

PART 2: MILITARY COURTS

2.1 Introduction

The second point in the NAP, and our second theme, is the establishment of the military courts to try terrorists under Anti-Terrorism Act (ATA) 1997 in Pakistan. In the first phase, nine military courts were established, three in Khyber Pukhtunkhwa (KP), three in Punjab, two in Sindh and one in Baluchistan.¹ At the moment 11 military courts are functional in Pakistan, with the last two instated in Karachi, Sindh, on August 26, 2015 by Chief of Army Staff (COAS).² The Ministry of Interior and Narcotics Control presented a report in National Assembly in January, 2016. According to that report 148 cases have been transferred to these special courts.³ The report also confirms 11 courts.

Military courts have been given legal cover through a constitutional amendment which was opposed by major political parties because of victimization in the past. An All Parties' Conference (APC) was called to create a consensus, which was reached after a discussion and assurances that politicians, traders, media etc. will not be tried in military courts.⁴

Prime Minister Nawaz Sharif stated that the courts will only try hardcore terrorists. "Special courts are part of the National Action Plan and are meant to provide an extraordinary solution for an extraordinary problem. All institutions would have to carefully scrutinize cases to be sent for prosecution in the special military tribunals."⁵

The Federal Interior Minister Chaudhry Nisar has mirrored the PM's statements, stating that only terrorists will be tried in military courts.⁶ He also tried to dissi-

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NAP POINT 2: Special trial courts under the supervision of Army. The duration of these courts would be two years.

¹ Staff Reporter. (2015, January 10). Nine military courts set up. Retrieved February 27, 2016, from <http://www.dawn.com/news/1156104>.

² AFP. (2015, August 26). Army Chief Approves More Military Courts. Retrieved February 24, 2016, from <http://newsweekpakistan.com/army-chief-approves-more-military-courts/>.

³ Questions and Oral Answers, 28th session of the National Assembly. (2016, January 15). Retrieved March 15, 2016, from http://www.na.gov.pk/uploads/documents/questions/1452850149_459.pdf.

⁴ Khalti, S. (2015, January 01). Military Courts: Old Fears, New Hopes. Retrieved February 24, 2016, from <http://pique.pk/military-courts-old-fears-new-hopes/>.

⁵ Staff Reporter. (2014, December 31). Military courts will try only hardcore terrorists: Nawaz. Retrieved February 24, 2016, from <http://www.dailytimes.com.pk/national/31-Dec-2014/military-courts-will-try-only-hardcore-terrorists-nawaz>.

⁶ Web Desk. (2015, January 03). Army did not put any pressure over formation of military courts: Nisar - The Express Tribune. Retrieved February 24, 2016, from <http://tribune.com.pk/sto->

pate the impression that the establishment of military courts means that the existing judicial system of the country is not delivering justice. Pakistan needs some extraordinary measures to deal with terrorism; establishment of military courts is the need of the time, he said.

Please see [Section 9.2.1: Pending Cases in Pakistan's Courts](#).

The 21st constitutional amendment was passed by both the National Assembly and the Senate on January 6, 2015, providing constitutional cover to the establishment of military courts.⁷

During a recent meeting to review implementation of NAP in Islamabad, it was approved to extend the scope of military courts to Gilgit Baltistan (GB). GB and Azad Jammu and Kashmir (AJK) councils will also adopt the 21st constitutional amendment to facilitate the formation of military courts.⁸ However, this remains pending.

Analysts and pundits in the country were quick to label the 21st Amendment a “soft coup”, and labeled the establishment of military courts as tacit acceptance of the failure of the justice system in Pakistan, particularly when it came to trying alleged terrorists. Military courts have also been called a “parallel judicial system”.

ry/816609/army-did-not-put-any-pressure-over-formation-of-military-courts-nisar/.

⁷ Rasheed, P. (n.d.). Constitution (Twenty-first Amendment) Act, 2015. Retrieved February 24, 2016, from http://www.na.gov.pk/uploads/documents/1420547178_142.pdf.

⁸ Haider, M. (2015, January 13). Govt extends scope of military courts to Gilgit-Baltistan, AJK. Retrieved February 24, 2016, from <http://www.dawn.com/news/1156747>.

2.2 ARTICLE: Military Courts: Old Fears, New Hopes – A History of Military Courts by Sher Ali Khalti⁹

Despite bitter experiences linked with military courts of the past these courts are the necessity of the day to deliver speedy justice to terrorists

It was a freezing cold day of the last week of December 1970. A young boy was sitting in front of a major, a colonel and a session judge in a special military court. The court was set up in Adiyala Jail of Rawalpindi, right there in the room of the superintendent of the jail. The crime of the young boy was that he had made a speech against Martial Law Administrator General Yahya Khan at Lal Kurti Bazaar of Rawalpindi. There was no sign of repentance on his face and he did not plead for mercy. He was awarded a sentence of six years' rigorous imprisonment by the military court.

It may come as a surprise for many people that he was none else than the sitting information minister Pervaiz Rashid. No one knew, as time passed, that one day he would himself justify his sentence and express confidence in the military courts that punished him for "speaking the truth." Yes this is the same Pervaiz Rashid, who after 45 years of award of punishment has presented a draft in the assembly about a constitutional amendment. This amendment will pave way for the establishment of military courts all over the country.

The only difference, stated by supporters of the intended move, is that at that time the military courts targeted democratic struggle and took away the right of free speech from people but this time these are being established to deal with the menace of terrorism. It is also said that the lacunae in the criminal justice system and the reluctance of witnesses, lawyers etc. to appear against terrorists in courts have helped the accused. The life of judges hearing terrorism cases and punishing terrorists is also at stake.

Military courts have always been controversial. They were established for the first time in 1953 when first martial law was imposed in Lahore to curb the riots against Qadianis. Death sentences were awarded to Maulana Maudoodi of Jamaat-e-Islami, Maulana Abdul Sattar Niazi of Jamiat Ulma-e-Islam (JUI) and others. These sentences were criticized and condemned all over the world and the martial law administrator had to change them to life imprisonments.

In 1958, this was General Ayub Khan who established military courts. Many pro-

⁹ Khalti, S. A. (January 1, 2015). Military Courts: Old Fears, New Hopes. Retrieved March 23, 2016 from <http://pique.pk/military-courts-old-fears-new-hopes/>. Reproduced with permission from original author. Pique is now defunct and attempts to contact its staff were unsuccessful.

gressives and leftists were hanged on the orders of these courts. Nationalists were also taken to gallows as they had continued struggle for their rights. Sardar Nauroz Khan and his siblings were awarded death sentence by military courts. While the death sentence of Sardar Nauroz Khan was converted into life imprisonment viewing his old age, his sons and nephews were not spared and hanged. Nawab Akabar Khan Bugti was also awarded life imprisonment. His only crime was to raise voice in the favour of Baloch people. The inhabitants of East Pakistan, Sindh and Sarhad (now KPK) provinces were also the victims of military courts.

In 1969 General Yahya followed the footsteps of his predecessors and established military courts. Workers of Awami National Party, Pakistan People's Party and Awami League, and communists were tried by military courts. Thousands of workers of Awami Leagues were given sentence in 1972 by these courts. However, these military courts were abolished under the orders of Justice Hamood-ur-Rehman who was tasked with looking into reasons behind separation of East Pakistan and compiling a report on the basis of these findings.

In 1979, General Zia came into power by the virtue of another martial law. Military courts were set up all over the country. The purpose behind this move was that to crush millions of people who were demanding fundamental rights and striving for restoration of the constitution of 1973. Sentences were awarded on a large scale in Sindh in Zia's regime by special military courts. Thousands of workers of Movement for Restoration of Democracy (MRD) including women had to face the wrath of Zia.

The solution to Karachi unrest and lawlessness was also sought through the establishment of military courts during the last regime of Nawaz Sharif. In 1999, the Supreme Court of Pakistan (SCP) under Chief Justice Ajmal Mian suspended these military courts. The SCP declared there was no space for parallel courts in the constitution of Pakistan.

Now Nawaz Sharif is once again in power and military courts are being established through an amendment in the constitution. Almost all the political parties are against military courts as they have been haunted by these in the past. They do not want to be victimized once again. An All Parties' Conference (APC) was called to discuss the issue and all the political parties present there expressed their concerns. After sometimes they were convinced and assured that politicians, traders, media etc will not be tried in military courts.

Chaudhry Nisar has repeatedly stated that military courts will only hold trials of terrorists and country's judicial system will continue to function. He has also tried to dispel the impression that the establishment of military courts means that the existing judicial system of the country is not delivering justice. "Pakistan is passing through an extraordinary situation and this situation demands extraordinary

measures,” Nisar said.

He further explained in a press conference that Pakistan Army, police and security agencies would present terrorists before special courts where they would get an opportunity to defend themselves. “The special courts headed by army officers will also work under laws, rules and regulations,” he explained in a bid to dispel fears that these courts will witch hunt people just for having a different view.

Having discussed the history of military courts in details one comes to the situation on ground and the concerns of those who are likely to be affected. The latest situation is that (till the filing of this report) the government has introduced two bills in the National Assembly by visualizing 21st amendment to the Constitution of Pakistan. One is related to Pakistan Army Act, 1952, for speedy trial of terrorists mainly in the wake of a terrorists attack on Army Public School, Peshawar. Any person who is or claims or is known to belong to a terrorist group or organization using name of religion or sect and raises army or wages war against Pakistan or attacks the armed forces and law enforcement agencies or attacks any civil or military installations or kidnappings of any person for ransom or causes death to any person or injury shall be punished under amended Pakistan Army Act. The military courts would be established and have a tenure of two years.

Senator Taj Haidar, senior PPP leader, expressing his concerns on the establishment of military courts said: “their history is not good at all. There is no need of parallel courts. Civilian courts will be weakened in the presence of military courts. As civilian courts get weakened democracy also gets weekend.” Taj adds that Army also got weakened when parallel armed forces of militants were raised by the establishment. These militants spread havoc in the country and today no one is safe from the barbarism of the terrorists.

Taj says Taliban were given an opportunity to organize themselves while the negotiations were being done between them and government. “Taliban organized and weaponized themselves during the time space given to them in the name of negotiations. Actually Taliban is a corps of establishment. But when they attacked Army Public School, Peshawar, the establishment decided that they should be handled strictly as it was hard to control them like in the past.”

Taj questions that if the intelligence agencies know when the Taliban are going to attack a target, then why they do not arrest them in time. If people from intelligence agencies can be entered in Taliban groups to keep an eye on their activities, then strict action can also be done against them. “Extremists have their political wings also like PTI. Taliban are organized and concealed themselves in many cores,” he asserts.

General (retired) Hameed Gul has a totally different opinion. He told Pique that

“military courts are a demand of time and justice. Our civilian courts have failed to provide justice. Judges are afraid of giving verdict against terrorists. There are many flaws in our law which is old and carved during the Anglo-Saxon age.” He says judiciary releases terrorists due to insufficient evidence and nonappearance of witnesses. “When a terrorist will come to a military court he will be punished within short span of time. The terrorist will be provided access to civilians lawyers so that he can defend himself,” he adds.

Responding a question, former ISI chief said that a major or a colonel will hear a case and it is wrong to say that no military officer knows the law. “Laws are taught during our training.” He rejects the claim of Taj Haider that democracy will be weakened due to the establishment of these courts. “Democracy will be strengthened if justice is done. Military courts are being set up on the request of democratic government. These are not being imposed by any one,” he adds.

When asked about the definition of terrorism and a terrorist, he says there existed confusion. Even the UN, which held a convention on this subject in 2003, failed to reach a consensus on the exact definition of terrorism.

He says 95 percent of the killers are released due to loopholes in law. He says “judges surrender as terrorists threaten them. But an army officer does not come under any pressure as he plays with danger all the time. It is a part of his training. I would again say that setting up of military courts is the only way to crush terrorism.”

Syed Nisar Safdar, Advocate Lahore High Court condemns military courts out rightly. He says it would be ridiculous if someone says that judges surrender as they are threatened. “If judges are provided the same security and environment as provided to army officers they can give excellent judgments. Military must only secure borders and should not intervene in the civilian judicial system. Establishment of military courts is actually a sheer violation of human rights,” said Safdar said.

He questions that how can a military officer hear cases related with law without having any experience of understanding and practicing law. “Can lawyers secure country’s borders? If the answer is no then how can a military office hear a case and give a verdict” he questions. Safdar says the attack on Army Public School is not a failure of judiciary. “It is a failure of army and intelligence agencies,” he comments.

Babar Ghauri, central leader of MQM, tells Pique that the “government has assured that only the terrorists will be tried in military courts and no political leader or other civilian would be tried in these special courts. He suggests that the military and the law enforcers shall keep an eye on madrassas which in his opinion are

the breeding grounds of terrorists and extremists.

“We had reservations on the establishment of military courts due to our past experiences with them. However, we accepted them in the best interest of the country,” Mr. Ghauri said.

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2.3 Number of Cases and Outcomes

Up until January 24, 2016, 40 terror suspects have been tried in military courts. Of these, 36 were sentenced to death, and the remaining 4 were imprisoned for life.¹⁰ Comprehensive details of the convicts sentenced in military courts can be found in [Annex IV: Military Court Verdicts](#).

Graph 2.1: Military Court Verdicts¹¹



The Center for Research and Security Studies, 2016

2.4 Controversies and Criticism

The establishment of military courts has also come under severe criticism. Human rights organizations have been concerned about whether the prisoners are provided due process. This was backed by US State Department Spokesperson Jen Psaki who said Pakistan has to be careful while trying civilian terrorism suspects in military courts and assure that they will be provided due process of justice.¹²

2.4.1 Human Rights Watch

Human Rights Watch’s Deputy Director Asia Division, Phelim Kine said, “Pakistan’s Prime Minister, Nawaz Sharif, claims to have a silver bullet to rid the country of terrorism: military courts. A constitutional amendment was signed into law on January 7, 2015 permitting military courts to prosecute terrorism suspects. The amendment justifies the use of military courts as a means “to permanently wipe out and eradicate terrorists from Pakistan”. Nawaz Sharif’s hyperbole has been no less extravagant, describing military courts as the antidote to “overcome 60

¹⁰ Mukhtar, I. (2016, January 09). Military courts convicted 40 terrorists so far. Retrieved January 19, 2016, from <http://nation.com.pk/national/09-Jan-2016/military-courts-convicted-40-terrorists-so-far>.

¹¹ Please see Annex IV.

¹² Iqbal, A. (2015, January 09). Military courts: US calls for ensuring due process. Retrieved January 19, 2016, from <http://www.dawn.com/news/1155812>.

years of unrest". Although the constitutional amendment stipulates a two-year time limit on their use, it poses a long-term threat to legal due process and rule of law."¹³

Additionally, many claim that the establishment of military courts is indicating that the country's courts have failed to provide justice. Military courts have also been called a parallel system to the existing judiciary. Oddly, one justification offered for the existence of the military courts is speedy trial of terror suspects, as well as shunning perceived ambiguities and shortcomings of the criminal justice system in Pakistan. The country's civilian courts have a well-earned reputation for prosecutions undermined by corruption, violence against prosecution and witnesses, and glacial service delivery.

2.4.2 Supreme Court's Verdict on Military Courts

Rights activist Asma Jehangir filed an application on behalf of the Supreme Court Bar Association (SCBA) against the execution of the first six convicts of the military courts, in April, 2015.^{14, 15} This was one of the fifteen petitions taken up by the apex court regarding the legality of the 21st constitutional amendment.

"Military courts violate the article 10 of the Constitution which gives the right to open and due trial to its citizens" said Kamran Murtaza, president of the SCBA. He further said that he would appeal against the Supreme Court's decision as it "violates fundamental constitutional rights of the people."¹⁶

On August 5, 2015, the Supreme Court upheld the establishment of the military courts. The apex court reasoned that the military courts were authorized and legalized by the supreme authority in the land: the parliament. Prime Minister Nawaz Sharif's Special Assistant for Law Ashtar Ausaf Ali called the decision "another strike against terror", labelling it a success for Pakistan.

"The European Union, the United States and other democracies need to understand that we need to make decisions according to our circumstances ... And we know best how to rid ourselves of terrorists," he said.

¹³ Kine, P. (2015, January 17). Are military courts the best way to fight terror? Retrieved February 24, 2016, from <https://www.hrw.org/news/2015/01/17/are-military-courts-best-way-fight-terror>.

¹⁴ Staff Reporter. (2015, August 06). Six judges declare 21st Amendment, military courts illegal. Retrieved February 24, 2016, from <http://www.dawn.com/news/1198632>

¹⁵ Iqbal, N. (2015, April 05). Military courts get Supreme Court nod. Retrieved February 24, 2016, from <http://www.dawn.com/news/1198533>.

¹⁶ Shams, S. (2015, August 07). Pakistan's military courts - a solution or a problem? Retrieved February 27, 2016, from <http://www.dw.com/en/pakistans-military-courts-a-solution-or-a-problem/a-18633959>.

2.5 Military Courts around the World

2.5.1 Military Tribunals in United States

The Army Public School incident in Pakistan is sometimes referred to as the 9/11 of Pakistan. While a crude comparison, it does illustrate the fact that the incident marked major policy shifts in the country, much like it did in the US. While the American stance on the death penalty is driven in-part by the majority of the public favoring the punishment for a crime such as murder,¹⁷ its history of military courts and orders is a separate matter altogether.

Post 9/11, President George W. Bush signed a new military order in the war on terror, intended to detain non-citizens accused of terrorism. The Secretary of Defense was given the power to establish military tribunals to try the accused within, or even outside of the United States, and would determine the rules and procedures, different from regular courts of law, to ensure a full and fair trial. Three to seven military officers would be commissioned to act as both judge and jury, and not all elements of the normal due process were to be afforded to the accused.¹⁸

In the war of 1812, a British spy was tried by a military commission constituted by General Andrew. Committees of War, a fancy name for military tribunals, were utilized during the Mexican-American War (1846-48). The Union also leveraged military tribunals during and after the American Civil War. After the 1862 Dakota War, thirty-eight individuals were executed after being sentenced by military courts. The alleged Lincoln conspirators were likewise attempted by military commission in the spring and summer of 1865. Post the Spanish–American War, military tribunals were used in The Philippines. A tribunal was also set up by President Franklin D. Roosevelt during WWII to attempt eight German citizens accused for espionage and sabotage in the United States.¹⁶

2.5.2 Military Courts in United Kingdom (The Military Court Service)

Military courts also exist in the United Kingdom in the form of the Military Court Service or MCS, granting criminal court administration to the Royal Navy (RN), Army and Royal Air Force (RAF) in the Court Martial, Summary Appeal Court (SAC) and Service Civilian Court (SCC). The MCS is headquartered in Upavon, Wiltshire, and there are five permanently manned MCCs in the UK. However, the courts are

¹⁷ Gallup. (n.d.). Death Penalty: Gallup Historical Trends. Retrieved February 24, 2016, from <http://www.gallup.com/poll/1606/death-penalty.aspx>.

¹⁸ Constitutional Rights Foundation. (n.d.). America Responds to Terrorism: Military Tribunals. Retrieved February 24, 2016, from <http://www.crf-usa.org/america-responds-to-terrorism/military-tribunals.html>.

“portable” and can hold proceedings anywhere in the world. Their function is to deliver a criminal court service for the three branches of the armed services.

2.6 Conclusion

Again, the government considers military courts to be a success, despite the criticism they are a parallel judicial system, unequivocally stating that the criminal justice system in Pakistan has failed, and allegations of a distinct lack of due process. The first half of the year was marked by significant blowback and Supreme Court proceedings. However, in the second half of the year, the verdicts picked up pace. However, despite 13 months, the fact that the “speedy trial” courts have only managed to hand out 40 verdicts establishes that perhaps these courts are not all they are made out to be. The lack of verdicts also works against the government and military’s rhetoric that these courts serve as part of the deterrent against extremism and militancy.

At present, well over one year has passed since the establishment of the military courts. However, with just forty convictions, the promises of “speedy trials” seem to have fallen short. The military courts, under the constitutional amendment that legalized them, have another year, which is due to expire on January 7, 2017. This will likely be renewed for another two years by the parliament.

2.7 OPINION: Military Courts
by Ahmer Bilal Soofi

While addressing the upper house of the parliament on 31 December 2014, Prime Minister Nawaz Sharif stated that Pakistan is in a state of war. On 16 January 2015, one month after the Army Public School (APS) Peshawar attack, the Chief of Army Staff General Raheel Sharif reaffirmed this fact. That Pakistan is in a state of war is an irrefutable fact supported by a series of statements made by Government officials and politicians, press releases by the ISPR, hostile statements by non-state actors and incidents and statements involving the TTP between 2011 and 2015.

In spite of the aura of counter-terrorism and military operations, the necessity and efficacy of military courts has been a subject of much debate. The most significant allegations have been leveled from the domestic, international and human rights perspectives. Were these courts really necessary? Are these military courts the panacea for the problems arising out of a deeply flawed criminal justice system? Have the military courts helped in countering terrorism? These are all valid questions meriting a substantive response.

The passage of the 21st Constitutional Amendment established a firm legal basis for military courts, as they were set up in accordance with the rule of law. Stretching over 900 pages, the Supreme Court's detailed verdict further strengthened the case for necessity and legality of these military courts. In paragraphs 121-145 of the plurality opinion, the Supreme Court deemed the creation of military courts a necessary and appropriate response to defend Pakistan against internal threats of war from non-state actors. Significantly, it characterized the existing situation as like', as a consequence of which the duty of the Federation, under Article 148(3) of the Constitution, to defend the provinces against external aggression and internal disorder, through the Armed Forces, was triggered.

Addressing the issue of necessity, the primary *raison d'être* for military courts was dispensation of speedy justice. The State of Pakistan is bound by its international legal obligations, under binding UN Security Council Resolutions 1373 and 1267, to counter terrorism. The Anti-Terrorism Courts (ATC) in Pakistan have been unable, for a range of reasons, to fulfill the State's obligations with regard to countering terrorism. Acquittals by the ATCs are internationally viewed as an inability of the State to fulfill its obligations. In light of this, questioning the necessity of military courts is illogical. However, the establishment of the military courts in no way absolves the Government of its responsibility to reform the ineffective criminal justice system.

Justice Umar Ata Bandial extensively referred to the direct relevance and applicability of International Humanitarian Law (IHL) to the military courts. The judg-

ment of the Supreme Court is a much-needed step in the process of clarifying the distinction between the law of peace and the law of conflict. When the TTP has committed several war crimes against the State of Pakistan, including targeting civilians and civilian objects, suicide bombing, hostage-taking and kidnapping and killing suspected spies, there is no requirement for a traditional declaration of war to be made in order for the law of war to apply in our present circumstances. Additional clarification of this factual situation is also necessary – the paradigmatic shift from peace to war must be reflected.

The military courts have been criticized for violating due process rights. In this context, it is pertinent to turn towards an examination of Pakistan's obligations under the International Covenant on Civil and Political Rights (ICCPR). Article 14 of the ICCPR requires trial of persons before a 'competent, impartial and independent tribunal'. The provisions of Article 14 are applicable to all courts and tribunals, whether civilian or military. Furthermore, General Comment No. 32, issued by the Human Rights Committee, stipulates: "While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of Article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned".

Those leveling such serious accusations, regarding violation of due process rights by military courts, must look towards Sections 73-113, 118, 119, and 126-129 of the Pakistan Army Act 1952, and the 1954 rules, which details inquiry procedures, appointments, custody issues, liability of offenders, etc. Moreover, the military courts operate on the same rules of evidence as ordinary courts, as contained in the Qanun-e-Shahadat Order 1984. A lack of understanding regarding how military courts function should not be cloaked as valid criticism from a human rights perspective.

General Comment No. 32 further asserts: "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials". The state of war Pakistan currently finds itself in is an exceptional circumstance and the failure of the ATCs in effectively countering terrorism allows Pakistan to resort to military court trials. Moreover, there are limitations on the types of cases that can be referred to the military courts – in fact, many of the cases referred have been rejected for falling out with the scope of exceptional cases.

The "specific class of individuals" referred to in General Comment No. 32 is taken into account under the Pakistan Army Act 1952. Section 8(8) defines an "enemy"

as all armed mutineers, armed rebels; armed rioters, pirates and any person in arms against whom it is the duty of any person subject to this Act to act". Those falling within the scope of the term "enemy" have not only taken up arms against the State but have also actively, through social media and their videos, affirmed their declaration to wage war against the State. It is these "enemies" that form the subject matter of military courts.

Article 10(9) of the Constitution, delineating safeguards as to arrest and detention, stipulates: "Nothing in this Article shall apply to any person who for the time being is an enemy alien". While, traditionally, the concept of an enemy alien has been applied in a territorial context applicable only to foreigners, the time has come to explore the possibility of "ideological enemy aliens". This is particularly significant in light of Article 5 of the Constitution, which identifies "loyalty to the State" as a "basic duty of every citizen" whereas militant non-state actors have, by their statements and actions, withdrawn this loyalty to the State.

Whether or not military courts have been effective in countering extremism and terrorism requires an understanding of counter-terrorism approaches and strategies. Counter-terrorism, in order to succeed, requires a multi-faceted approach. Military operations and military courts, while an important part of that strategy, cannot succeed without de-radicalization of society. Eliminating existing terrorists is effectively under process but to prevent the radicalization of prospective terrorists is not an objective of the military courts, nor can it reasonably be attached to them.

The trial of civilians by military tribunals is neither new nor a Pakistan-specific phenomenon. In 2001, the United States established military tribunals to conduct trials of non-citizens suspected of terrorism in the United States or abroad. In fact, the United States had used military tribunals during the US-Mexican War in the 19th century and in the mid-20th century when a U-boat brought eight German soldiers into New York. Consequently, the establishment of military courts cannot be challenged under Pakistan's domestic law or its international legal commitments so long as the principles of fair trial and due process, particularly those prescribed by IHL, are observed. Additionally, the military courts are not a permanent entity – they are merely a time-bound measure under the Constitution.

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