



RESEARCH PAPER

Analysis of Twenty-third Amendment of Constitution of Islamic Republic of Pakistan: Impacts and Prospects

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ABSTRACT

This research highlights the importance of constitutional amendments and specifically those which were exercised after 18th amendment, when the provinces were given autonomy to regulate their administrative and all other matters with full liberty. Later on also many amendments were adopted by the Constitution of Pakistan, 1973. The most important is 23rd amendment which was passed on 30th of March 2017 which caused a significant change in the history of judicial process. Under this amendment, Military Courts were established which were also established prior to this amendment and those were subject to the amendment of 21st amendment in the Constitution of Pakistan, 1973. This article highlights the pros and cons of establishment of Military Courts and its effects on judicial system of Pakistan as well as on civilians of Pakistan. It is purely qualitative study and based on primary as well as secondary sources. At the end of the article. It has been concluded with precise suggestions.

Keywords: Army Act, Civilians, Extension Of Tenure, Military Courts, Speedy Trials, Terrorism

Introduction

An amendment is a formal change or addition made to a law, contract, constitution, or any official document. It is typically made to correct, enhance, or update the original document's content or provisions. Amendments are often made through a prescribed legal or procedural process (Study.com, 2023). The Twenty-third amendment to the Constitution of Pakistan was passed in 2017 by the Parliament of Pakistan by a two-thirds majority. It was introduced to extend the time period of military courts. The working time period of military courts was two years, which ended in 2017, and after that, a bill was introduced in parliament to extend the working time period of military courts by two years. This amendment was passed by the Parliament on January 7, 2017, and it got presidential assent from President Mamnoon Hussain in March 2017. This act extended the working time period of military courts until January 6, 2019, and after that time period, the amendment had to expire and be removed from the constitution automatically. This is all because the trials of terrorists were not properly taking place in the other courts, and the terrorists were getting benefits from the loopholes in the court system and were not properly punished. This act extended the time period of those courts and made the terrorist trials efficient.

On December 16, 2014, six gunmen attacked the Army Public School in Peshawar. The target was the students and staff of Army Public Schools, Peshawar. In this attack, deaths (including those of students and staff) occurred, and 114 were injured. After this incident, the Twenty-First Amendment to the Constitution of Pakistan was proposed, which was based on the establishment of military courts in Pakistan for the speedy trial of terrorists and the proper punishments. As I have mentioned above, the terrorists get

benefits from the loopholes of the other courts, such as the lack of proofs they got released by the courts. So the Pakistani government decided to establish the Military Courts for their efficient trials. This becomes possible through the 21st Amendment, which was passed on January 7, 2015. This amendment allows the establishment of military courts for a two-year period, which has to end on January 7, 2017. In this time period, many terrorists were sentenced to death penalty, and the president has signed the death sentences of many terrorists.

Literature Review

As the Constitution of Pakistan 1973, has undergone numerous amendments over the years, reflecting the evolving political and social landscape of the country. Among these, the 23rd Amendment, passed in March 30, 2017 stands out as a significant modification to the judicial system, specifically the establishment of military courts. Prior to the 23rd Amendment, the creation of military courts had been authorized under the 21st Amendment, enacted in 2015. These courts were intended to address the ongoing issue of terrorism in Pakistan by providing a swift and expeditious trial process for terrorism-related offenses. However, the two-year timeframe of the 21st Amendment necessitated the introduction of the 23rd Amendment to extend the life span of military courts for an additional two years, until January 6, 2019. The 23rd Amendment generated considerable debate and controversy, with proponents arguing that military courts were essential for combating terrorism effectively and swiftly, while opponents raised concerns about the potential for human rights abuses and the erosion of the civilian judicial system. The amendment's provisions outlined the jurisdiction of military courts, specifying their authority to try cases involving terrorism, waging war against the state, and offenses committed by persons subject to the Pakistan Army Act. It also established safeguards, such as the requirement for prior approval from the Supreme Court for the establishment of military courts and the right of appeal to the Supreme Court against military court decisions. The 23rd Amendment served as a temporary measure to address the immediate threat of terrorism while simultaneously emphasizing the need to reinforce the civilian judicial system in the long term. It underscored the delicate balance between security and human rights, a challenge that continues to shape Pakistan's legal and political landscape (**Zubair. M. 2019**). After the Twenty-third Amendment in the Constitution of Pakistan and the amendment in the Army Act, 1952, the military courts can try civilians who are attached to any terrorist party, are against the armed forces of Pakistan, or are affiliated with anti-religious parties. Following are some offenses for which military courts can trial civilians (**Tarar.N.A 2023**):

- The persons who wage war against the country
- The persons who attack any of the law-enforcing institutions of Pakistan or attack any civil or military installations
- The person who kidnaps someone and demands money to release them
- The persons who process, store, or transfer the materials that could be used in suicidal attacks
- The person who makes terrorist vehicles or uses those vehicles
- Makes any terror attack or tries to make any terror instability within or outside Pakistan.

The person who helps the terrorists with money or collects funds for them.

Two petitions were filed in Supreme Court of Pakistan against the Twenty-third Amendment in the Constitution of Pakistan. These petitions were filed by:

1. Supreme Court Bar Association (SCBA)
2. Lahore High Court Bar Association (LHCBA)

On 15 April 2017, Rasheed A. Razvi, the president of the Supreme Court of Pakistan Bar Association, filed a petition against the 23rd Amendment following the two-year extension of military court tenure. After filing the request, Mr. Razvi stated in an interview that they will call a SCBA meeting on Saturday and may formally request an early hearing of the matter from the top court in a few days. The president of the SCBA has previously stated that, in their opinion, terrorism infringes individuals' fundamental rights and that military justice is insufficient and that military tribunals are ineffective in combating it. Under the 21st Amendment, military courts were first created with a two-year term limit; this judgment was contested in the Supreme Court. By a vote of 11 to 6, the Supreme Court authorized the creation of nine special military courts in 2015 to trial insurgents. The petition contends that the judgment of the 21st Amendment has been rendered invalid because the courts' existence has been extended through the 23rd Amendment, which was meant to be a temporary remedy. It also draws attention to the Zafar Ali Shah case from 2000, which argued that some aspects of the constitution—like judicial independence and fundamental rights—cannot be changed by parliament. The petition maintains that these fundamental constitutional provisions must be protected by the judiciary from parliamentary majorities. The founding fathers' conception of the Constitution established the separation of powers, and any attempt to change its essential structure—as demonstrated by the 23rd Amendment—should be overturned. It is also regarded as disturbing and an infringement on judicial power for civilians to be subject to special military courts. The petition recognizes that the parliament's ability to change the Constitution is limited and cannot violate the fundamental rights of the people. In this petition, the respondent is the federal government, represented by the secretaries of defense and law.

The Supreme Court of Pakistan dismissed the petition filed by the Supreme Court Bar Association (SCBA) against the 23rd Amendment. The SCBA had argued that the amendment violated the fundamental rights of citizens and the independence of the judiciary. The Supreme Court, however, upheld the amendment as constitutional and necessary for the security of the state. The court also observed that the military courts were subject to judicial review and that their jurisdiction was limited to specific offenses.

On 17-04-2027, a petition was filed by Ch. Zulfiqar Ali Bhutto, President of Lahore High Court Bar Association, The constitutional amendment and the law that permit military courts to try civilians for terrorism-related offenses was contested in the Supreme Court appeal brought by the Lahore High Court Bar Association (LHCBA). The 23rd Amendment, according to the LHCBA, infringes on citizens' basic rights. The petition claims that it also violates the ideas of judicial independence and the separation of powers. Invoking Article 184(3) of the Constitution, the petition lists the four province law departments and the federal government as respondents. In order to handle terrorism charges involving civilians, military courts were established for a two-year period in 2015 after the 21st Amendment was enacted by Parliament. The Pakistan Army (Amendment) Act, 2015 and the 21st Amendment were also contested in the Supreme Court. A majority of 11 to 6 of the 17 judges on the bench heard the case and rejected the petitions.

The petition of Lahore High Court Bar Association, however, casts doubt on the military trials' impartiality and transparency. It claims that no details are available regarding the accused, witnesses, lawyers, or the results of the trials, including where, when, and how they were conducted. The petition also asserts that Parliament's authority to

change the Constitution is limited. It states that it cannot approve any amendment that does away with fundamental rights. The LHCBA additionally references earlier Supreme Court rulings that have maintained the fundamental elements of the Constitution, including federalism, the separation of powers, the independence of the judiciary, and the parliamentary system of government. It states that the amending power of Parliament cannot change these features. Based on the ruling made in the SCBA petition, the Supreme Court of Pakistan also dismissed this petition. Nonetheless, the Supreme Court maintained the amendment's constitutionality and declared it essential to the state's security. The court further noted that the military courts' jurisdiction was restricted to particular offenses and that they were subject to judicial review.

Material and Methods

The research methodology used in this article is descriptive in nature and primary sources have been focussed as there was very short data available on the same topic. And this was the reason that in this research mostly Constitution of Pakistan has been referred as a reference.

Purpose of 23rd Amendment

The purpose of the Twenty-third Amendment in the constitution of Pakistan was to extend the period of Military Courts and to provide a legal cover to the Military Courts to try civilians accused of terrorism-related offenses for a time period of more than two years, which expired on January 6, 2017. This two-year time period was extended for the speedy trial of terrorists and to give them proper punishments.

Arguments Regarding Amendment

After the proposal of the Twenty-third Amendment, some groups were in favor of the bill, but some were against it. They give different reasons why they are in favor of or against that bill. Some of these arguments include the following:

Arguments in Favor of Amendment

- The military courts can provide the speedy trial of offenders with severe punishments, and the terrorists will not be given any chance to save themselves from the punishments.
- Military courts are more effective and efficient than civilian courts because civilian courts are overburdened as there are a lot of cases pending there, and these will be unable to provide justice to the terrorists.
- The civilian courts are under pressure from some political parties or corrupt, and the justice will be affected by the civilian courts, and we don't want to give any advantage to the terrorists, so the existence of military courts is beneficial.
- Civil courts sometimes release offenders due to the non-availability of witnesses or evidence, but military courts will use their own methods to get evidence against the offenders by their own intelligence and will punish the terrorists.
- The military courts are formed under the Pakistani Constitution and have won the majority votes for their establishment. They also have judicial review by the Supreme Court, so their working will be legal.
- The Military Courts may also become biased as they make arguments against the civil courts. These courts if have to exercise its powers, it will be more effective and

will achieve the confidence of citizens of Pakistan if add the trials of all politicians through these courts so that Pakistan may improve its image at national and international level.

Arguments Against the Amendment

- Military courts must exercise its powers for military officers/officials and should avoid such a speedy trials because there are chances of an unfair trial if the trials are done in such hasty manners and raises many questions on the credibility of the decisions of Military Courts.
- The Military Courts rely on the confessions taken from the accused persons brutally and with coercion, which is totally unlawful and against the fundamental rights of the citizens as available in the Constitution of Pakistan. The Military Courts must exercise its powers depending on Private Complaints and based on strong record so that it may achieve more importance at national as well as international level and free from any criticism.
- Trials of civilians in the military courts make the courts of general jurisdiction less powerful, and their supremacy is affected by these courts because the civilians are subject to the courts having jurisdiction for civilians trials.

Impacts and Implications of The Amendment

Twenty-third Amendment had greater impacts and implications on the rule of law, human rights, democracy and peace in Pakistan.

- The parallel judicial system may undermine the sovereignty of the civilian court system as it may be against the rule of law in Pakistan and may not provide an efficient and effective judicial system in Pakistan.
- This amendment may also affect human rights by not providing civilians with the right to a fair trial in civilian courts but in the not legally working military tribunals.
- This amendment may also affect the democracy of Pakistan, as it weakens the system of separation of powers and checks and balances among the three institutions of Pakistan and may empower the military courts over the civilian tribunals.
- The amendment has two types of effects on peace in Pakistan. First, they can maintain peace by providing severe punishments to the terrorists, and second, they can trouble people in peace by taking people to their courts, making decisions behind closed doors, and using coercion to make the victim confess.

Actions of Supreme Court

Recently, after the incident of May 9, 2023, the conditions in Pakistan were very unstable, and the victims were imprisoned and their trials were held in the military courts. Punishments were given by the military courts for doing illegal acts and standing against the state. The supporters of Pakistan Tehrik Insaf damaged badly the different institutions in Pakistan including the Pakistani army; that is why they were imprisoned, given mental torture and punished.

After considering all of these conditions, the Supreme Court of Pakistan took a suo moto action against the actions of Military Courts after several petitions filed in Supreme Court and considered different case laws to give its decision on October 23, 2023. The

Supreme Court of Pakistan held that the actions of military courts have no effect on these matters.

The Supreme Court of Pakistan further held: "It is further declared that any action or proceedings under the Army Act in respect of the aforesaid persons or any other persons so similarly placed (including but not limited to trial by Court Martial) are and would be of no legal effect" (google source).

Limitation: The study is limited, it only discusses 23rd Amendment instead of all the amendemnets made in the Constitution of Pakistan.

Conclusion

The 23rd Amendment was passed in 2017 by the Parliament of Pakistan to increase the working tenure of military courts, which ended in 2017 and was provided under the 21st Amendment, in which military courts have the authority to try civilians for terror attacks or any other terror investigation. They were allowed to take trials of civilians in military courts instead of civilian courts with the purpose of speedy trials and giving the terrorists harsh punishments, and many of them were also sentenced to death at that time. This system was introduced to overcome the terrorism in Pakistan by giving them very hard punishments to avoid others doing so. This method proved helpful, as they were using their special methods to collect evidence against the accused, and the accused was unable to benefit from the loopholes of the civilian courts. Benefits aside, this system also had some drawbacks, like weakening the system of separation of powers, the military having to work in its own domain, and the court system in Pakistan, which should be strengthened to conduct speedy trials. Some petitions were also filed against the 23rd Amendment but were dismissed by the Supreme Court of Pakistan.

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