

PILDAT Policy Brief

Revival of Military Courts in Pakistan

With the expiry of the sunset clause of the 21st Constitutional Amendment on January 07, 2017, the Government and the opposition parties reached an across-the-board consensus on March 16, 2017 to revive Military Courts for another two years. The Government is now expected to table two revised Bills - the 23rd Constitutional Amendment Bill and the Pakistan Army Act, 1952 Amendment Bill - on March 20, 2017 to provide the necessary legal cover for revival of Military Courts.



An image of the meeting held between Parliamentary Leaders and chaired by the Speaker, National Assembly held on March 16, 2017 on revival of Military Courts

First of all, there is apparently no reason why the Federal Government did not initiate the process well before the expiry date of the 21st amendment so that the gap of around four months could be avoided.

The revival of the Military Courts, which were declared to be a ‘bitter-pill’ when these were originally established two years ago, may be a necessity again given the continuing onslaught of terrorism and the weaknesses in Pakistan’s criminal justice system. However, in doing so, the Government and the Parliament must seriously deliberate on what may be the most workable approach to setting up of effective military courts.

The formation of the Military Courts came about as an ‘extraordinary measure’ which was packaged as a ‘stop-gap arrangement’ to eradicate terrorism due to the flaws and inefficiencies of the legal system. Hence the two-year sunset clause was placed allowing the Government and the Parliament to institute necessary reforms to strengthen the legal system to

adequately and effectively manage challenges of terrorism. Reforms in the criminal justice system within two years was also a central tenet of the National Action Plan (NAP). However, without any substantive progress on reforming the judicial system, the proposal to re-establish military courts is tantamount to Government failure which the Government itself may consider as “*admission of failure of the existing system.*”¹

It is a legitimate expectation in a democracy that before initiating the legislative proposals to re-establish Military Courts, the Government needed to inform the Parliament and the people on the two-year performance of the Military Courts, the *raison d'être* behind their re-establishment for another two years as well as the steps it took in reforming the criminal justice system. That it failed to do so reflects a somewhat casual approach not just towards such a critical issue of re-establishment of Military Courts but also towards the institution of the Parliament.

The Parliament, for its part, has also done precious little in the past two years on reviewing the performance of the Government on reforms in Pakistan’s criminal justice system. Although the Senate did a commendable job to produce a detailed report on the Provision of Inexpensive and Speedy Justice in the Country after detailed deliberations in its Committee of the Whole in December 2015, the Parliament on the whole did not exercise its oversight role in a befitting manner. Its Committees should have sought monthly reports from the Government on the steps taken to reform the justice system.

Given that the re-establishment of military courts is a *fait accompli* now, an objective analysis is required on the role of the judicial review that has eclipsed the rationale behind setting up of Military Courts. The rationale behind the institution of military courts is that these are efficient in handing out convictions. The procedure of appeals is not impeded by the rigmarole of the conventional criminal justice system, and as a result convictions are not unnecessarily forestalled. However, this objective does not appear to be fully met perhaps due to the role of the judicial review. While the Government has not shared any data on performance of the Military Courts, a total of 274 cases were referred to Military Courts since January 2015. So far, a total of 161 terrorists were awarded death penalty by the Military Courts in two years out of which only 12, i.e. 7% have been administered death penalty. 113 terrorists were awarded imprisonment of varying duration during the period.² The Supreme Court, in its judgment on August 05, 2015 had declared that the trial of any accused person under the Pakistan Army Act, 1952, is to be subject to Judicial Review both by the High Courts and the Supreme Court.³ As a result, according to media reports, convictions of around 35 militants are pending before the Peshawar High Court.⁴ In addition, review petitions of at least 11 of the convicts of military courts against dismissal of their earlier appeals are also pending before the Supreme Court.

¹ For details, please see: <https://www.thenews.com.pk/print/191856-Military-courts-admission-to-failure-of-existing-system-minister>

² For details, please see: <http://www.radio.gov.pk/10-Jan-2017/aj-kii-khabar>

³ For details, please see 180(g)(h), page no. 372 of the Supreme Court’s judgment issued on August 05, 2015 on Constitution Petition No.12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010. The complete judgment may be accessed at:

http://www.supremecourt.gov.pk/web/user_files/File/Const.P.12of2010.pdf

⁴ The news story can be accessed at: <https://www.dawn.com/news/1307695>

The Army Act 1952 lays down the Military Court of Appeal as the appellate forum of military courts, with the Chief of Army Staff being the one who approves the sentence of the appellate forum.⁵ According to a report *'the verdict of a military court that is upheld by a Military Court [of Appeal] is final and cannot be appealed before a civilian court, even the High Court or the Supreme Court of Pakistan'*.⁶

In going forward, therefore, Government and the Parliament must consider the most effective form of re-establishment of military courts. Parliament exists for the purpose of careful review and discussion on legislative proposals before their passage. In expecting Parliament to simply sign a dotted line agreed outside the House by party heads amounts to insulting the constitutional role of the elected representatives. Instead of the announced presentation and passage of the legislation on March 20th, both houses of Parliament must devote some time for individual members to deliberate on the proposed laws instead of repeating the bad example of passage of 21st Constitutional Amendment after only 174 minutes of debate in 2015. After all, if elected representatives of the people do not have the time for review and debate on laws before they vote, what is the rationale behind their role?



A view of the Parliamentary Leaders addressing a Press Conference after a meeting in the Speaker of National Assembly's Chamber on February 28, 2017 to forge consensus on revival of Military Courts

Given its inability in instituting reforms in the criminal justice system in the past two years, the Government needs to outline concrete proposals, alongside

⁵ Pakistan Army Act 1952 can be accessed at:

<http://pakistancode.gov.pk/english/UY2Fqajw1-apaUY2Fqa-ap%2BYaQ%3D%3D-sg-iiiiiiiiii>

⁶ For full text of the report, please visit: <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf>

a set timeline. While unlike in the past, the Parliament needs to redeem itself and carry out an effective and regular oversight in this regard, the PPP and the PML-N agreement to form a new Parliamentary Committee to oversee Government efforts to enact necessary criminal justice reforms, implementation of NAP and other security related issues seems like not a very effective measure. With the existence of Standing Committees overseeing Defence and Interior Ministries both in the Senate and the National Assembly, there is apparently no need to create an additional, Special Committee. It is also important to note that even if a National Security Committee of the Parliament is constituted, it may not be possible for it to undertake all these responsibilities. Instead, monitoring progress on criminal justice reforms should specifically be the responsibility of the Parliamentary Committees on Law and Justice, and monitoring implementation of the National Action Plan should be that of the Parliamentary Committees of Interior. The most effective way to do so may be joint exercise of progress review by the Standing Committees of the Senate and the National Assembly for this purpose.

However, a clear roadmap is also required for the Parliamentary Committees on Law and Justice in this regard. The Committees must meet every month solely to review the progress on institution of reforms by the Government on criminal justice system. PILDAT proposes that these meetings should be open to the media, if not to the general public. Each meeting of the committee must strictly monitor progress and share it regularly. For instance, the Committee should review monthly progress on percentage of the work done by the Government ensuring that it is 100% complete in two years. This would mean that the progress on average should be about 5% every month. Such specific proposals are required for a vigilant and consistent oversight failing which the Parliament may again be looking at instituting another stop gap arrangement.

Table 1: Comparison Between Pakistan Army (Amendment) Act, 2017 (Bill) & Pakistan Army (Amendment) Act, 2015

Section No.	Pakistan Army (Amendment) Bill, 2017	Pakistan Army (Amendment) Act, 2015	
Preamble	An extraordinary situation and circumstances still exist which demand continuation of special measures	Extraordinary situation and circumstances exist, which may demand	
	Misusing the name of religion or a sect or by committing grave and violent act of terrorism against the State	Using the name of religion or sect.	This change is repeated at every place this line is used
	<i>After an exposition of the special measures pursued under Pakistan Army (Amendment Act) 2015 the Act states: And Whereas the aforesaid special measures have yielded positive results in combating</i>	<i>Not present.</i>	

	terrorism		
	And WHEREAS it is in the national interest to continue the special measures adopted pursuant to the Pakistan Army (Amendment) Act, 2015 (II of 2015) for a further period of two years;	<i>Not present.</i>	
1. (2)	It shall come into force at once and shall be deemed to have taken effect on and from 07th January, 2017	It shall come into force at once.	
1. (3)	The provisions of this Act shall remain in force for a period of two years from the date of its commencement and on expiry of the said period all cases triable under this Act and are pending in courts established under the Pakistan Army Act 1952 (XXXIX of 1952), shall stand transferred to the courts established under the Anti-terrorism Act 1997 (XXVII of 1997)	The provisions of this Act shall remain in force for a period of two years from the date of its commencement.	

Table 2: Comparison Between Twenty Eighth Constitutional Amendment Bill and the Twenty First Amendment

Section	Twenty Eighth Constitutional Amendment	Twenty First Constitutional Amendment	Comments
Preamble	An extraordinary situation and circumstances still exist which demand the continuation of the special measures adopted for the expeditious disposal of certain offences...	Extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences...	
Preamble	by any terrorist group... misusing the name of religion or a sect or by committing grave and violent act of terrorism against the State or from foreign and locally	By any terrorist group... using the name of religion or a sect.	This has been replaced wherever this line appears.

	funded anti-state elements		
Preamble	And whereas the special measures adopted pursuant to the Constitution (Twenty-first Amendment) Act, 2015, enabling trial of cases relating to terrorism under the Pakistan Army Act, 1952, have yielded positive results in combating terrorism;	<i>Not present</i>	
Preamble	And whereas it is in the national interest to continue the special measures adopted pursuant to the Constitution (Twenty-first Amendment) Act, 2015 for a further period of two years	<i>Not Present</i>	
	<i>Not Present</i>	<i>Three paragraphs: 1) grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution by the framers of the Constiution.. 2) terrorists tried by military courts... 3) People of Pakistan have expressed their firm resolve through their chosen representatives in the all parties conferences...</i>	
2	Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at Serial No. 6 and 7 of sub-part III of Part I of the First Schedule, who claim, or are known, to belong to any terrorist group...	Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at Serial No. 6, 7, 8 and 9 of sub-part III of Part I of the First Schedule, who claims, or is known, to belong to any terrorist group...	

3	<p>The following new entries shall be added, namely:</p> <p>6. The Pakistan Army Act, 1952</p> <p>7. The Anti-terrorism Act 1997 (XXVII of 1997), only to the extent of sub-clause (iv) of clause (d) of sub-section (1) of section 2 of the Pakistan Army Act, 1952, added through the Pakistan Army (Amendment) Act, 2017</p>	<p>The following new entries shall be added, namely:</p> <p>6. The Pakistan Army Act, 1952</p> <p>7. The Pakistan Air Force Act, 1953 (VI of 1953)</p> <p>8. The Pakistan Navy Ordinance, 1961 (XXXV of 1961)</p> <p>9. The Protection of Pakistan Act, 2014 (X of 2014)</p>	