



International Commission of Jurists

**Pakistan: Military trials for civilians
Questions and Answers**

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Pakistan Military trials for civilians: Questions and Answers

The International Commission of Jurists (ICJ) releases the following Q and A in view of the upcoming full-court hearing by the Supreme Court of Pakistan on 16 April 2015 in proceedings challenging the legality of the 21st amendment to the Constitution and amendments to the Army Act, 1952, granting jurisdiction to military courts to try civilians charged with certain acts of terrorism.

The Q and A explains the amendments to the Constitution and the Army Act, and clarifies that the trial of civilians in military courts violates Pakistan's obligations under international standards to ensure people charged with criminal offences are tried by independent and impartial courts in proceedings that meet minimum standards of fairness.

1. When did Pakistan allow military courts to try civilians?

On 6 January 2015, less than a month after a terrorist attack on an army public school in Peshawar that killed nearly 150 people, most of them children, the Pakistani Parliament unanimously voted to amend the Constitution of Pakistan, 1973, and the Army Act, 1952, to allow military courts to try civilians for offences related to terrorism. President Mamnoon Hussain signed the amendments into law on 7 January 2015.

2. What is the content of the 21st Amendment to the Constitution and amendments to the Army Act?

The 21st Amendment to the Constitution inserts the Pakistan Army Act, 1952; the Pakistan Air force Act, 1953; the Pakistan Navy Ordinance, 1962; and the Protection of Pakistan Act, 2014 into the first schedule of the Constitution. Laws in the first schedule are exempt from the operation of Article 8 (1) and (2) of the Constitution, which stipulate that the State shall not pass any law that violates fundamental rights, and that any law that violates the fundamental rights provisions of the Constitution shall be void.

The 21st Amendment also provides that for offences related to terrorism committed by those who claim to, or are known to, belong to a terrorist organization "using the name of religion or a sect", Article 175 (3) of the Constitution, which enshrines the principle of the separation of the judiciary from the executive, will not be applicable.

The amendment to the Pakistan Army Act, 1952, adds to the list of persons who can be tried by courts martial those who commit offences related to terrorism who belong to “any terrorist group or organization using the name of religion or a sect”.

Prior to the amendment to the Army Act, only officers of the Pakistan Army; persons enrolled under the Act; other persons in “active service”; or persons seducing and attempting to seduce persons in the Pakistani military from their allegiance to the Government of Pakistan could be tried by courts martial.¹

3. Are the amendments permanent?

Both amendments have a “sunset clause” of two years, after which they will cease to be in effect.

4. For what offences can military courts now try civilians?

The amendments apply to all persons who claim to, or are known to, belong to “any terrorist group or organization using the name of religion or a sect” and carrying out acts of violence and terrorism, including:

- attacking military officers or installations;
- kidnapping for ransom;
- possessing, storing or transporting explosives, firearms, suicide jackets or other articles;
- using or designing vehicles for terrorist attacks;
- causing death or injury;
- possessing firearms designed for terrorist acts;
- acting in any way to “over-awe the state” or the general public;
- creating terror or insecurity in Pakistan
- attempting to commit any of the above listed acts within or outside of Pakistan
- providing or receiving funding for any of the above-listed acts
- waging war against the state.

In addition, the amendments bring certain offences included in Protection of Pakistan Act, 2014 within the jurisdiction of military courts, when the offences are alleged to have been committed by those claiming to, or known to, belong to “any terrorist group or organization using the name of religion or a sect”. These offences include:

¹ See section 2 and section 31, Pakistan Army Act, 1952.

- crimes against minorities;
- killing, kidnapping, extortion, attacks or assaults on government officials, members of the judiciary, foreign officials, tourists, media personnel, social workers or “other important personalities”;
- destruction of or attacks on energy facilities, gas or oil pipelines, aircrafts and airports, national defense materials and institutions, and educational institutions;
- illegally crossing national boundaries “in connection with” any of the above-mentioned offences.

It should be emphasized that the amendments extend the jurisdiction of military courts only to those who claim to or are alleged to both belong to organizations that use the name of “religion or a sect” *and* to have carried out the above listed offences. Those charged with committing acts of violence and terrorism, including those listed above, who are accused of being members of, for example, separatist or nationalist groups, do not come under the ambit of the amendments.

5. What procedures do Pakistani military courts follow?

The Government of Pakistan and the armed forces have not disclosed the procedures that are adopted by the military courts set up under the amendments. The authorities have also not publicly disclosed the names of the people being tried by military courts under these new laws or the offences with which they have been charged. They have also not disclosed information about the time and venue of trials, thus decreasing the possibility of public access to such proceedings.

Procedure for referral of a case to the military court

According to government sources, provincial apex committees, comprising of civilian and military officials, are responsible for selecting the cases of individuals charged with terrorism related offences to be referred to the military courts for trial and forwarding them to the Ministry of the Interior for final approval. The ICJ is unaware of any particular criteria being used by these committees for the selection of such cases.

The Ministry of the Interior vets the list submitted by the provincial committees, and sends a final list of cases to the military for trial.

Composition of military courts

According to newspaper reports, which quote military officers, and to information received by the ICJ from Government and military officials, the procedure for trial of alleged acts of terrorism will be similar to the procedures of courts martial in cases under the Army Act, 1952.²

Under the Army Act, a military court is composed of three to five serving officers of the armed forces.³ There is no requirement that the military officers are lawyers or have any legal training. The officers remain subjected to the military chain of command.

A law officer of the Judge Advocate General branch of the military advises the military court.

Right of appeal

Accused persons convicted by military courts and sentenced to death, imprisonment for life, imprisonment exceeding three months, or dismissal from service have the right to appeal the verdicts and sentences to a military appellate tribunal.

A military appellate tribunal is presided over by "an officer not below the rank of Brigadier". The Chief of Army Staff, or any other officer appointed by him, also sits in the appellate tribunal.⁴ Officers who comprise appellate tribunals are serving military officers who are not required to have any legal training and who continue to be subjected to the military chain of command.

The law provides that every appellate court hearing "may be attended by a [judge advocate](#) who shall be an officer belonging to the Judge Advocate General's Department, Pakistan Army, or if no such officer is available, a person appointed by the Chief of the Army Staff."⁵

The military appellate tribunal has the power to "reduce or enhance the punishment" awarded by the military courts of first instance.

² See, for example, 'The new martial powers', *Dawn News*, 8 January 2015, accessed at: <http://www.dawn.com/news/1155411/the-new-martial-powers>

³ Section 85 of the Army Act, 1952: A general Court martial shall consist of not less than five officers each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of captain. Section 87 of the Army Act: A field general Court martial shall consist of not less than three officers.

⁴ Section 133-B, Pakistan Army Act, 1952.

⁵ *Ibid.*

The verdict of a military court that is upheld by a military appellate court is final and cannot be challenged before a civilian court, even the High Court or the Supreme Court of Pakistan.

Evidence

According to the Army Act, the rules of evidence in proceedings before courts martial are the same as those observed by regular civilian criminal courts.⁶

The amendments to the Army Act allow the Federal Government to transfer proceedings pending in any other court against any person accused of committing prescribed offences under the amended law to a military court. Where cases are transferred from other courts, military courts may admit as evidence and base a verdict on previously recorded statements – which means that witnesses who have already testified before a civilian court are not required to testify again before the military court after the case has been transferred.

Secret hearings

The Army Act does not require that trials in courts martial or court martial appeals take place in public.

An Ordinance passed on 25 February 2015, further amending the Army Act, allows judges of military courts to hold *in camera* trials.

Location

According to the Army Act, an accused person may be tried and punished for offences under the Act “in any place whatever”.

The army has set up nine military courts thus far — three in Khyber Pakhtunkhwa, three in Punjab, two in Sindh and one in Balochistan.

6. How many cases have been transferred to the military courts for trial?

The Government has not released information on the number of cases that have been referred to military courts for trial under the new provisions. Newspaper reports, however, indicate the number is in the hundreds, and describe the cases as mostly related to so called “hardcore terrorism”, where suspects belonging to proscribed organizations, including the Tehreek-i-Taliban Pakistan and

⁶ Section 112, Pakistan Army Act, 1952.

Lashkar-e-Jhangvi, are accused of being involved in violent attacks and sectarian killings.⁷

7. Have the military courts commenced proceedings under the new provisions?

Yes.

On 2 April 2015, military courts convicted seven people of undisclosed offences. Of them, six were sentenced to death and one was sentenced to life in prison.⁸

On 15 April 2015, the Supreme Court Bar Association challenged the death sentences given to six convicted persons in the Supreme Court. The petition alleged that the fair trial rights of the accused were not protected, and requested the Supreme Court to stay their executions until the petitions challenging the 21st constitutional amendment and amendments to the Army Act, 1952, were decided.⁹

8. What was the justification for the 21st Constitutional amendment and the amendment to the Army Act?

According to their preambles, these laws granted military courts jurisdiction over civilians for offences related to terrorism for the purposes of "expedience" and "speedy trials".

Alleged failure of civilian courts

Following the attack on the army public school in Peshawar, government officials, military officials, members of Parliament, and media personnel severely criticized the civilian judiciary for its failure to convict terrorism suspects.

⁷ See, for example, 'KP govt. refers 423 cases for trial by military courts', *Dawn News*, 30 January 2015, accessed at: <http://www.dawn.com/news/1160451/kp-govt-refers-423-cases-for-trial-by-military-courts>, 'Sindh to refer 64 cases to military courts', *Daily Times*, 10 February 2015, accessed at: <http://www.dailytimes.com.pk/national/10-Feb-2015/sindh-to-refer-64-cases-to-military-courts> and 'Military courts: Provinces identify over 1300 hardcore terrorists', *Express Tribune*, 2 February 2015, accessed at: <http://tribune.com.pk/story/831364/military-courts-provinces-identify-over-1300-hardcore-terrorists/>

⁸ Press release, *Inter-services public relations*, 2 April 2015, accessed at: https://www.ispr.gov.pk/front/main.asp?o=t-press_release&date=2015/4/2

⁹ 'SCBA challenges trials by military courts', *Dawn News*, 15 April 2015, accessed at: <http://www.dawn.com/news/1176092/scba-challenges-trials-by-military-courts>

Proponents of the use of military courts highlighted the high percentage of acquittals, long periods of trial, overcrowded dockets and the slow progress of proceedings in civilian courts, including special courts such as the Anti-terrorism courts established to try offences related to terrorism under the Anti-terrorism Act, 1997. They claimed that civilian courts lacked the will to convict those responsible for terrorist attacks. These proponents argued that only the military was competent to punish terrorists and deter future terrorist attacks.

Empirical data, however, does not support these claims. According to Pakistani human rights groups, as well as ICJ's interviews with prosecutors working in Anti-terrorism courts, the low number of convictions in cases of individuals charged with terrorism-related offences was largely the result of flawed prosecution and investigations, and lack of adequate witness protection, rather than unwillingness of civilian judges to convict terrorism suspects.

Security of judges and witnesses

Another rationale offered for trials of terrorism-related acts before military courts is that civilian judges, as well as their families, are at greater risk of threats, intimidation and violence than military officers, including those who serve as judges on military courts.

Instead of seeking to improve security for the judiciary, the Government indicated that it was unable to provide security to civilian judges, prosecutors and witnesses in terrorism cases, and therefore had to rely on military courts, which is claimed to enjoy greater security.

9. Are trials of civilians before military courts permissible under international standards?

Laws authorizing the trial of civilians in military courts for terrorism-related offences in Pakistan are incompatible with international standards, which require that those accused of any criminal offence- no matter how heinous- are guaranteed a fair trial by an independent, impartial and competent tribunal.

These standards emanate from several sources. The first is international treaties, including the International Covenant on Civil and Political Rights, 1966 (ICCPR), to which Pakistan is a party and thus bound to comply, and the authoritative interpretations of the ICCPR by the UN Human Rights Committee, the body of independent experts established by the treaty and mandated to monitor implementation of its provisions.

Article 14 of the ICCPR states “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The UN Human Rights Committee has made clear, that the right to a fair trial before an independent and impartial court under Article 14 of the ICCPR applies to all courts, whether ordinary or specialized, civilian or military.¹⁰

The UN Human Rights Committee has also stated that “the trial of civilians in military or special courts raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.”¹¹ It has also repeatedly called on countries to prohibit trials of civilians before military courts.¹²

Another source is the *Draft Principles Governing the Administration of Justice Through Military Tribunals*,¹³ which were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2006. The Draft Principles, which focus exclusively on military courts, affirm that the jurisdiction of military courts should be restricted to military personnel in relation to military offences. The principles also emphasize the right to a fair trial, including the right to appeal to civilian courts, at all times, and also that civilians accused of a criminal offence of any nature shall be tried by civilian courts.

Similarly, Principle 29 of the Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity states that: “The jurisdiction of military tribunals must be restricted solely to specifically military offenses committed by military personnel”.¹⁴

Other relevant sources which provide guidance are regional human rights treaties and standards such as the European Convention for the Protection of Human Rights and Fundamental Freedoms; the

¹⁰ Human Rights Committee General Comment 32, “Article 14: Right to Equality before courts and tribunals and to a fair trial,” (General Comment 32) UN Doc. CCPR/C/GC/32, para 22.

¹¹ *Ibid.*

¹² For example, Human Rights Committee, Concluding Observations: [Slovakia](#), UN Doc. CCPR/C/79/Add.79 (1997) para 20; [Lebanon](#), UN Doc. CCPR/C/79/Add.78 (1997) para 14; [Chile](#), UN Doc. CCPR/C/CHL/CO/5 (2007) para 12; [Tajikistan](#), UN Doc. CCPR/CO/84/TJK (2004) para 18.

¹³ *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

¹⁴ *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

American Convention on Human Rights; the African Charter on Human and Peoples' Rights; the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the bodies of law developed by the regional human rights courts and other bodies mandated to monitor state parties' compliance with treaties, such as the European Court of Human Rights; the Inter-American Court of Human Rights; and the African Commission on Human and Peoples' Rights.

The case law of the Inter-American Court of Human Rights has clarified that under no circumstances should civilians be tried before military courts.¹⁵ The Inter-American Court of Human Rights has held that where "a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated."¹⁶

The 2003 case before the African Commission of Human Rights, *Law Office of Ghazi Suleiman v. Sudan*, concerned the trial of a civilian before a military court established by Presidential Decree and composed primarily of military officers, including three in active service. The ACHPR stated:

Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial.

In addition, the ACHPR found that "selection of active military officers to play the role of judges violates the provisions of paragraph 10 of the fundamental principles on the independence of the judiciary."

The Commission stated that "military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts."¹⁷

While the European Court of Human Rights has not yet held that trials of civilians before military courts are prohibited in all

¹⁵ *Palamara-Iribarne v Chile*, Judgment of the Inter-American Court of Human Rights, 22 November 2005, paras. 124, 139, 269(14).

¹⁶ *Castillo Petruzzi et al. v. Peru* (1999), paras. 127 and 128.

¹⁷ *Law Office of Ghazi Suleiman v. Sudan*, Comm. Nos. 222/98 and 229/99, para. 64, African Commission on Human and Peoples' Rights, 2003, available at: <http://www1.umn.edu/humanrts/africa/comcases/222-98.html>

circumstances, it has said that such trials must be exceptional. In such exceptional circumstances the courts must be independent, impartial and competent, and must respect minimum guarantees of fairness. It has required states permitting such trials to show that in each case the trial before a military court was necessary and justified and that the regular civilian courts were unable to undertake such a trial. It has also stated that laws allocating trials of certain categories of offences to military courts were not sufficient justification.¹⁸

10. Do military court proceedings in Pakistan meet international fair trial standards?

International standards require that military courts, like all other courts, must be independent, impartial and competent, and in criminal cases must respect minimum guarantees of fairness, including those set out in Article 14 of the ICCPR.

Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards.¹⁹

Competence, independence and impartiality

Military courts in Pakistan are not independent or impartial. Judges of military courts are military officers who are a part of the executive branch of the State and do not enjoy independence from the military hierarchy. They are not required to have judicial or legal training, or even a law degree,²⁰ and do not enjoy any security of tenure,²¹ which are prerequisites of judicial competence and independence.

¹⁸ See, *Fair Trial Manual* (second edition), Amnesty International, 2014, pp. 224-226.

¹⁹ For more information about the operation of military courts, see also Katharine Houreld, 'Worries grow as new courts hand Pakistan army more power', *Reuters*, 25 March 2015, accessed at: <http://www.reuters.com/article/2015/03/25/us-pakistan-military-courts-insight-idUSKBN0ML2PD20150325>

²⁰ See, for example, *UN Basic Principles on Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (UN Basic Principles on Independence of the Judiciary). Principle 10: 'Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.'

²¹ *Ibid.*, principle 12: 'Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.'

Members of the office of the Judge Advocate General (the branch of the military comprised of senior officers, lawyers and judges who provide legal services to the military), may supervise the operation of military courts, but do not sit on the bench hearing cases.²²

Critical decisions with respect to the constitution of courts martial, place of hearing, and final sentences are currently left in the hands of military officers (not judges), which further violates the fundamental requirements of independence of the judiciary.²³

Public hearings

Fairness requires that trials should be public except for in certain prescribed circumstance,²⁴ in which good cause exists for conducting parts or all of a hearing *in camera*.

The reasons for any closure of the hearing must be consistent with international standards and should be fully stated on the record and any such closure should be kept to the bare minimum to ensure fairness.

The Pakistani Army Act does not guarantee either public trials in courts martial, or public hearings in courts martial appeals. In an Ordinance passed on 25 February 2015, the government further amended the Army Act to allow judges of military courts to hold *in camera* trials and made a provision for proceedings through video link.²⁵

Appeals

²² Section 103, Pakistan Army Act, 1952.

²³ *Basic Principles on Independence of the Judiciary*, *supra* fn. 20. Principle 14 : 'The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration' and Principle 3: 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.

²⁴ These include: morals; public order, which relates primarily to order within the courtroom; national security in a democratic society; when the interests of the private lives of the parties so require (for example, to protect identity of victims of sexual violence); and to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interest of justice. See *supra* fn. 18, p. 123.

²⁵ 'Security for military court judges and prosecutors', *Dawn News*, 25 February 2015, accessed at: <http://www.dawn.com/news/1165793/security-for-military-court-judges-and-prosecutors>

The Pakistan Army Act, 1952 bars civilian courts from exercising their appellate jurisdiction over decisions of courts martial.²⁶

Civilian courts in Pakistan have held they may assume jurisdiction only where “any action or order of any authority relating to the Armed Forces of Pakistan, which is either *corum non judice*, *mala fide*, or without jurisdiction.”²⁷

According to international standards, where military tribunals exist, their authority should be limited to ruling in the first instance. Consequently, recourse procedures, particularly appeals, should be brought before civilian courts.²⁸

Furthermore, the fact that military appellate courts are composed of individuals who are not judges, and are not required to have any legal training, violates the right of a review before an independent and impartial tribunal, guaranteed under international standards.

Judgment

A duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is an essential component of a fair trial.²⁹ The judgment must also be made public, with the only exceptions being the interest of juvenile persons, or in proceedings concerning matrimonial disputes or the guardianship of children.

Military courts in Pakistan often do not make detailed reasoned judgments. In the course of considering a petition raising fair trial concerns, including access to judgments of military courts and reasons for conviction, the Supreme Court in 2012 directed the Government to make necessary amendments to the Army Act.³⁰ The Court’s directions, however, are yet to be implemented.

²⁶ Section 133, Pakistan Army Act, 1952.

²⁷ 2014 SCMR 1530: “When any action of the army authorities regarding a serving officer of the armed forces or any other person subject to the Pakistan army act, 1952, was established to be either *mala fide*, *quorum non judice* or without jurisdiction then the same could be assailed through a constitutional petition by the aggrieved person, and the bar of jurisdiction under Art.199(3) of the Constitution would have no applicability.”

²⁸ Principle 17 of the draft Principles Governing the Administration of Justice Through Military Tribunal, UN Doc. E/CN.4/2006/58.

²⁹ *Supra* fn. 10, General Comment 32.

³⁰ ‘Focus on inconsistencies in the Army Act’, *Dawn News*, 18 November 2012, accessed at: <http://www.dawn.com/news/765116/focus-on-inconsistencies-in-army-act>

It should be noted that judgments of the seven cases decided by the military courts on 2 April 2015, which are referenced above in Question 7 above, have not been made public.³¹

Death penalty

Military Courts in Pakistan have the power to impose death sentences.

Where permissible under international standards, the death penalty may only be imposed pursuant to a final judgment rendered by a competent court after a legal process which affords all possible safeguards to ensure a fair trial, including those set out in Article 14 of the ICCPR. The UN Human Rights Committee has stressed that in cases where the death penalty is imposed, scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a death sentence following a trial that does not meet the minimum requirements of fairness under Articles 9 and 14 of the ICCPR is a violation of the right to life guaranteed under Article 6 of the ICCPR.

As noted above, military courts in Pakistan are not independent and the proceedings before them are not consistent with the minimum requirements of fairness set out in Article 14 of the ICCPR. The imposition of death sentences by military courts in Pakistan, therefore, is incompatible with Pakistan's obligations to respect and protect the right to a fair trial and the right to life.

11. Have the 21st Amendment and the changes in the Army Act been challenged before the Supreme Court?

More than a dozen petitions, including petitions made by the Pakistan Bar Council, the Supreme Court Bar Association, and the Lahore High Court Bar Association, have been filed before the Supreme Court of Pakistan challenging the trial of civilians by courts martial under the 21st Constitutional Amendment and the amendments to the Army Act. The petitioners argue that the amendments violate the rights to a fair trial and the independence of the judiciary and are inconsistent with the principle of separation of powers recognized by Pakistan's Constitution.

³¹ See 'Military courts secrecy unnerves experts', *Dawn News*, 4 April 2015, accessed at: <http://www.dawn.com/news/1173841/military-courts-secrecy-unnerves-experts> and 'Dispatches: hashtag injustice', *Human Rights Watch*, 6 April 2015, accessed at: <http://www.hrw.org/news/2015/04/06/dispatches-hashtag-injustice-pakistan-s-military-courts>

On 4 April 2015, the Chief Justice of Pakistan, Nasir-ul-Mulk, constituted a full-bench, comprising of all Supreme Court justices, to consider the petitions.

The first hearing of the case before the full-bench is scheduled for 16 April 2015.

12. What has the Supreme Court of Pakistan previously said about the military trial of civilians?

The Supreme Court of Pakistan has previously ruled that laws granting military courts jurisdiction over civilians were unconstitutional.

On 30 January 1998, after a series of violent incidents, the Nawaz Sharif Government amended the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998, providing for the establishment of military courts throughout Pakistan to try persons accused of various offences including causing disturbance in violation of the law; engaging in illegal strikes; and "distributing, publishing, or pasting of a handbill" or making graffiti or wall-chalking intended to create unrest or fear or create a threat to the security of law and order or to incite the commission of an offense.

In *Sheikh Liaquat Hussain v. the Federation of Pakistan*,³² the Supreme Court held that provisions of the Ordinance that extended the jurisdiction of military courts to civilians were unconstitutional.

Justice through independent courts is a fundamental right

In *Sheikh Liaquat Hussain*, the Supreme Court held that a trial by independent and impartial courts is a fundamental right of all citizens of Pakistan. The Supreme Court reasoned that since personnel of the armed forces are under the final administrative control of the military command and eventually the federal government, they did not meet the requirements of independence and impartiality.

Parallel judicial system

The Supreme Court also held that since no provision of appeal before the Supreme Court is provided against the orders of the Military Courts and because their functioning and supervision is not subordinate to the Supreme Court, the establishment of Military Courts for trial of civilians amounts to a "parallel system for all intents and purposes which is wholly contrary to the known existing

³² PLD 1999 SC 504.

judicial system having been set up under the Constitution and the law.”³³

Doctrine of necessity

The Supreme Court has recognized the gravity of the threat posed by terrorism and other criminal acts, and stated that such acts are a negation of the principles of democracy, freedom, equality, tolerance and social justice. However, the Court made clear that any law made to restore peace and curb terrorism must be consistent with the Constitution and fundamental rights enumerated within it:

*It is imperative for the preservation of the State that the existing judicial system should be strengthened and the principle of trichotomy of power is adhered to by following, in letter and spirit, the Constitutional provisions and not by making deviation thereof on any ground whatsoever.*³⁴

The Supreme Court also held that a departure from the principle of separation of powers and the right to a fair trial could not be justified on the basis of the public emergency or the “doctrine of necessity”.³⁵

13. Do other countries in South Asia allow military courts to try civilians?

Since the amendments were signed into law in January 2015, Pakistan is the only country in South Asia to allow military courts to try civilians for non-military offences, including offences related to terrorism.

In the rest of the region, the trend is of narrowing the jurisdiction of military courts and bringing the procedures followed by military courts as close as possible to those followed by regular courts.

India

In India, the Supreme Court held as far back as 1982 that military courts raise fair trial concerns:

Ours is still an antiquated system. The wind of change blowing over the country has not permeated the close and sacrosanct precincts of the Army. If in civil courts the

³³ *Ibid.*, para 33.

³⁴ *Ibid.*

³⁵ *Ibid.*, para 53.

*universally accepted dictum is that justice must not only be done but it must seem to be done, the same holds good with all the greater vigour in case of court martial where the judge and the accused don the same dress, have the same mental discipline, have a strong hierarchical subjugation and a feeling of bias in such circumstances is irremovable.*³⁶

In April 1999, the Law Commission of India made recommendations to the Government to make amendments to the military justice system, including constituting an appellate tribunal comprising of at least one retired high court or Supreme Court judge.³⁷

Nepal

In *Bhuvan Niraula, et. al. v. Government of Nepal, et. al. (2011)* Responding to a public interest litigation petition that the military justice system as set out in the Army Act, 2063 (2006) does not adhere to constitutional principles for an independent judiciary, the rule of law, a fair trial and the right to justice as guaranteed under Article 24 of the Interim Constitution, the Supreme Court in June 2011 ordered the Government to: (1) form a task force to review the existing Army Act and to provide recommendations on reforming the military justice system, ensuring its compliance with Nepal's human rights obligations; and (2) implement the recommendations of the task force.

Bangladesh

The question of the trial of civilians in military courts came up in Bangladesh, when members of the Bangladesh Rifles, a paramilitary force, staged a mutiny in February 2009, where more than 70 people were killed.

In August 2009, President Zillur Rahman requested advice from the Supreme Court as to whether the Army Act, 1952, could be extended to cover Bangladesh Rifles personnel accused of mass killing and other crimes during the mutiny.

On 11 September, the Supreme Court gave its opinion, holding that military courts have no jurisdiction over BDR personnel, as they are members of the civilian police force.

³⁶ *Lt. Col. Prithi Pal Singh Bedi etc. vs Union of India and Others*, August 25, 1982.

³⁷ Law Commission of India, 'One hundred and sixty ninth report on amendment of army, navy and airforce acts', April 1999, accessed at: <http://lawcommissionofindia.nic.in/101-169/report169.pdf>