilians in the military courts of Pakistan is contrary to state's obligations, under international conventions, to respect and ensure the observance of fair trial's standards and other basic rights, particularly the right to life (International Commission of Jurists, 2015).

#### **IV. Conclusion**

Contrary to past practice the authoritarian regimes now prefer to use the indirect method to get control and become authoritative and that is usually done by sorting "amendments or replacements" in the constitution. Constitutionalism, which is primarily linked with the growth and consolidation of democracy, is now used to create a competitive authoritarian or hybrid governments. In Pakistan military had always played a decisive role in the affairs of the state and had overturned the democratic governments many times. The authoritarian regimes now are effectively relying on indirect methods to strengthen its power and control in the affairs of the state, despite the existence of the democratic rule in the state. The 21st amendment to the constitution although did not toppling with the government directly but it restricted the civil liberties and violated the basic rights of the citizens of Pakistan. In the cover of constitutional democracy, the creation and persistence of military courts in Pakistan was abhorrent step that militated the spirit of democratic constitutionalism. In the light of what has been discussed, this research paper concludes that passing of the 21<sup>st</sup> constitutional amendment is the example of Abusive Constitutionalism in Pakistan which undermined the democracy, violate the basic structure of the Constitution, by creating a parallel judicial system against the integrity of the civil judicial system, violate the fundamental rights and principles of due process of law. Nonetheless, the delicate balance between the national security and enforcement of fundamental rights cannot be realized unless the organs of state do respect each other's

domain. No constitutional amendment should be allowed to take away the basic rights granted by the Constitution because it makes the country less democratic and strengthens the authoritarian regime over the civilian which is witnessed in case of 21st amendment.

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