

Special courts

*Shahzad Akbar**

*Mirza Shahzad Akbar qualified as Barrister from Lincoln's Inn and LLM from University of Newcastle. He is Director of Foundation for Fundamental Rights, an organization working towards advancement, protection and enforcement of fundamental human rights.

In light of National Action Plan, several military-led special courts have been set up across the country. Today, they operate with secrecy. This sets wrong precedent. In any case, military courts are not the solution to cut in militancy in the long-range. What is needed is a long-term strategy, which, instead of dismantling the constitutional setup, strengthens it. So far, that is still missing.

Shrouded in secrecy

After the Peshawar carnage, Prime Minister Nawaz Sharif announced National Action Plan, one of the points being the establishment of military-led special courts to try convicted terrorists. To many, this was predictable.

Predictable, because the sentences from military tribunal had come out, even before the National Action Plan was hammered out. On December 16th, as Prime Minister Sharif lifted the seven-years-old moratorium on death penalty, army chief General Raheel Shareef signed the execution warrants of six terrorists earlier tried by a military tribunal. The 20-point NAP, on the other hand, was rolled out on December 24th, 2014.

Pakistan resumed these executions, soon. Again, the first to be executed, Arshad Mehmood, was before the NAP was announced – on December 20th, 2014. A former military personnel, Arshad was earlier sentenced to death by a military

tribunal. A large number of people attended his funeral, showing the presence of pro-militant mindset, which stays unaddressed in NAP or its execution.

To establish such courts, the government, with the support of some other political parties, amended the Pakistani constitution as well as Pakistan Army Act, 1952. The first was made possible by the 21st Constitutional Amendment Bill, 2015; and the second, by Pakistan Army (Amendment) Bill, 2015.

Liberal parties voted in favour of the amendments, despite internal reservations that the changes amount to sacrificing democratic values. Pakistan People's Party Senator Raza Rabbani labeled supporting the amendments to swallowing "bitter pill" for the "security of Pakistan." Religious parties objected the move, arguing that the amendment unfairly singles out religion-inspired militancy only. Pakistan Tehreek-e-Insaf, ruling party of Khyber Pakhtunkhwa, a province hit hard by militancy, publicly supported the amendments but refrained from voting in their support due to political differences with the ruling party in the center.

These amendments made way for what is commonly called as military courts for a period of two years. Military officers, instead of civilian judges, will try convicted terrorists. The court operates under Judge

Advocate General, the Army's legal wing.

Under the new constitutional amendment, a total of nine military courts have been established; these include three in KP, three in Punjab, two in Sindh, and one in Balochistan. Legally, provinces have been sending terrorism cases to the military courts through the interior ministry.

By mid-2015, the military courts have sentenced 6 people to death. The Supreme Court had earlier suspended execution of these convicts until the constitutionality of the special courts was decided. However, in August 2015, the Supreme Court gave its approval to the military courts, in a divided opinion, with option of appealing military courts conviction if a question of fair trial or due process is raised by the accused.

Trials of the military courts are secret. Information about them is therefore hard to get; no one knows who is being tried, for what, and how. Overall, however, nothing is known whether the accused has hired lawyers of choice and if, at all, civilian lawyers may appear before the proceedings.

Even though interior minister Chaudhry Nisar Ali Khan assured that only hard-core terrorists would be tried in these tribunals, several cases referred by the provincial government are of terrorists who

were being tried in Anti-Terrorism Courts. Their cases have been forwarded so that they get convicted.

In late August 2015, we have seen usage of another special law, Protection of Pakistan Act 2014, when it was invoked to arrest and detain a former federal minister in Karachi. This has raised serious questions about misuse of such laws.

Not first time

It is not the first time that military courts are set up in Pakistan. Besides the military dictators, democratic governments too have established such courts in the past. In 1970s, for instance, Zulfikar Ali Bhutto set up summary military courts in Balochistan. Likewise, in 1999, Prime Minister Nawaz Sharif's government asked for special courts in Sindh, amid governor's rule there; this despite that the cases could then be dealt under the Anti-Terrorism Act, introduced only two years earlier in 1997.

However, both those special tribunals, set up under Bhutto and Sharif, were challenged in the apex courts:

The ones set up by Bhutto were challenged in Lahore and Sindh high courts, in cases namely *Darvesh M. Arbey v. Federation of Pakistan (PLD 1980 Lahore 206)* and *Niaz Ahmed Khan v. Province of Sindh (PLD 1977 Karachi 604)*. The superior judiciary

declared the summary courts unconstitutional, demonstrating that the civil authorities as well as the security forces could not act outside the constitutional parameters and limits.

Same was the fate of courts set under Sharif. The Supreme Court, under Chief Justice Ajmal Mian, banned the establishment of military courts, in the case of *Sh Liaquat Hussein v. Federation of Pakistan (1999 SCMR 569)*, declaring them unconstitutional and of no legal effect. Holding that a parallel judicial system cannot exist in the country, the Supreme Court ruled that the executive is unauthorized to set up any judicial system that lacks superintendence and control of the superior courts.

This time too, the constitutionality of the military courts was challenged. Lahore High Court Bar Association challenged the establishment of military courts on the grounds similar to the one made in the past. This time, however, the court upheld the constitutional amendment establishing the military courts, but gave right to challenge convictions in superior courts on grounds of lack of due process and fair trial.

Negative development

Special courts leave a negative imprint on the country's fragile democracy.

These courts directly clash with the constitutional requirement of separation of powers. By appointing military personnel to dispense justice, the special courts in effect blur the line between judiciary and executive.

The establishment of special courts contravenes many fundamental rights the Constitution embodies: Article 4 caters for right to life, liberty and property; Article 9 provides for security of person; Article 10 stipulates the right to a fair trial and due process; and Article 14 guarantees right to dignity. All these articles are violated by the special courts.

Proponents of these speedy courts termed it need of the hour, as, they say, the civilian criminal justice, has miserably failed at convicting terrorists at all. They argue that in ordinary courts witnesses would backtrack or the prosecutors and judges would not proceed due to serious threats to their lives.

The military-led courts ignore the elaborate system put in place to otherwise try ordinary cases. For instance, under the Code of Criminal Procedure 1898, an accused is given notice of the allegations as well as copies of evidence, seven days before charges are framed against that person. But that is missing in military courts, where an accused is already declared terrorist. The objective of punishment takes precedence over justice.

In any case, replacing a civilian judge with a military office just because the latter will brave threats won't solve the entire problem. What about the investigation, prosecution, and operation branches? What if they too are susceptible to threats? As long as holistic reform is missing, it is reasonable to doubt that the military-led courts would achieve any result.

Setting up military tribunals to summarily try suspects or hang them in public won't be of much effect if the militant minds continue to thrive. The funeral of Mehmood, the first one to be put to death after lifting moratorium on death sentence, offers a case study. That a large number of mourners attended his funeral in his ancestral village raises question marks on the purpose of instilling fear through military courts has been served at all.

The very purpose of military courts is to resolve an issue too quickly. However, being quick doesn't entail being just. A comparison can be made with how the United States obtained some confessions through torture. Khalid Sheikh Mohammad, for instance, confessed to his crimes, within minutes of being water-boarded. Yet, doubts linger if any anti-terror milestone was ever achieved from that technique.

Long-term strategy

Countering terrorism, on the other hand, requires a comprehensive,

holistic, long-term strategy without usurping the existing democratic and legal set up.

The anti-terrorism courts can be strengthened, first through working on infrastructure uplifting and capacity building. There is a serious need for criminal justice system reforms in the country especially procedural overhaul. Archaic procedures from 19th century colonial era simply cannot deliver in today's environment, where on the one side, we face serious existential threat due to terrorism, but also an overreaching executive that threatens the concept of a just and fair state.

Meanwhile, the top judges of the country laid down a strategy to expedite the disposal of terrorism cases. The strategy, involving hearing cases on a daily basis and constituting special benches, came in the meeting chaired by Chief Justice of Pakistan, Justice Nasir-ul-Mulk, and attended by the chief justices of the provincial high courts. This critical decision, however, is overshadowed by the decision of establishing military courts, which made the strategy redundant.

Unfortunately, despite passing of a considerable time since December 16th 2014, no steps have been taken by the government or any other organ of the state to reform the criminal justice system which is crying out for a meaningful overhaul.

