

## **Civilians Trials in Military Courts in Pakistanv. The International Fair Trial Standards on Military Justice. A Critical Analysis**

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### **Abstract**

In response to the militant assault on a school in Peshawar in 2014, killing 141 people, mostly children, the State of Pakistan has established MCs to trial civilians blamed for enumerated terrorism-related wrongdoings. Since the establishment of MCs in January 2015, many civilians have been awarded death sentences and various ranges of imprisonment. Nonetheless, nationally and internationally, there are widespread reservations about the working mechanism of Pakistan's MCs. It is alleged that they fall seriously short of the international norms of a fair trial. This research study investigated the compatibility of these MCs with the international fair trial standards. The study found that Pakistan's military justice mechanism to trial civilians is incompatible with the international norms of fairness and due process. The paper suggests that the only long-term way out to the growing menace of violence in Pakistan lies in strengthening the ordinary criminal administration of justice rather than resorting to the short-sighted and 'exceptional' measures.

**Keywords:** Right to a Fair Trial; Military Courts; Violation of Fair Trial Rights; International Fair Trial Standards on Military Justice; Pakistan

### **1. Introduction**

*"Even the worst criminal is entitled to his dignity as a man, and the crime committed by him does not denude him of such a right which is preferable to his belonging to the human race and not to his belonging to the community of criminals."*(Justice Naseem, 1994)

In January 2015, Pakistan established Military Courts (MC) to try non-military citizens' charged with enumerated militancy-related wrongdoings. The empowerment of MC to try civilians was made possible through alteration to the Constitution of 1973 and Pakistan Army Act (PAA), 1952 (ISPR, 2018). Initially,

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the creation of MCs was considered an interim "solution" to prosecute "terrorists effectively." Therefore, MCs were formed for a limited time frame of two-year. However, in January 2017, the Federal Government has extended their life for another two-year period, which expired in March 2019. Now again, proposals are in the pipeline from the current ruling party to extend their term for another two-year.

This paper is embarking upon the journey to investigate the compatibility of Pakistan's MCs with the international fair trial norms and best practices. The paper will explain how the trials of non-military nationals in MCs violate the international fair trial norms. The main argument of this paper is that Pakistan's MCs trying non-military nationals are in stark contrast to the international fair trial standards as enunciated in international and regional human rights treaties, instruments, and jurisprudence.

## **2. Historical Overview of the MCs in Pakistan**

Pakistan has a lengthy past of trials of civilians in MCs and many governments established MCs to try civilians accused of heinous or terrorism-related crimes. For instance, in 1953, the ex-Prime Minister *Khawaja* declared martial law in Lahore (Punjab province). MCs were established to trial many of the arrested religious leaders accused of inciting violence (ISRP, 2018). Again, in 1975, under the Suppression of Terrorist Activities Act, ex-PM Zulfikar Ali Bhutto formed special tribunals to try civilians for terrorism and rebellion-related wrongdoings (Special court Act 1975). Then, in 1987, the Government of ex-PM Jenejo passed a special law from the Parliament named Special Courts for Speedy Trial Act, providing for the establishment of special tribunals to try specified offenses. In 1991, through the Constitution (Twelve Amendment) Act of 1991, the ex-PM Sharif's Government created special courts to speedily trial individuals blamed for specified atrocious offenses.

On August 13 1997, ex-PM Sharif's Government brought the Anti-Terrorism Act (ATA), which provided for the formation of the Anti-Terrorism Courts (ATCs) to conduct trials of terrorism-related wrongdoings. Again, in 1999, ex-PM Sharif set up MCs in Sindh province to make possible trials of civilians in terrorism-related crimes. In 2014, ex-PM Sharif's Government passed the Pakistan Protection Act (PPA) from the Parliament, which stipulated the creation of special courts. Finally and more recently, in January 2015, MCs were established to conduct a trial of civilians suspected of terrorism-related wrongdoings done to jeopardize the State's security or wage war against the State or as provided in Schedule to the PPA.

### 3. Up-to-date Performance of the MCs

Since January 2015, Pakistan has established eleven (11) military-led special courts in different parts, including three (3) in KPK. Official statistics show that as of December 16, 2018, the Interior Ministry of the Federal Government has transferred seven hundred and seventeen (717) terrorism cases to MCs, 545 have been decided. (ISPR, 2018) Out of 545 decided cases, 310 condemned prisoners have been sentenced to death. In contrast, 234 convicts have been awarded rigorous imprisonments of various durations varying from imprisonment to life to the lowest five-year imprisonment. Out of 310 death convicts, 56 are already executed, while two suspected are acquitted, and 54 cases dropped on technical grounds. (Dawn, March 2018)

**Table 1.1: Details of Cases Decided by the MCs (as of December 16, 2018).<sup>3</sup>**

S. No.	Status of Cases	
1	Total Cases in MCs	717
2	Total Cases Decided	545
3	Death Sentences Awarded	310
4	Life Imprisonment and Other Sentences Awarded	234
5	Number of Convicts Executed	56
6	Number of Cases Pending in MCs	172

### 4. International Law on Trials of Civilians in MCs

#### 4.1 UN Human Rights Committee

Although neither the ICCPR nor any regional human rights treaty expressly bars the establishment of MCs per se, they do demand all courts to be impartial, independent, and competent, among other things, in any circumstances, including the national crisis (*Kavanagh v. Ireland, April 2001*). In this connection, it is pertinent to recall Principle 5 of the UN Basic Principles on the Independence of the Judiciary. (RSIL, 2018) It guaranteeing every criminal suspect right of hearing in ordinary tribunals exercising recognized legal procedures and courts not using

<sup>3</sup>Sources: Data jointly compiled by the International Commission of Jurist and The Daily Dawn, accessed at: <https://www.dawn.com/news/1306792>

the well-known recognized legal processes should not be established to oust the authority related to the normal judicial tribunals.

Moreover, the UN Human Rights Committee (HRC) developed jurisprudence that applies fair trial safeguards to criminal procedures before special or MCs in all situations, including the State of emergency (HRC, 2017). For instance, in its General Comment (GC) 13 concerning establishing the military or special court, HRC has stated that Article 14 applies to every criminal court, whether general or special. HRC has further stated that it has recorded the presence of MCs in several States of the world, which may pose a grave challenge to the justice system's impartiality. Interestingly, HRC has remarked that generally, the justification for creating special or MCs is to apply special processes that are not compatible with the ordinary norms of fairness. HRC has added that although ICCPR does not forbid special or MCs per se. Nonetheless, the situations under which they are established expressly shows that conducting trials of non-military persons in such courts must take place in special circumstances. That also after honestly providing all the safeguards mentioned in Article 14 of the ICCPR.

Furthermore, HRC in the *M. González Del Río* case has granted the status of 'absolute right' to the right of the trial (R2FT) in an impartial and independent court that offers no exception. Also, in GC 32, HRC has said the principle of parity before the lawfully established courts demands treating of like nature cases in similar procedures and where special courts are constituted to apply special procedures in conducting trials of specified crimes, then unbiased and sound reasons should be mentioned to justify such a division. In addition, HRC has held with the effect that where the concerned State could indicate that conducting of trials in special or MCs is justified by "objective and serious reasons" then civilians' trials in MCs "should be exceptional," and where concerning the specific crimes, the normal judicial courts are incapable of conducting a trial. (HRC 2017)

Thus, it can safely be concluded from the above views and comments of the HRC that all criminal courts, whether ordinary or special, including MCs, must guarantee to accused fair trial safeguards, including the right to an impartial and independent court. Consequently, in cases where fair trial guarantees are not ensured to an accused, HRC has found a violation of the R2FT.

#### **4.2. European Court of Human Rights**

Though, like HRC, the European Court has not declared total prohibition of civilians' trials in MCs, nevertheless, the Court's jurisprudence shows that MCs should be competent, impartial and independent as well as respect the minimum guarantees of fairness (Ghori 2018). These minimum guarantees relating to the

R2FT are contained in Article 6 of the Convention. Hence, where the prerequisites of fairness are not met, the Court has come to the finding that the European Convention has been violated. For instance, in the case of *Incal v. Turkey*, the Court has declared that National Security Courts in Turkey trying civilians concerning national security related offences, are short of the basic principle of independence and impartiality as promised under Article 6 (1) of the Convention because one colleague was a military judge belonging to the Military Legal Service, subservient to military regulation and his tenure of appointment to the court was merely for a time of 4 years, which can be extended. In preceding case, the Court has concluded that the applicant was not provided with the R2FT and he has genuine concerns to doubt the impartiality and independence of the Turkish National Security Court.

In case of *Martin v. United Kingdom*, the Court has found that an accused's reservations on the independence and impartiality of the tribunal were accurately justified because MC was composed of two non-military persons and six military personals. Similarly, in case of *Findlay v. United Kingdom*, the Court has held that the MC which has tried the applicant was neither impartial nor independent because its members were in subordination to the prosecution officer who had the authority to influence the decision of the MC. (Amnesty international 2014) Most importantly, in case of *Engin v. Turkey*, the Court has also held that individual justification and "compelling reasons" are required for each forwarded case of an accused for trial to MC; thus, laws transferring specific classifications of offence to MCs are not reasonable explanation. In a more recent case of *Mustafa v. Bulgaria*, the Court has unanimously held that Article 6(1) of the Convention was violated when Mr. Mustafa, a civilian was tried and convicted by MC for an ordinary crime. In preceding case, the Court has found that the applicant doubts over the impartiality and independence of the MC was justified. (*Incal v Turkey 2005*)

#### **4.3. Inter-American Court of Human Rights**

The Inter-American Commission has concluded that in order to assess the fairness of the proceedings in a special court, normally, it is checked whether the court is legally established. Secondly the judges are impartial and competent; the presiding judges are autonomous of the administrative branch of the government and other governmental authorities. Authority of court guarantees equality and non-discrimination. The court processes and procedures comply with the international fair trial norms, containing an appeal right (IACR, 2002) concerning trials of civilians in MC, the precedents of the Inter-American Court shows that no situations warrant such trials. For instance, in a case, the court held that where a

MCassumes cognizance over a crime that is normally put up for adjudication in ordinary courts, then an accused's R2FT is infringed. Furthermore, as mentioned above, in another case, the court has also held that special tribunals be not established to oust the authority of ordinary courts. The Inter-American Commission has also prohibited the trials of civilians in MCs. In its 2002 Report, the Commission has concluded that in order to assess the fairness of the proceedings in a special court, normally, it is checked whether the court is legally established; the judges are impartial and competent; the presiding judges are autonomous of the administrative branch of the government and other governmental authorities; authority of court guarantees equality and non-discrimination; and the court processes and procedures comply to the international fair trial norms, containing an appeal right. In its 2000 report on the situation of human rights in Peru, the Commission has adopted the view that although no international treaty contains clear provisions on the prohibition of trials of civilians in MC, however, "there is international consensus that the jurisdiction of such courts needs to be restricted." (American commission report 2000).

#### **4.4. African Commission on Human Rights**

With regard to trials of civilians in MC, the precedents of the Inter-American Court shows that no situations warrant such trials. For instance, in case of *Loayza Tamayo v. Peru*, the Court has held that "rendering judgments for which no reasons are given, do not meet the standards of independence and impartiality imposed by Article 8(1) of the American Convention, as an essential element of the concept of due process." In case of *Radilla-Pacheco v Mexico*, the Court has held that where MCassumes cognizance over a crime that is normally put up for adjudication in ordinary courts, then an accused's R2FT is infringed. In case of *Castillo Petruzzi et al v Peru*, the Court has adopted an unequal and clear position on the total prohibition of trying civilians in MCs, wherein it was expressly held that special tribunals be not established to oust the authority of ordinary courts. In preceding case, the Court has thus declared that MC's procedures were in contravention of Article 8 of the Convention and the principle of access to an impartial, independent and competent forum. The Court has later on cited jurisprudence developed in the case *Castillo Petruzzi et al v Peru* in many other cases. For example, in case of *Cantoral Benavides v. Peru*, the Court has reiterated that the jurisdiction of the MC should be reserved for military personnel only.

#### **5. Testing Pakistan's MCs on the Litmus Test of International Fair Trial Standards**

In the following lines, we will briefly analyse Pakistan's MCs on the litmus test of international fair trial standards.

### **5.1. No Independent and Impartial Trial Courts**

The first and foremost allegation is that Pakistani MCs are not impartial, independent and competent to try civilians (Ghori and Hafez 2018). To elaborate, trials in MCs are governed under the provisions of PAA. Section 85 of PAA requires a General Court Martial (GCM) to be composed of a minimum of five serving military officers having three years commission service in the military. Reports of various national newspapers show that trials of civilians in MCs also follow procedure of GCM as envisioned in PAA (Dawn 2015). It means MCs are headed over by serving army personals, who are subservient to the army chain of command and are not legally needed to be lawyers or have necessary legal training, which is not compatible with the above international fair trial standard on the competency, impartiality and independence of the military justice system. Although, Section 103 of the PAA does provide that members of the Office of the Judge Advocate General (OJAG) may supervise MCs' operation but they do not necessarily sit on the benches, which hear criminal cases.

### **5.2. No Independent and Impartial Appellate Tribunals**

The second objection is that military trial courts of the first instance and the military appellate tribunals also serve military officers. As mentioned above, international fair trial norms demand that MCs convicted ought to have the right of appeal before an impartial and independent appellate tribunal (Gul 2018). In contrast, Section 133-B of the PAA provides that any person condemned by an MC and awarded the death penalty, imprisonment for life, or incarceration over three months has got the right to file an appeal against the verdict in the Court of Appeal headed over by an army brigadier level officer. Moreover, Section 133-B of the PAA also authorizes Chief of Army Staff (CAS) of the Pakistan Army or a military person he chooses to sit in designated Court of Appeal. Proviso to Section 133-B states that judge advocates belonging to the OJAG may be set in the Court of Appeal, and if no such officer is present, then an appointee of the CAS will attend court. Thus, the military appellate forums also comprise serving army personals who are subservient to the military chain of command and do not require legal training, which violates the above express principle of the international fair trial norms.

### **5.3. No Right of Appeal to Regular Criminal Courts**

The third criticism is regarding the non-availability of the right of appeal to regular criminal courts against verdicts of the MCs. As stated above,

international fair trial standards confine the power of MCs to ruling in the court of the first instance, and further appeal against the judgment of MC should be brought before the civilians 'ordinary courts (Hashim and Asad, 2015). Under the original scheme of Section 133-B of PAA, the verdicts of the Court of Appeals are final and cannot be challenged in any court or forum whatsoever, which means the judgments of the MCs of the first instance could only be contested in the military's Court of Appeal. (SCMR 2014) In other words, civilian appellate forums, including SCP and provincial HCs, are barred from using their appellate authorities over the verdicts and convictions of the army appellate forums.

#### **5.4. No Open Case Referral Mechanism**

The fourth criticism is about cases referral procedures to the MCs (UNHR, 2017). The Provincial Apex Committees, composed of military and civilian officers, refer cases to MCs to conduct trials. These Committees forward the selected cases to the Federal Ministry of Interior, which vets cases and then finally onward submit to concern MCs to conduct the trial. In addition, amended Section 2(4) of PAA also empowers Federal Government to transfer any case related to the enumerated offense (s) pending before any court to MC for trial. In other words, the Federal Government can transfer a case involving the commission of the enumerated offense (s) and which is pending adjudication before any court like the Anti-Terrorism Court for trial by the MC. Critics say that the Pakistani government has not made open any threshold criteria to select terrorism-related cases for the MCs.

#### **5.6. Secret Trials and No Access to Judgements of MCs**

The fifth criticism is about the secrecy of trials and opacity of MCs judgments. To remind, international fair trial standards clearly require that the judgments of the courts, including special courts, should be written and reasoned, including the evidence, legal reasoning, and essential findings and further be made open except where the best interest of juveniles offenders demands otherwise (The News 2015). However, in contrast, the critics argue that Pakistan's MC trials are clouded in secrecy and do not issue comprehensive reasoned judgments. For instance, in its 2016 report on Pakistani MCs, the International Commission of Jurists has written down that military as well as governmental authorities have not made open information concerning the place and time of MCs' trials, exact accusations, and proof against the MCs' convicts. The verdicts of MCs containing the basic conclusions, legal-rational, and proof-based on which sentences were awarded. This report further says that family members of the detainees, journalists, trial monitors, and human rights associations were refused access to

the proceedings of the MCs (Hassan, 2019). The report further adds that Pakistan's MCs have not made their judgments public in 81 cases decided so far despite requests being made for gaining access to it by the relatives of death convicts.

### **5.7. Denial of the Counsel of Choice**

Sixth objection is that MCs do not practically provide an accused with a lawyer of choice as guaranteed in domestic and international legal frameworks. Section 2 (IV) (e) of the amended PAA affords every criminal suspect the legal right to hire the services of a lawyer of choice at trial. In case an accused is indigent and not able to employ counsel. (Shah, 2015). The preceding Section of law gave discretionary power to the convening authority to furnish a legal counsel to him at government expense provided the accused requested it. Theoretically speaking, although the military law does provide for the counsel of choice, it is generally alleged that the terrorist suspects are not provided practically with counsel of choice.

### **6. The Way Forward**

It is a strong need of the hour that instead of resorting to the short-sighted military way of justice. Pakistan should drastically overhaul and reform the colonial-era general criminal justice administration to successfully handle ever-increasing crimes, including the menace of militancy and terrorism. There is also a strong need to reform the 170-year-old Code of Criminal Procedure and other colonial-era criminal legislation to provide speedy and impartial justice. Interestingly, the UN HRC has also asked Pakistan to revise the domestic legal framework regarding the MCs to repeal their authority over non-military persons (Sultan, 2015). Police investigation and criminal prosecution service should be strengthened to bring the terrorists to justice in ordinary civilian's courts. Particularly, Pakistan should heavily invest in the capacity building of police investigators and prosecutors to successfully investigate and prosecute terrorism-related offenses (HRW 2017).

### **7. Conclusion**

It is quite clear from the above discussion that the criminal proceedings before Pakistan's MCs trying non-military persons lag behind the minimum international norms of R2FT. No doubt, the State of Pakistan faces serious terrorist and violent attacks. It has legal obligations to defend the citizens from militant attacks and bring the perpetrators to justice who commit violence and terrorism against the State and its people. However, it is equally important that any counter-terrorism measure must embrace the minimum international norms of R2FT in criminal justice administration. Thus, MCs should be afforded fully fair trial

safeguards to try civilians accused of terrorism-related offenses. The State authorities must ensure that processes of MCs at minimum fulfil international norms of fairness. Finally, most recently, the UN HRC has also asked Pakistan to overhaul its MCs to make their procedures intotal compliance with Articles 14 and 15 of ICCPR.

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