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Formal Institutionalization of Military Rule: The 21st Amendment in Pakistan

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Abstract: *The first ‘regular’ transfer of power between two civilian governments in Pakistan manifested itself in the aftermath of the 2013 general elections. Many celebrated this shift as a positive sign of democratic consolidation. However, the appreciation of this allegedly ‘new democratic wave’ ignores the resilience of decade-old authoritarian, and anti-democratic patterns. The military still dominates all significant political decision-making processes. Furthermore, with the 21st constitutional amendment the soldiers were able to further entrench their formal role in the political-institutional setup. This seriously challenges the notions of civilian supremacy, which is unfortunate, since civilian control of the armed forces is a necessary constituent for democracy and democratic consolidation.*

Keywords: Pakistan, Army, Constitution, Amendment, Civil-Military Relations.

The complexity of the challenges in the process of state- and institution-building in a decolonized context tends to reduce the distance between military and civilian realms in numerous young Asian states, especially in Pakistan¹. Here, the inherited British colonial notion of civilian supremacy over the armed forces and the soldiers’ aloofness from the political sphere² underwent a gradual but significant changes leading to various regime-types oscillating between military dictatorship and elected political authoritarianism after independence³. In this context and over the time, Pakistan was considered as a potentially classic example of a *praetorian* state⁴ in which the Army perceives itself as *the* sole guardian of the country’s national sovereignty and physical, political and moral integrity, the chief initiator of the national agenda and the major arbiter of conflict between social and political forces⁵. In order to maintain this role, the military developed a critical outlook on its corporate interests prioritizing the achievement of its goals independent from the ‘disappointing’ civilian (political) sphere⁶. This phenomenon was exemplified in the initial years after the country’s independence through modernization including procurement of arms and equipment

or sophisticated training based on the military autonomous decision⁷. This happened not only through the consumption of a relatively extraordinary, disproportionate amount of national resources but also on the expense on civilian supremacy. This process got enhanced due to domestic political turmoil and a remarkable external threat perception in the initial years (which is actually enduring until today), a lack of (elected) civilian leadership, and an unfortunate alliance between the country's ruling bureaucracy and the armed forces⁸.

According to many observers, the development of the political system became characterised by a lack of institutionalization and chronic instability while the army grew in strength and size over time⁹. This created an imbalance of power, favouring the armed forces and, simultaneously, further weakened civilian power in the political decision-making process. Subsequently, the army established itself as the most dominant actor in the business of the state, namely in the form of direct and indirect military intervention able to gain control over all significant decision making areas¹⁰. Therefore, Pakistan must be perceived as a case of failed civilian control. This is unfortunate, since civilian control of the armed forces is a necessary constituent for democracy and democratic consolidation¹¹. Therefore, it does not come by surprise that Pakistan does not fit into the story of a global triumph of democratization.

Also, in the beginning of 2015 another unfortunate episode took place in Pakistan's truncated political history. Once again, one could hear the momentous military rhetoric of the 'doctrine of necessity'¹² in order to justify direct intervention into the country's politics to establish formal prerogatives and an institutionally ensured role for the military. Institutionalized prerogatives describe formal rights by which the armed forces are able 'to exercise effective control over its internal governance, to play a role within extra-military areas within the state apparatus, or even to structure relationships between the state and political or social society'¹³.

On January 6th, the National Assembly and the Senate unopposed approved the 21st Constitutional Amendment Bill and Pakistan Army Act 1952 (Amendment) Bill 2015¹⁴. These laws will provide constitutional cover for extending the jurisdiction to military courts for the trial of terrorism suspects.

The 21st amendment to the Constitution also provides for entering the Pakistan Army Act 1952, the Pakistan Army Act 1953, the Pakistan Navy Act 1961 and the Protection of Pakistan Act, 2014 in the first schedule of the Constitution. The first schedule of the Constitution contains laws which are exempted from the application of Article 8 (1) and (2) of the Constitution. These articles are part of Chapter 1 of the Constitution relating to the fundamental rights¹⁵. More concrete, the 21st Amendment Act provides for the creation of military speed trial courts (STCs) for offences relating to terrorism, waging war against Pakistan and prevention of acts threatening the security of the country. The Act shall remain in force for two years starting January 7, 2015 after the President signed the Act¹⁶. Unsurprisingly, the decision to enforce the legal framework was publicly portrayed as a political response to the atrocious Peshawar school massacre and the Waqar border blast (both end of last year), in which hundreds of people were murdered or severely wounded by terrorists¹⁷.

Although terrorism and Islamic fundamentalism needs to be combatted fervently –about 56,000 people died in terrorism-related incidents in Pakistan over the past decade¹⁸ - the latest constitutional amendment gives reason to worry. Several leading oppositional politicians, lawyers, human rights activists, and political analysts have expressed their opposition to the new, special military courts¹⁹. There are several reasons for this:

First, the 21st Amendment determines a significant transfer of power to armed forces' authorities. Especially the fact that civilians can be subjected to military jurisdiction is a major cause of concern. It is not quite clear if the proposed special tribunals will function under the supervision of the country's highest courts or if there will be any effective parliamentary oversight. In this regard, one should mention that it is a generally accepted international principle that military courts should have no juridical clout over civilians²⁰. In other words, the judicial system must ensure that civilians accused of a criminal offence of any nature, including terrorism, are brought to justice by civilian courts. Military courts in many countries do not have a good reputation or record of offering a fair judicial system, especially regarding human rights and fundamental principles of justice²¹.

Second, many observers are concerned about the clause that the federal government can transfer any case pending in any trial court to military courts²². Taking the real composition of Pakistan's power structures into account, one has to be aware that this paves the way for military dominance in judicial affairs and it also reduces the significance of all higher (civilian) courts²³. In addition, the new bill does not mention the right of convicted subjects to appeal decisions in civilian courts²⁴. This creates a severe distortion of the separation of powers and undermines the basic structure of the constitution by giving an extraordinary judicial mandate to an executive agent. Furthermore, it deepens the rift between the judiciary and legislature²⁵. In sum, the new legal framework will lead to a further destabilisation of the country's political institutions/ institutional framework.

Third, military justice without transparency and oversight, is seriously undermining the democratic process in Pakistan, which lacks any experience and tradition of consolidating political institutions like civilian control. Therefore, the 21st Amendment is not only indicative for the willingness of the army's top brass to direct the political process openly but

also that the country is once under the auspices of military rule. Here, one has consider the fact that the latest constitutional engineering bolsters the already existing informal dominance of the armed forces through the manifestation of the strongest formal institutional role for the military in Pakistan's political decision making process ever. The handing over of more power to an institution which has undermined and changed the Constitution several times in the past is more than just an act of negligence. The 21st Amendment can be equated to the surrender of any democratic achievements and further widens the path of deeply entrenched authoritarian tendencies.

Fourth, the history as well as contemporary politics shows that Pakistan's security circles have a quite idiosyncratic definition of terrorism, which is not necessarily in line with the common understanding of this phenomenon. Subsequently, fears exist that the trials will not only be used against terrorism but also against political opposition, critical media, or separatist groups, especially in the Balochistan province²⁶.

Taking the genesis of terrorism and Islamic fundamentalism into account, it is also naïve to think that Pakistan's public safety will improve or be guaranteed with the setup of military courts. Furthermore, the argument put forth that military courts are more capable of protecting the life and integrity of judges. Additionally, witnesses must be put in perspective with view on the high profile attacks on military installations and the undermining of Pakistan's armed forces by Islamic fundamentalist protagonists in the last years. This move is yet another example for the dysfunctional political system as well as the incompetence and unwillingness of the civilian part of the country's so called 'establishment' to deal with the tremendous challenges the country has to face. In contrast, it is obvious for many international counter-terrorists experts that Pakistan's security forces have nurtured many terrorist groups on the country's soil for a long time, particularly in the loosely-controlled tribal areas in the north-

west bordering Afghanistan. Subsequently, civilians were neither willing to agree on how to deal with the militants²⁷ nor did they have the sufficient decision-making power and competence to implement a coherent and consequent counter-terrorist strategy. Therefore, it would be a misinterpretation to proclaim that civilians were completely coerced into accepting special military courts. It is rather the often observed unwillingness of the civilian leadership and political class to tackle militancy and fundamentalism and thus to secure the safety of its people. The military is once again in charge and the civilians are out; yet another example for shifting of responsibilities at the cost of democratic institutions. There was and still is enough time and freedom for civilians to manoeuvre in order to carry out necessary substantial reforms to improve the judicial criminal system. Ultimately, it is also noteworthy that the 21st Amendment, even if it might look like it, is not just a short-sighted knee-jerk response²⁸ or ‘extraordinary measure for an extraordinary situation’ by civilians²⁹, quite the contrary. It resembles a well-planned, gradual strategy intended to build up a formal role of the military in the country’s political landscape. Some people would call it a ‘constitutional coup’ or as “a monument to the betrayal of the civilian, democratic cause”³⁰.

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² Rizvi, Hasan-Askari (2007), *Democracy in Pakistan*. Assessment Paper prepared for the Project on State of Democracy in South Asia.

³ Mitra, Subrata K./Siegfried O.Wolf and Jivanta Schöttli (2006), *A Political and Economic Dictionary of South Asia*. London: Routledge, pp 287-291.

⁴ Perlmutter, Amos (1977), *The Military in Politics in Modern Times*. New Haven: Yale University Press; Kukreja, Veena (1991), *Civil-Military Relations in South Asia. Pakistan, Bangladesh and India*. New Delhi: Sage Publications; Shah, Aqil (2003), “Pakistan’s ‘Armoured’ Democracy”, *Journal of Democracy*, Volume 14, Number 4, (October 2003), pp. 26-40; and, Wolf, Siegfried O. (2012), *Civilian Control and Democratic Transition: Pakistan’s Unequal Equation*, Research Report 2, Pakistan Security Research Unit (PRSU), Durham University; [online available: <https://www.dur.ac.uk/resources/psru/PSRUreport2withPGNnos.pdf>].

⁵ Rizvi, Hasan-Askari (2003), *Military, State and Society in Pakistan*. Sang-E-Meel Publications: Lahore; and Rizvi, Hasan-Askari (2009), *Military & Politics in Pakistan 1947-1997*, Sang-E-Meel Publications: Lahore

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- ⁹ Nawaz, Shuja (2008). *Crossed Swords. Pakistan: Its Army, and the Wars Within*. Oxford University Press: Oxford, p xxviii.
- ¹⁰ Wolf, Siegfried, (2012), *op cit*.
- ¹¹ Croissant, Aurel, David Kuehn, Paul W. Chambers and Siegfried O. Wolf (2010), 'Beyond the Fallacy Coupism: Conceptualizing Civilian Control of the Military in Emerging Democracies', In: *Democratization*, October 2010, Vol. 17, Issue 5, pp. 950-975.
- ¹² Nawaz, Shuja, *op cit*, pp 363, 561.
- ¹³ Stepan, Alfred (1988), *Rethinking Military Politics: Brazil and the Southern Cone*, Princeton University Press: Princeton, N.J, p 93; and Croissant, Aurel et al, *op cit*, p 956.
- ¹⁴ Daily Times (6.1.2015), NA passes 21st Amendment, Army Act Amendment unopposed; [online available: <http://www.dailytimes.com.pk/national/06-Jan-2015/na-passes-21st-amendment-army-act-amendment-unopposed>].
- ¹⁵ Geo.tv (5.1.2015), "JUI-F expresses reservations over 21st Amendment", [online available: <http://www.geo.tv/article-170822-JUI-F-expresses-reservations-over-21st-Amendment-->]. Article 8 (1) of the Constitution says any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void. Article 8 (2) says the state shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.
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- ²⁶ Jaffrey, Shumaila, *op cit*.
- ²⁷ *Ibid*.
- ²⁸ *Ibid*.
- ²⁹ Dawn, (6.1.2015) *op cit*.
- ³⁰ Dawn (3.1.2015), "A Sad Day"; [online available: <http://www.dawn.com/news/1154719>].