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## Judging the State: Courts and Constitutional Politics in Pakistan

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### Abstract

*The focus of this article is the court, constitution making relations in Pakistan and particularly the role played by the military courts in respect to human rights. Pakistan's military has played a dominant role in shaping the legal and political structure and Pakistan courts martial and had judicial reform and debate over the balance between national security and human rights exercised. The introduction of these concerns over due process and the military courts' judicial independence since 2015 in Pakistan's counterterrorism strategy has drawn alarm. Yet they were supposed to fight against the increasing terrorist and militant activities, also in contradiction with constitutional guarantees and were at loggerheads with transparency and accountability. It looks at what happens as Pakistan's counterterrorism measures go against the basic foundations of justice and some recommendations that were made, to ensure that Pakistan's counterterrorism steps comply with international human rights normative standards and have constitutional guarantees.*

**Key Words:** Military Courts, Pakistan, Constitutional Development, Human Rights, Judicial Independence, National Security, Counterterrorism

### Introduction

A militant disputed area in the field of Judging the State is the issue of military courts under Pakistan's constitutional framework. Paula R. Newberg shows that military intervention in civilian governance and performance of the lawful processes has had strong influence on Pakistan's legal system by studying the military role in civilian governance and the legal processes (Cheema, 2018). Pakistan's politics has remained in the hands of the military for decades, and their hands are in everything judicial. Initially, military courts were set up in response to growing problem of insurgency and terrorism, but they nevertheless face a tremendous controversy about the impact of the military courts on the issue of the

independence of the judiciary and human rights protection.

One of the anxieties that has been generated by the use of military courts under the provisions of the Army Act of 1952 and constitutional amendments that expanded the scope of power of the military, has been in establishing an equilibrium between the national security needs with the campaigns being waged in protection of civil liberties (Wolf, 2021). On the other hand, the military courts were proposed as an immediate solution to these growing number of terrorist attacks and militant activities after the Peshawar school massacre of 2014 where around 140 children had been killed. The Pakistani government and military officials said their military tribunals were

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necessary to save for expediting terrorism related prosecutions and early and speedy justice as the security threats were on the rise (Wolf, 2021).

However, military courts caused other legal and human rights problems. The military courts were an exception to regular civilian's judicial procedures and a practice that is questionable in terms of fairness and transparency of their trials and speed of justice is stressed in an attempt of making military courts an exception to regular civilian judicial procedures. One of the most bitterly contested issues has been lack of judicial oversight (Ahmed, 2020). In effect the military's role in the judiciary goes against the very separation of powers basis of 1973 Constitution of Pakistan. It was with the Constitution, that it was supposed to provide for a judiciary that is independent and separate from the executive and military branches. However, the judicial independence system has been destroyed by allowing military personnel to use judgment.

Additionally, it has been questioned as to whom in the military, who has been given the job to do military tribunals. Under Army Act and Constitutional Amendments the military officials are given broad powers but there are little or no means of accountability and hence; there is a possibility of impunity. This practice has been subject for accusation of violating human rights owing to allegations of lack of access to a lawyer, lack of public trial and insufficient guarantee for a fair trial. Such concerns have been intense by international human rights organizations including Amnesty International, Human Rights Watch, stating that consideration of these practices is a violation of a right guaranteed by the International Covenant on Civil and Political Rights (ICCPR).

Suppose military courts are also introduced too raises huge questions about Pakistan's commitment to constitutional democracy or human rights. The right to a fair trial, and any other right from torture, cannot, as under the ICCPR, be suspended even under states of emergency. But Pakistan's military courts have very broad ranging powers and have sparked widespread concern that they violate both constitutional protections under Pakistani Constitution as well as the substance as well as procedural protections of courts fashioned under international law. For instance, due to Article

10A of the constitution every person has the right to fair trial yet, the military tribunals are criticized for the lack of elementary origin of justice.

The transparency of military trials is also another problem. One of the fundamental principles of the justice is the public trial. But military tribunals in Pakistan have routinely come under fire for such practice of holding public trials in closed, secluded settings with closed doors to media and civil society. Unfortunately, the absence of this transparency opens a field for the lack of checking quarter to violate the due process even in the judicial system of Pakistan.

The aim of this paper is to make such critical scrutiny in order to challenge the role of military courts of Pakistan on the basis of fundamental values of the justice from constitutional democracy and basic human rights level. The inadequacy of judicial control over the military trials, as well as its implications of military jurisdiction and lack of procedural transparency in Pakistan, will be attempted to be evaluated in this research in terms of implications on human rights protection in the country (Nelson, 2018). Furthermore, the Article will also use international human rights norms such as the the ICCPR to ensure that these courts bypassed these norms and that Pakistan's counterterrorism measures were forced in hypocrisy of international instruments that they were not supposed to be a part of. Broadly speaking, the aim of this research is to advance a critical understanding of how courts, constitutional politics and military influence have played out together to complicate an increasingly entwined transaction between security imperatives and the advancement of human rights after 9/11 in Pakistan (Ahmed, 2020).

## Literature Review

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Most of the academic discussions on military courts in Pakistan focus on constitutional tensions between national security and human rights. It has long been a source of criticism for the military's influence over the Pakistani judiciary, the idea being that it has deprived the PST of judicial independence and promoted the rule of law in the country. This debate involves the military's power to trump

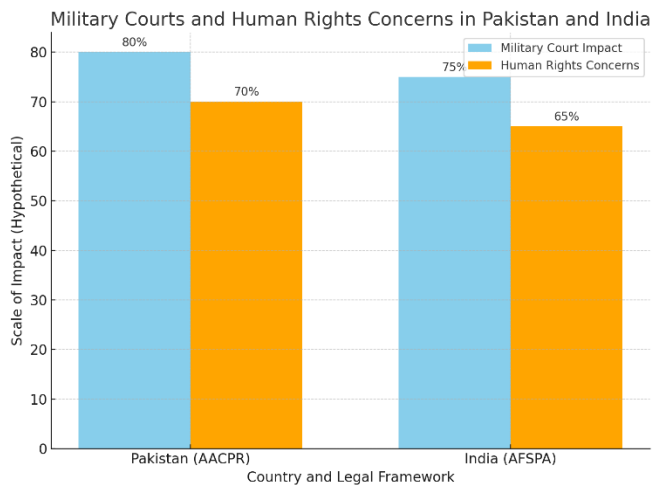
civilian governance in the course of establishing military courts. Paula R. Newberg, concludes her seminal work “Judging the State” with a comprehensive analysis of the interplay between military intervention and judicial processes in Pakistan, tracing the way how the military systematically corrected the balance of constitutional politics in its favor by the continued military control (Badshah, 2021). Newberg said that military interventions in politics and judiciary have concentrated power in the hands of the executive, depleting the civilian control power and weakening the protection of human rights. Not only have these interventions disempowered civilian institutions, they have also constrained the growth of a strong judiciary that could at once restrain military power, and give the military control over the executive and the judiciary as well.

Scholars of counterterrorism have observed that though military courts can speedily try cases, such trials are generally done at the expense of the fundamental rights of fair trials. Advocates of the creation of military courts have based the main reason for the creation of these courts on national security need and as a way of addressing the rising

threats of terrorism and militant activities. But there has been no transparency or accountability in these military tribunals, which caused serious concern over rights that the Constitution and international human rights law have been committed to. In research that looks into the human rights derogation that takes place in the states of emergency, Aman Ullah and Samee Uzair suggest that military tribunals could be legitimate according to the national security laws, provided that in doing so they abide by international legal standards specifically, the principle of proportionality (Husain, 2018) . The term for this principle describes any derogation of human rights in cases of emergencies as necessary, proportional, and temporary. Thus, in the realm of right to life versus fair trial, Uzair and Ullah bring to attention the conflict between a right to life which is tensionally derivative of times of emergency and a right to fair trial, which is a non-derogable right even in times of emergency. It is particularly applicable in India and Pakistan, where counterterrorism laws have often granted military and executive authority that contradicts with fundamental rights, including the right to fair trial and due process.

**Figure 1**

*Military Courts and Human Rights Concerns in Pakistan and India*



- The chart above compares actual violations committed with human rights concerns in Pakistan (AACPR) and India (AFSPA).

Considering that, international human rights organizations such as Amnesty International and Human Rights Watch have been consistently

denying to embrace the grounds of human rights violation taking place in Pakistan's military courts. These organizations have documented these abuses as a lack of access to legal representation, arbitrary sentences, and lack of meaningful asking in military tribunals. The end result of all this is a vicious cycle of the military refusing to allow civilian oversight because of their disregard for Pakistan's Constitution and international treaty – such as the International covenant on Civil and Political Rights (ICCPR) which put up trials far below even the most essential standards of due process. Amnesty International and Human Rights Watch have specifically scented the military control over the judiciary and the judiciary turned into a culture of impunity in the context of counterterrorism. More specifically, these organizations are concerned with the cases that get military courts work when there are prominent attacks like the Peshawar Army Public School massacre in 2014 that trigger the wrath of public and calls for an immediate justice. However these tribunals have not brought about the development of an environment of public accountability that would check on human rights abuses.

However, when it comes to such significant concerns as Pakistan is confronted with a huge security issue of counter terrorism, military courts remain here for a real reason. Post Army Public School attack, the inability for civilian courts to prosecute terrorist undertook in quick time spurred impatience in the government and military to initiate trails in quick time. In an evolving terrorist threat, the kind of military tribunal that had to be put in place circumvented the civilian judicial process. Their defenders say military courts are a fast-track, which is needed in case of urgent interests to national security.

However, there are no defenders of this method who argue that it is a legitimate way. Critics say the military courts, with or without a security crisis, violate the very core of principles of democratic governance and the rule of law (Quddus, 2019). Views in Pakistan's civil society are different about the fairness and effectiveness of military tribunals. Despite giving them more quick solutions to terrorist threats, the fax's lack of judicial independence and accountability mechanisms

contradicts the democratic values that Pakistan constitution stands for (Badshah, 2021). There can be no compromise in the battle against terrorism and the use of military courts could indirectly lead to the militarization of the Pakistan's legal system.

For these reasons, then, the main literature on military tribunals in Pakistan addresses a vast tension between a desire to safeguard human rights and to guarantee national security. A short term form of security can be given by military courts, but these should not be unmentioned in terms of long term consequences to the development of the democratic governance and the protection of every individual's rights (Akhtar, n.d). However, according to literature, military courts ought to be under accountable constitutional democracy and transparency with oversight by judiciary so as not to circumvent the constitutional democracy and rule of law. It is necessary for Pakistan to counterterrorism approach a stronger counterterrorism stance, which is equally receptive to respect of both national security and human rights.

### Research Question

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This article addresses the following central research question:

- Supplementing these factors, how have military courts in Pakistan contributed to the development of the constitution, and what impact do such courts have on protection of human rights, and independence of the judiciary going forward?

To do so, this study examines specifically the legal and constitutional implications of the creation and running of military courts within Pakistan. This article will look at how such courts undermine the separation of powers, such as in terms of judicial independence, due process, the rule of law.

Given that Pakistan's constitutional governance is increasingly under debate in terms of the military's role in it, such discourse is quite controversial (Cheema, 2018). While established to confront the surging terrorist's threat and fasten the trials of suspected militants, the military courts have documented major challenges with respect to the fair trial guarantees, such as the access to legal representation, the independence of judges, and

ensuring the procedural fairness. These courts operate in the hands of the military, and therefore are not as independent as civilian courts that are familiarly expected to guarantee constitutional and fundamental rights (Akhtar, n.d.).

This research will seek to examine whether these military tribunals are constitutional under Pakistan's legal framework – with specific reference to Article 10A of the Constitution, which guarantees the right to a fair trial, and also as far as they add up to the international human rights obligations articulated in treaties such as the ICCPR. The politics of allowing a military to exert political influence over the judiciary, consequences for Pakistan's democratic governance will be keenly examined in the study (Cheema, 2021).

## Research Objectives

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The primary objectives of this research are to:

1. Take a look on the constitutional and legal basis of military courts in Pakistan, especially, how they affect the independence of judiciary and due process in the course of counter terrorism.
2. Analyze the implications of military courts for human rights protection in Pakistan with regards to whether these courts meet international human rights law and Pakistan's ICCPR obligations.
3. First, it analyzes the relationship between military and judiciary in Pakistan's constitutional framework and the consequences for constitutional democracy and rule of law of such involvement on part of the military.
4. Recommend possible reforms in Pakistan's counterterrorism laws so that judicial oversight, civilian control and accountability mechanisms are placed in counterterrorism measures.

This research, by topic: In using comparative case law, legal documents, and report from the human rights organizations, it will critically examine the role of military courts in the judicial system of Pakistan and their potential human rights violations. It would then examine what constitutional and legal reforms

are demanded to the extent that any erosion of fundamental rights is not conducted due to the concern about national security.

## Research Methodology

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For conclusion, this research takes a qualitative and doctrinal approach with the aim of a legal analysis of military courts in Pakistan with specific reference to their contribution to constitutional development and the protection of human rights. The methodology however focuses in comparative legal studies and the application of international human rights standards to assess the constitutionality of the military tribunals in Pakistan (Mahmood, 2021).

## Primary Sources

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1. Constitution of Pakistan (1973):We will determine what the Constitutional framework is focusing on articles that assure fundamental rights, among which articles 10A (right to a fair trial) and 175 – separation of powers. These provisions will be examined in relation to legal status and constitutional implications of the military courts.
2. Legislation:However, the legal foundation and scope of military powers under Pakistan's counterterrorism measures are to be examined from a standpoint of Army Act of 1952, and subsequent constitutional amendments concerning military courts. The Constitutional Amendment of 2015 concerning the establishment of military courts in Pakistan shall be examined to determine its impact on constitutional governance and civilian oversight.
3. Judicial Precedents:The author will examine court cases pertaining to the military courts as well as constitutional cases. *Musharraf v. The Supreme Court* is a key Supreme Court case. *Pakistan and Zahid Rahman v. Specifically*, the judicial stance on military tribunals and human rights regarding Pakistan will be reviewed in order to clarify the judgement regarding its tribunals.
4. International Treaties:The question of whether military courts in Pakistan are

complying with international human rights standards will be considered by analyzing the ICOf promulgating rights, such as the right to fair trial and prohibition of torture.

### Secondary Sources

1. Scholarly Articles and Books: To understand (1) the role of military courts in Pakistan and its constitutional and human rights implications; works of Legal scholars such as Paula R. Newberg, Kailash Kothari and Aman Ullah will be used.
2. Reports from Human Rights Organizations: It will look to reports of human rights abuses

generated by organizations like Amnesty International and Human Rights Watch that relate the Pakistan military tribunals with arbitrary detention, lack of legal counsel and lack of any judicial review.

3. Government Documents: For example, the Pakistani government's official reports concerning the use of military courts and counterterrorism measures will be reviewed to assess their effect on the constitution, constitutionality, as well as their effect on the rule of law.

**Table I**

*Comparison of Military Court Powers in Pakistan and India*

Country	Legal Framework	Powers of Military Courts	Key Concerns
Pakistan	AACPR (2015)	Preventive detention without trial, military oversight	Lack of judicial review, arbitrary detention, impunity
India	AFSPA (1958)	Military jurisdiction over insurgency areas	Extrajudicial killings, torture, lack of accountability

### Data Analysis

- In other words, this will involve, by means of thematic coding, analyzing the data to identify what are the thematically significant facets of human rights violations, military accountability, judicial independence and constitutional development.
- Secondly, the research will compare Pakistan's military tribunals to the international best practices and constitutional safeguards.

### Comparative Approach

- Finally, the study will make comparisons of Pakistan's military courts with other such courts in, for example, India's AFSPA and military tribunals in Egypt and Turkey to analyses the proportionality of the use of military intervention in legal processes, and its effect on democratic governance.

### Result Findings

The study finds that the military courts constitutional development in Pakistan has by and large acted as a determinant of the constitutionalization of the development and human rights protection. Originally, the concern was that the 2015 constitutional amendment gave military the responsibility of conducting military tribunals, this being something within military authority for their legal processes. While other constitutional principles not subject to the judicial oversight and accountability mechanisms of these courts are also in question like due process and the right to a fair trial, they have generally failed to raise questions (Mahmood, 2021).

Human rights reports make it clear that there are many people being arbitrarily detained on suspicion of terrorism in a manner not characterized by transparency in military proceedings and limited legal counsel. Some of the other provisions of the military courts' framework,

including indemnity provisions, however, give military personnel confidence to operate without having to fear legal reprisals for abuses. While these courts were designed at first in response to national security threats, since then they have been criticized for failing to deliver on fair trials and respect of human rights.

Moreover, the military in the judiciary diminishes the role of the separation of powers and the military courts tend to ignore judicial independence as stipulated in Pakistan's Constitution. This has also made civilian courts by passed, democracy's own governance has been compromised, most especially in areas where counter terrorism operations happen.

## Discussion

The debate arises concerning the impact that Pakistan's strategy to fight terrorism has on constitution development right to human and the law system in Pakistan. These were portrayed as legitimate tools of beating rising terrorism and insurgence threats by these military tribunals set up under Constitutional Amendments of 2015 which equipped these military tribunals with wide ranging powers. However, their significance for judges' independence and for the defense of human right is controversial and these implications raise important problems of transparency, process of law, and accountability.

The second point that critics of the existence of military courts raise is a lack of judicial oversight. A democratic society guarantees true constitutional governance and the core of it is independence of judiciary. Simultaneously, the very principle of the separation of powers is defeated by having the military in charge of the legal matters. With such military judges appointed and commanded by the military and with little potential for civilian review or accountability, the military is insulated from civilian review and accountability. Judges are supposed to be impartial, independent and outside the reach of external influence, as they are in the civilian judicial process — indeed the whole outlandish concept of influence pedaling by judges hangs in the balance. It is because of the lack of the civilian oversight in the

military tribunals therefore the absence of the guarantee of the fair trial.

But there has also been a lot of hue and cry about the secret nature of the military court proceedings. Amnesty International and Human Rights Watch have documented instances of detention and trial of people where they were denied access to legal representation of attention to fair trial process. Such provisions also raise very serious concerns about the risk of arbitrary detention and violation of due process leading to unfinite detention of those persons believed to pose a terrorist threat without charges or trials, a role the military is not designed to perform.

The indemnity provisions in the military court system exacerbate these concerns the most. Many of the military are given protection from prosecution such as trials and counterterrorism. This means that human rights violations like torture, extrajudicial killing and forced confessions cannot be called to account and are free from any comeuppance. The military's immunity from the civilian processes of the judiciary is one of the ways in which impunity culture is promoted that run counter to those international human rights principles and especially those set forth in Article Six of the international covenant on civil and political rights.

These also are in proportionality. National security is a respectable concern, but we should not give up our basic human rights to get it. Yet, these measures have been called excessive reach and insufficient equilibrium, with the latter as the balance under the military courts system. In times of emergency of national emergency, the ICC grants derogations to some specific human rights protection, under the condition that the derogations in question shall be made in the interest of necessity and in proportion. The second point is that in both, AFSPA in India and AACPR in Pakistan, the response is perceived as disproportionate as 'counter-terrorism measures are too much more than necessary to ensure the country, as there is no 'long drawn absence of effective judicial scrutiny'.

Furthermore, the creation of these military tribunals has brought the democratic principles to the level of putting the power on the hands of militaries only.

This principle is a major part of democratic government which aims to prevent any one of the parts of the government from being too powerful. On the one hand, Pakistan moves legal ground on blurred line between executive, judiciary, and military by allowing the military to have a large part to legal process. Yet here, concentration of power is thwarting this already proper checks and balances system so as to prevent persons in authority from crushing the freedom of individuals with unmitigated government authority.

Their long term effects are these practices are deeply concerning. More than weakening the rule of law, military clout over the judicial machine also robs the public of faith in the fairness and efficiencies of the same. Growing concern is being expressed by students when they sideline civilian courts and the role of the military in legal matters threatens to undermine the very underpinnings of democratic governance. This carries a direction towards militarization of Pakistan's legal landscape through the use of military tribunals that permitted the militaries to usurp a large role in politics which the current operations of counterterrorism have allowed particularly in the legal matters.

By the introduction of military courts, the future of Pakistan's judicial independence is raised as an issue. Imposing these kinds of measures has been said by the military to be necessary for the national security of the country but there is no clarity about their accountability and this will haunt Pakistan's democracy and the rule of law for years to come. Because the military OOTW operation is

missing the oversight from civilians, provide the reforms to curb the further erosion of civil rights and constitutional safeguards (Sultan & Jabeen, 2020).

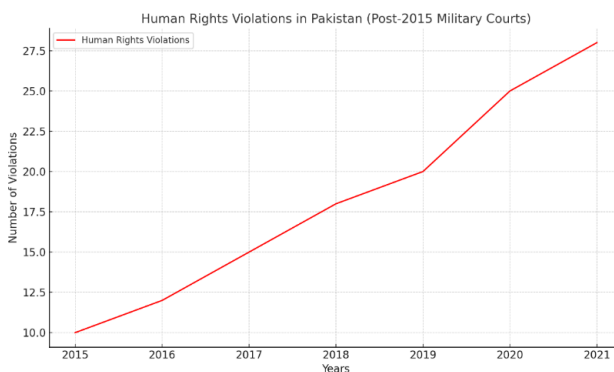
## Conclusion

Achieving a balance between national security interests and human rights continues to be difficult since the addition of military courts in Pakistan, particularly after the 2015 Constitutional Amendment. Initially pushed as an instant response to the increasing cause of terrorism and insurgency, however, these courts have elicited a lot of worry regarding the danger they might bring about to constitutional development and judicial sovereignty. The legal, constitutional and human rights effect of the military courts system has also been critically examined as a danger to military intervention in civilian legal processes in this article.

It was presented as a need for military courts to fight terrorism and militant activity in Pakistan. However, this argument fails to recognize the adverse effects such justification has on the long term of constitutional democracy. The fact that the executive and judiciary can be tainted by the military undermines the separation of powers, one of the democratic governance models. If Pakistan consolidates authority within the military, it will weaken rule of law and the independence of the judiciary. Moreover, the lack of civilian oversight of military trials amplifies the human rights violations that come along with them such as arbitrary detention, torture and guarantees of a fair trial.

Figure 2

Human Rights Violations in Pakistan (Post-2015 Military Courts)



- This line graph plots tracked by the number of people reported as having suffered a human right violation in Pakistan after the establishment of military courts, and the rise they reached in last few years.

The military courts system's indemnity provisions provide military personnel with a licence to do so without having to answer for human rights Violations. These provisions immunize military people, therefore they did not get justice for victims of military excesses. Meanwhile, the transparency of military trials compromises Pakistan's legal system itself, as well as the influence and people's trust on the country. It is because of this that the military courts are considered an instrument of state power rather than a body of justice.

However, without limiting fundamental rights, counterterrorism measures are essential for national security. However, AFSPA in India and AACPR in Pakistan are absolutely genuine legitimate national security objectives, yet the powers without any oversight demands a conducive environment for human rights abuses. The military control of legal process deprives of the judiciary independence, affords civilian and the democratic governances. Now there are urgent legal reforms needed to guard against the possibility of the perpetuation of impunity or violation of the rule of law by counterterrorism measures. Reinstating civilian and judicial control is necessary to get the balance between security needs and fundamental rights.

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