

# MILITARY COURTS AND PARADOX OF DOCTRINE OF NECESSITY: STATUS OF MILITARY COURTS IN PAKISTAN

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**ABSTRACT:** *Military courts have great worth throughout the history of the states. If we look towards USA, Britain, Africa, Israel, France, Germany, Russia, China, all of them accepted the importance of military courts. These states managed difficult situation with the help of military courts, although civil courts were also working there. It is said that government has three pillars (executive, legislative and judiciary). The judiciary's role is to provide justice according to the constitution and laws of the states. But sometimes, in certain situations, civil courts are considered not fit for tackling the situation, so military courts are established. The constitution of the developed and developing states accepts the worth of military courts, conditionally and unconditionally. Pakistan is also one of these states where military courts have been established to tackle the terrorist activities with adding the section 212A in General Zia-ul-Haq period and by amending the constitution with the help of 21<sup>st</sup> amendment as well as the Military Act of Pakistan 1952. In fact, judiciary is over burdened with civil and criminal cases as the process of proceedings is very slow, this led law and order situation to the worst, occurring of the suicide attacks became routine matter and culprits have no fear of punishment. The image of the state was going to blur. It was decided to establish the military courts and this decision was criticized. The research is based on the analysis of the authentic material in the form of literature in comparative judicial system, institutional theory, as well as civil military cooperation, and judicial sector reforms. Through the conceptualization of the data, the researchers have developed their stance that if our judicial structure is updated the rigorous pending cases are completed in time, the results would be far better and healthier and the departments can save themselves from mutual disinterest. If the civil courts had worked properly there would have been no need of military courts .if military courts are established it is not amazing, all over the world these courts are working to tackle the emergency situations and it is the substitute of civil courts.*

**KEY WORD:** Civil courts, Military Courts, military courts procedure, Law in order, Humanitarian laws.

## INTRODUCTION

According to oxford dictionary, 'military courts are based on commissioned officers for the discipline and punishment of the military personnel's. But sometimes these courts are used to handle the civilian cases in emergency situation. Military courts and military tribunals have vast historical background throughout the history of the states; we examine gradually the status of the states of military courts of USA, UK, Israel, South Africa, Russia, Australia, Myanmar, Egypt, China, and Pakistan. There are two types of law, one is civil and other is military, when civil law is not in the position to tackle the situation; military laws are used to settle the problems. The procedure of both the ways is defined in the constitution of the states. Military courts are also working in Pakistan. Constitution and military laws of Pakistan are amended, the matter is that why the military courts are established and why civil courts are non-relied. Are the lawyers not being allowed to deliver the fair trials? It has been tried to explain either the doctrine of necessity about the military courts is right or not? The status of military courts in other states is examined below.

### Military courts of USA:

Military courts and military tribunals have vast background throughout the history of USA. Congress defined the procedures of military laws. From very start in 1775, US congress introduced articles of war and these articles were defined by the military commanders. In the war of independence, USA and England remained dependent on military courts. The articles of war were borrowed from British precedents but gradually US congress modified them. On December 8, 1779 General George Washington advised congress to define and fix any alteration in military codes. After independence, constitution of US was ratified and

articles of war were also introduced. So, the article 1, section 8 of US constitution empowered congress to make rules and regulations for naval forces. Joseph Storey, who served US Supreme Court from 1811 to 1845, explained the powers of the congress over military in making wars, establishing armies and maintaining navy. As congress saved its hands, legislation was also completed in 1789 that military will follow the congress. It was also mentioned that congress would also legislate as necessary in future. Article 65, also adopted in 1806, it also authorized the military Generals to establish military courts, these courts could only award life imprisonment but its proceedings would also be transformed to the secrets of war, its confirmation and approval would be by the president of USA. So, in 1942, President of USA Franklin. D.Rosevelt appointed military tribunals against Nazi Saboteur. Similarly during civil war, military tribunals were appointed in large number. During the war of 1812, General Anderus Jackson imposed martial law in provinces and cases were dealt with the help of military tribunals. When Maxican war started, General Winfield used military tribunals as military was in foreign and there was lack of reliable judicial system for the victims. These tribunals were supposed to deal the military officials and Maxican citizens equally. Congress established rules and regulations for the martial laws in 1806. Similarly in the Seminal war of 1818 Jackosan again implemented military tribunals. These military tribunals consisted of 11 members, headed by Major General Admund. P.Gains (Military Affairs,1832),(Smith,1919).

General Scott also imposed martial law in 1847 at Tampico and handled the system with the help of military courts (Scott,1864). Scott got clearance from congress about punishing the offenders. Martial law order represented the

executive authority; it was handed over to tackle the grave offences. Military authorities were also extended in Mexican war. It authorized the direct movement of the military and confessed the presidential powers in war period. The president was determined to save the sovereignty of the state. Constitution appointed president as head of government who could only pardon but not intervene in the procedure of military courts.

When civil war started in USA, a U-turn came in the establishment. So, congress empowered president Abraham Lincoln to overrule the writ of habeas corpus and impose martial law in several regions. General John C. Fremont got administrative powers on 30<sup>th</sup> August 1861 and imposed martial law in Missouri (Richardson 3214-30) and people having weapons faced military courts.—Especially those people were targeted who destroyed the railway tracks, telegraphic lines (communication system), and bridges. Although civil courts were working but situation was tackled with the help of military courts. He mentioned that civil courts have become unreliable (The War of the Rebellion 282-89, 402-05, 407). During the civil war military tribunals received instructions from civil executive branch not from congress. Because President Lincoln expressed that he had taken the oath for the survival of USA, and safety of the state, so he has to take measures effectively. Legislation was established in 1863 and it was mentioned that in the time of war, offences, insurrections and rebellion practices would be punishable by the military courts. The state also emphasized that the rebellion persons against the US would be handled by it (Id. at 737, sec. 38). Insurgency broke out in 1862 in Minnesota and the Dakota community, more than 600 people were killed only in five weeks, military tribunals were established to investigate the incidents, this tribunal convicted 323 people and 303 were sentenced to be hanged till death. But President Lincoln ordered not to act without his instructions and Major General Pope wrote to president that if these convicted persons would not be hanged, further innocent, 1500 people would be killed from the groups to which they belong including women and children but Lincoln issued orders of 39 to be hanged and remaining were pardoned. At various times district and civil courts mentioned that president had powers to suspend the constitution without the approval of the congress. President Johnson appointed a military tribunal to investigate the assassination of Abraham Lincoln, although civil courts were operating. Military tribunal recommended 7 men and 1 woman, four were sentenced to death and four were imprisoned for life. President Johnson mentioned that when wars come, the law of war would be automatically implemented. After overcoming the civil war, military courts carried on their work in USA at various points till WWII.

General Macrathur implemented martial law in Philippines and local population was dealt by it. In June 1942, eight Germans reached US to destroy the bridges, factories, rail roads and other strategic targets, but they were traced, their case was put before the military court. On July 2, 1942 Roosevelt issued proclamation of 2561 in 1942 to set a military tribunal and mentioned that war article 38/1920 authorized president to get the assistance of military tribunals(Ex parte Quirin, 317 U.S. at 20).

In 1944, two more German spies came on US soil with the same process of 1942 and were traced by FBI in New York City. These were also dealt with the same procedure of 1942 with the help of military courts (Fed. Reg. 548 (1945)). When Pearl Harbor was attacked by Japan in 1941, Governor Joseph proclaimed martial law there and suspended the writ of habeas corpus. Military tribunals were held to sort out the matters (Anthony,1942). When WWII ended Japan was defeated, military courts were established here, 920 Japanese were executed, 300 were imprisoned, an international military tribunal in Tokyo was also established from 1946-48, it sentenced 25 more prominent leaders including Prime Minister Hedeki Tojo (Piccigalo,1979). Article 38/1920 empowers the president to proceed the military tribunals.

On November 13, 2001 Bush administration empowered by article 38/1920, and setup the military tribunals to trial the suspected terrorists involved in 9/11 attacks in New York and Washington D.C. On April 4,2011 Attorney General Holder took a U-turn and announced that Khalid and four other 9/11 terrorist suspects will face a military trial at Guantanamo Bay.

According to Loius Fisher, US congressional researcher service writer, Bush administration, while setting up these military tribunals, sought inspiration basically from the fact that the military courts established by President Franklin D.Roosevelt were upheld unanimously by US Supreme Court in 1942.

While dealing with the investigations of the murder of Abraham Lincoln, President Johnson asked his attorney general James Speed to prepare an opinion about the procedure of the trial who concluded his opinion in the favour of military courts. Finally, President Johnson offered the alleged conspirators to face a trial before a nine person military commission. The trial continued for seven weeks and 371 witnesses were heard. Commission send the sentences and trial record to president Johnson for review, who approved all sentences including the death sentence of a woman Marry Stuart (Linder,2007).

**Military Courts in Israel:** Since the independence of Israel more than 200000 cases were dealt by military courts. These courts were dominant and weighted the military decisions through their judicial powers (volume,89,2007). Military men in uniform are the judges and reserve the interests of the military with limited knowledge of law and having low trust over the civil courts. Military courts are protected under the constitution, Palestinian occupied territories and civilian cases of these areas are dealt by the military courts. More than 124000 people were prosecuted from 1993-2000 only. Number of these courts were decreased and increased with the security and political considerations (Benisho,2005,p.299). Article 64(2) of fourth Geneva Convention provides more strength to the military courts. Article 64 (1) and 43 affirms the military courts it is mentioned that if local legislation is not going to tackle the obstacles then military courts can be established, regarding the legislation. Although the civil courts are working there but with the help of 'Doctrine of Necessity' these civil courts can be bi-passed. International humanitarian law also supports the military laws in occupied territories, with no political affairs. In the article 14,15 and 16 of Geneva

convention on international covenant on civil and political rights (1966), military jurisdiction and military administration was acknowledged.

In 1967, with the proclamation No-2 of military courts in occupied areas of Palestine were launched, area commander was endowed with the full legislative, executive and judicial powers. By exercising these authorities, military commanders are enacted for the criminal legislations and the reference of Security Provisions Order (SPO) was used (Israel Military court report,2005). In 2004, for this a minor change was brought to this order with the statement that military judges must have legal training to hear the cases. It was further mentioned that the presiding judges must be a law qualified. Military appeal courts were also established in offer camp. Article 42, of 1942 Hague Convention extended the authority of legislation, criminal responsibility order of 1968 the article 2 of criminal responsibility order (1968) also granted the jurisdiction of military courts over the offences in the region. The military commanders were granted extraterritorial authorities provisions to defend the state's integrity. When civilians faced no security, then with the help of above mentioned powers military courts could be automatically established. Article 7 (c) of SPO provides the extraterritorial protection against threats to the security of region and public. It says that Israeli military commander can undertake any extraterritorial principles due to the security of the region. Military courts legislation enabled them to disregard the limits of interim agreements. Legal authorities of the military courts have dominated over the civil population of Palestine (Military Courts, 1967).

**Military courts in Russia:** Russian military defendants can appeal in civil courts which are against the existing system of US. In military courts, judges are military officers, with military ranks, the total management of military organization. Russian acts allow the civilian cases to be trialed in military courts (Uglavono, 2001). But various military courts decisions were challenged by the civil courts. They criticized that the military officers had no professional experience in certain criminal cases. On other hand civil judges have information about the armed forces. Military justice in Russia developed and strengthened in 18<sup>th</sup> century. Peter I introduced the new military courts, Peter III strengthened these courts with structure and procedures. Military judges of the courts consisted of 13 members; field marshal was the head of the tribunals. These military judges were not selected or elected but chairman could choose randomly the assessors (Brill,1970,pp.251-57). Till 1750, Russia had no legal degree but after it legal education was started with the help of the universities. The trend of military courts remained unsettled till 1860s but it was replaced with the model of mixed courts of professional and military judges (Darbyshire,2000,pp183-192). Tsar Alexander drastically changed the judicial system of Russia. The statutes of military courts were introduced in 1867 with three trial judicial system. Special military courts were established in 1918 after the formation of red army. Russian historians of military courts expressed that civil courts of Russia were not relied. In 1958, soviet government adopted new regulations and introduced mixed courts with the participation of mixed judges, some permanent and some military assessors. Russian constitution devoted the power to

the military personals to defend the current military structure (Peterburg,1996,p.365). Russia has three kinds of courts for both civil and military defendants with the name of lower level, intermediate and secondary level, the third is with the name of higher level of criminal chamber of Russian federation, the chain from lower to high comes. The current legislation of Russia does not exempt the military courts and it defendant them with parallel manners. Civil and military cases are regulated by the same criminal procedure (Moskva,1957,p.50). Constitution of Russia has no guarantee for civil and military defendants in case which is punishable by the death penalty. According to the military legislation of Russia federal military districts are dealt by the military courts. Military and professional judges in Russia are appointed by the executive branch and military judges from military hi-profile. These military judges keep in mind that the defendants are usually guilty.

**Military courts in Australia:** Chapter III of the constitution of Australia Act 1986 allows the military courts; clause 12 empowers the judges of the military courts with dual commission as judges in federal courts and federal magistrates respectively. Sub clause (1),(5) and (6) of clause 311 deals the appointment of judges and federal magistrates. Clause 51 gives authority to military courts of Australia .Clause 28-49 authorizes the chief justice to make arrangements of military courts (legal and constitutional affairs legislation committee, military court of Australia bill, 2012) . Military courts keep the same powers as the Hi-courts to punish and proceed. Supreme Court has the authority to hear the appeals against the decisions of the military courts. Section 80 of the constitution of Australia also elaborates the area of military courts within and outside the area of Australia (military court report,2012). Clause 64 authorizes the parliament to decide about the military courts cases for special trials. Clause 85-92 relates the pleas and trials of the military courts. Article 113 defines powers of the hi-courts about the appeal against military courts verdicts. Murder, fraud traitor activities would be dealt by military courts according to the articles 19-21 of the constitution of Australia (Military law sub-clause 51(4),2012).

**Military courts in Burma/Myanmar:** Military tribunals have been established in Myanmar for the trial of political prisoners; civil courts are also working but state law and order restoration council (SLORC), lead by military officers, decides which case will be regarded to military courts (Amnesty International January,1992),(SLORC,1988). The SLORC'S law orders 1/89 and 2/89 established the military courts in July 1989. Military tribunals were empowered to 'waive unnecessary witnesses without hearing the prosecution witnesses'. It was also mentioned in order no.2/89 'the decision and judgment passed by a military tribunals shall be final'. Military tribunal's decisions had no judicial appeals (Torture summery trials under Martial law, index 16/10/90). Family members of the convicted persons were not allowed to hear the trials and these trials were held in cameras. September 18, 1988 SLORC abolished all the civil judicial institutions but after short period previous status was rehabilitated. Special military tribunals were established for specific cases, which were decided after the consultation with the judges and law officers. In August 1991, SLORC

issued law No. 11/91 and amended the 1975 state protection law and allowed the military to detain the people without charge or trial up to five years. In 1989 hundred people, in 1991 military tribunals sentenced 47 people including 32 members of the parliament got the sentence of life imprisonment (Amnesty International Briefings, 1990).

**Military courts in Egypt:** Status of military courts in Egypt is also like other states. Abdulfateh-Al-Sissy (president) empowered the military courts to encounter the protestors and government opponents (Military courts decree, November 17, 2014). This law has been passed by the president without the approval of the parliament. 11000 civilian cases were handed over to the military courts. Al-sissy issued the orders of military courts after the attacks on military and the casualties of 31 soldiers in Siani peninsula. The new decree of law 134/ 2014 empowered the military to help the police in protecting the public and vital facilities including gas- pipelines, rail road, oil wells (refineries), bridges, road networks and communication system etc. In this law, military courts were given wide legal authorities since the modern republic of Egypt (Egyptian constitution, 1971). Article 204 of the Egypt's constitution (Military force in law enforcement, 2012) empowers the president to move the civil cases to military courts. 31 years emergency of Egypt empowered the president to refer the civilian cases to military courts. Military courts of Egypt are working under the supervision of Defense Ministry not under the civil judicial authority. Military courts always deny the civil procedures. It is as the article 198 of previous constitution of Egypt which was passed by Morse (ex-President of Egypt) administration. It also allowed the military courts to launch the trial against civil protestors, activities and politicians (Military trials in Egypt, 2014), (Sharif, 2015).

**Military courts in South Africa:** The alleged culprits have no right to appeal against the findings or punishments awarded by military courts. The supreme court of South Africa has the power to ensure a fair trial by over viewing the proceedings of military courts and by maintaining check and balance system. The facts found by military courts are passed to the adjutant general and chief of South Africa de jure force. An accused can request that the proceedings of military court to be reviewed by review council (Anderson, 1988), (Postma, 1967). The law procedure of military courts is similar to that used in civil courts (Henning, 1979), (Pretorius, 1973).

The procedure followed in summary trials is also very similar to that of the court martial with a few exceptions such as the proceedings are not held in public and accused is not given right to be legally respected. Section 73 of the first schedule and the rule 39(1)(f) states that an officer with certain prescribed law qualification can be provided to help the accused legally during a court martial under certain circumstances. The members of military courts are usually officers who completed their military law courses through military institutions (Kirsten, 1970), (Terrell, 1980). (Morgan, 1983), (Oosthuizen, 2010).

**Military courts in Pakistan:** On 13<sup>th</sup> May 1952, the Governor General of Pakistan signed army act of Pakistan. Criminal court is a court of ordinary criminal justice established in Pakistan or elsewhere by federal government.

Enemies of the state including all armed mutineries, rebels, rioters, pirates and persons in arms would be dealt by it. It is the duty of the subjects of the state to file court martial against such criminals.

An officer, who is empowered by the federal government or the commander in chief and is not below the rank of brigadier, is to manage the military courts. At least five members should be present in general court. Any person who has been sentenced by a military court can put forward an appeal to federal government. Commander in chief or any authorized person to hear the petition under the section 128 of Military Act of Pakistan 1952. So keeping in view the situation of Pakistan to deal with the terrorism and waging war or insurrection against Pakistan, and to prevent the actions of terrorist groups, armed groups, wings and militants or against persons using the name of the religion or sectarianism, the constitution of Pakistan & Military Act has been amended. Threatening the security of the country, some fast resulting measures can be taken to manage the situation.

The armed groups using the name of religion or different sects and the elements, which are either locally funded or getting foreign support, are grave and unprecedented threat to the integrity of Pakistan. This act will implement at once in the hour of need and will remain in use for a period of two years from the date of its commencement. This act will prevail to the extent of inconsistency even if there is a clash between this Act and any previously existing Act.

Military courts will help the government to bring peace and to portray it as a lead actor. In fighting militancy, armed forces must have a major role in all the strategies made by government. But the legal process should be carried out by regular judicial system. In any democratic government military has only one role i-e fighting arms. So, military courts can never take the place of judicial courts.

At ground levels armed forces have successfully made a strategy against terrorism. Now military courts can trial and convict like a legal institution. In fact there (in Pakistan) are already a lot of constitutionally established secular courts, Sharia courts and local jirgas. If a new judicial system overrules the citizen rights awarded by the constitution or the judicial independence then it gives no solution even to terrorism and militancy. There is still a point not mentioned yet, the military courts ensure the threatened and frightened population that state can still fulfill its duty to protect them and keep peace in the state.

**A Passed bill by the National Assembly:** An extraordinary situation and circumstances existed in the country, which demanded special measures for speedy trials of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts treating the security of Pakistan by any terrorist group, armed group, wing and militia or their members using name of religion or sectarianism. There exists grave and unprecedented threat to the integrity of Pakistan by raising arms and insurrection using name of religion or a sect by locally funded elements. Article 245 is included in the constitution with commencement that.

1. "This act shall come in force at once".
2. "The provision of this act shall remain in force for a period of two years from the date of its commencement".

3. "If a conflict comes between the provision of this act and any other law for the time being in force, the provision of this act shall prevail to the extent of inconsistency".

The military top brass began to prepare a blue print for setting up of military courts and execution of other tasks assigned to the army under the national action plan against terrorism. Political parties approved the 20 points National Action Plan (NAP) against terrorism.

### CONCLUSION:

If state involves in war, then it can establish military courts. As Pakistan is involved in the declared war on terror, therefore, these courts are morally, legally justified act of government. In fact, military courts in the states are established to tackle the situation. For speedy trials these courts are introduced. For controlling suicide attacks, sectarianism and violence from country this decision has been taken in Pakistan. After two years these courts will automatically dissolve. Help is gained from military courts. People and media should be positive for these courts, because these courts are working for the security and the protection of the state. Military courts brought the establishment as lead actor. History shows that military has to play a key role in any governmental strategy in fighting militancy & other policies; legal process must be in civilian hands. Military is a fighting wing in democratic governments. Military courts are not the substitute in democratic governments. But Military of Pakistan has used a strategy in fighting terrorism to establish the military courts at the ground level. Pakistan is already crowded with different kinds of courts like secular courts, Sharia courts, and socially approved by the local jirgas. Pakistan's judicial system is so poor in convicting the criminals throughout its history. Neither democratic nor military men allowed it to work freely. Investigation & prosecution procedure is too much back warded; on other hand judges are also not felling themselves secure owing to their decisions in heinous criminal cases. These problems must be fixed in Pakistan. Military courts are certainly not the answer. But it is seen that the dogma which is created by the judiciary of Pakistan can be swept with the help of military courts and in these two years emergency reforms must be taken in judiciary for the safety of Pakistan's people and for the democracy of Pakistan.

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