

Politics of Counter-terrorism and the 21st Constitutional Amendment in Pakistan

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Abstract

This research concerns the recent amendment (called the 21st Amendment) to Pakistan's constitution and the discourse of exceptionalism it generated in the context of a counter-terrorism project. Immediately after the horrific attack on a military run school in Peshawar—the Army Public School, an All Parties Conference (APC) was held in Peshawar that approved a 20 point National Action Plan (NAP). It seemed as if the tragic event in Peshawar was long awaited site for generating discourses of threat, urgency, crisis and exception. The meaning and interpretation of the event was thoroughly incorporated into a regime of legitimization for exceptional sovereign practices (such as torture, and detention without trial) promulgated in the 21st Amendment. This research problematizes the discourse and regime of truth constructed around the Peshawar tragedy and the 21st Amendment's justification. Methodologically, due to dearth of academic works on the subject, the research heavily relies on journalistic sources and semi-academic pieces published in various newspapers and journals.

Introduction

Immediately after the horrific attack on 16 December 2014, on a military run school in Peshawar—the Army Public School, an APC was held in Peshawar that approved a 20 point National Action Plan (NAP).¹ The 16/12 Peshawar tragedy facilitated the construction of a battle cry: 'never forget Peshawar'.² On 6 January 2015, both houses of the Parliament (the

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¹ The detailed National Action Plan can be seen here http://nacta.gov.pk/Download_s/Presentations/National_Action_Plan_NACTA_Pakistan.pdf; However, the seriousness of the current government in the re-organization of NACTA (one of the 20 points in the NAP) was questioned for no allocations made in the national budget 2015-16. See, for example, 'No Funds for Nacta in National Budget', *The Nation*, 07 June 2015. Can be accessed here: <http://nation.com.pk/islamabad/07-Jun-2015/no-funds-for-nacta-in-budget>

² <http://nation.com.pk/columns/10-Apr-2015/the-forgotten-war-on-terror>

National Assembly and the Senate) voted unanimously to pass the 21st Amendment³ to the constitution, and amendments to the Army Act, 1952. The amendment thus paved the way for the establishment of special/military courts to try people charged with terrorism related offences using religious justification and sectarian affiliation.⁴ The amendment to the constitution was criticized for violations of international standards set for dispensation of justice that insists on providing fair chances of trial and then review petition, to people charged with criminal offences.⁵

The stated amendment was rationalized as an ‘extraordinary measure for an extraordinary situation’. The ‘entire nation’ was claimed to be ‘unanimous’ on eliminating the scourge of an enemy called terrorists. The country was imagined to be in a state of war against a very perfidious enemy that is also invisible. Subduing this threat required exceptional measures. Survival and existence of a nation, we were reminded, come first. The following quotation from the text of the amendment under ‘statement of objects and reasons’ says,

An extraordinary situation and circumstances exist which demand special measures for speedy trial of offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan. There exists grave and unprecedented threat to the territorial integrity of Pakistan by miscreants, terrorists and foreign funded elements. Since there is an extraordinary situation as stated above it is expedient that an appropriate amendment is made in the Constitution.⁶

We were thus told to accept the inauguration of an extraordinary chapter in our political history as truth: the Peshawar tragedy has brought about ‘exceptional times, and exceptional times require exceptional measures’. This research concerns the recent amendment, the 21st Amendment to Pakistan’s Constitution and problematizes the counter-terrorism discourse using Agamben’s notion of the state of exception. This research problematizes the discourse and regime of truth constructed around the Peshawar tragedy and the 21st Amendment’s justification. The exceptionalism was generated in the context of a global counter-

³ Full text of the 21st Constitutional Amendment can be accessed here: http://www.na.gov.pk/uploads/documents/1420547178_142.pdf

⁴ *Ibid.*

⁵ See for example, various articles and op-eds appeared in daily newspapers, both English and Urdu.

⁶ http://www.na.gov.pk/uploads/documents/1420547178_142.pdf

terrorism project which aims to win security at the cost of civil liberty. Pakistan's recent drive under discussion is inseparable from similar legal and constitutional developments in other parts of the world.⁷

Methodology of the research, due to dearth of academic works on the subject, heavily relies on journalistic sources, and semi-academic pieces published in various newspapers and journals.

After brief introduction, the remaining part of this paper is organized as follows: Section one is a discussion on the content of 21st Amendment and the various responses it generated in Pakistani politics. A re-reading of the 21st Amendment, using exceptionalism as theoretical lens, is provided in the section that follows. The last section concludes the paper with a focus on security/liberty trade-off.

Content of the 21st Amendment

To safeguard the amendment from Article 8 (1) and (2) which stipulates that any laws violating fundamental human rights shall be void, the 21st Amendment was inserted in the first schedule of the constitution. The amendments were made to the Pakistan Army Act, 1952; the Pakistan Air force Act, 1953; the Pakistan Navy Ordinance, 1962; and the Protection of Pakistan Act, 2014. The military courts were thus empowered to try terrorism related offences using the name of religion or sect. Before the amendment, the courts martial could only try those who are in 'active service'. Likewise, the principle of the separation of judicial and executive powers (enshrined in the Article 175 (3) of the Constitution) will be inapplicable. Article 175(3) deals with separation of powers.⁸

The amendment allows for military courts, under a military officer (not properly trained in legal profession and part of the executive body of the state), to preside over terror-related cases for two years. Under section 85 of the Army Act 1952, a military court consists of three to five serving officers. Legal training for the military officers in the military court is not mandatory. However, the military court is advised by a law officer of the Judge Advocate General of Pakistan

⁷ For Canada's anti-terrorism laws in the aftermath of 9/11, for example, see: W Wesley Pue, 'War on Terror: Constitutional Governance in a State of Permanent Warfare', Laskin Lecture in Public Law, Osgoode Hall Law School, 2002. For a discussion on the US 'Patriot Act' of October 2001, see, for example, David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terror*, The New Press, 2003.

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

Army.⁹ The accused persons by the military courts have the right to approach the military appellate tribunal. The verdict of the latter is final and cannot be challenged in the apex civilian courts.¹⁰ Thus it enables to replace a civilian judge who may be more exposed to threats posed by the terrorists with a military officer who is willing to fearlessly confront the threatening repercussions. The amendment will address the issue of terrorism by 'conducting trial as on war footing basis targeting the terrorist groups or their members'. The issue (and challenge) of ineffective civil/criminal justice system was not explained: why this system is not delivering? And why an effort has not been put into reforming this system? The pertinent observation was made by an analyst: do we also envisage replacing civilian investigators, prosecutors and the police deputed to apprehend the terrorists and their supporters with military persons? It was also reported that the decision to establish special courts overshadowed a critical move by the Chief Justice of Pakistan attended by the chief justices of the high courts after which a strategy was announced to expedite the disposal of terrorism cases, including hearings on a daily basis, and constitution of special benches. For some analysts the amendment was a negative development for Pakistan's nascent democracy that blurs the lines between the judiciary and the executive under the trichotomy of powers enshrined in the constitution. In an immediate response to this, the army started strengthening its legal department by creating a new post of Director General Law affaires Directorate (DG LD), which will be held by a Maj. General. For some analysts, the development is an expression of the 'turf war' between the judiciary and the executive.

In its news report, 'The New Martial Powers', English daily *Dawn* (8 January 2015) summarizes the new powers gained by the military courts as,

- Individuals illegally crossing national boundaries can now be tried by the military courts.
- Federal government can transfer any case, pending in any trial court, to military courts.
- Those convicted by military courts will have no right of appeal before civilian courts.
- New legislation gives a judicial mandate to an executive functionary.

⁹ International Commission of Jurists' report, 'Pakistan: military trials for civilians, Questions and Answers', April 2015, p.5; also see, *Dawn*, 8 January 2015.

¹⁰ *Ibid.*, pp.5-6.

Some political parties such as the Muttahida Qaumi Movement (MQM) announced their preference for a martial law than having military courts¹¹ for two years which might victimize their workers. Mainstream religious political parties (Jamiat Ulema-e-Islam-F and the Jamaat-e-Islami) abstained from voting, having contention over relating terrorism to religion only, thus ignoring other manifestations of violence in the country, with the fear that this might invoke an operation against madrassas and religious organizations.¹² It is interesting to observe that for both, the MQM and the religious parties, the core concern was not expressed on the basis of curtailment of civil liberties. The petitioners challenging the formation of the military courts questioned the absence of 'fair trial' and the possibility of extra-judicial punishments through the military courts. Their contention was also against no provision for appeal and review of the military courts, decision in the Supreme Court.¹³ This necessarily curtails the authority of the higher courts, and leads to undermining of the entire judicial system. In a counter-argument published in an op-ed, Malik Muhammad Ashraf justifies the amendment because the 'constitution itself is the creation of the Parliament' and it can amend any part of the constitution. It implies that the constitutional amendment cannot be challenged in the court.¹⁴ Ashraf's argument can be summarized in the following excerpt from his article,

The judiciary as an institution of the state is under obligation to play its role in warding off the dangers to the existence of the state and therefore must not construe the measure as a challenge to its status. The entire nation is unanimous on eliminating the scourge of terrorism at all costs. The country is in a situation of war against a very treacherous and invisible enemy and quelling the threat posed by it certainly

¹¹ 'Altaf calls for martial law instead of military courts', *The News*, 24 December 2014, accessed at: <http://www.thenews.com.pk/article-169672-Altaf-calls-for-martial-law-instead-of-military-courts>

¹² See, for example, '21st Constitutional Amendment links religion with terrorism', *The Express Tribune*, 6 January 2015, accessed at <http://tribune.com.pk/story/817517/govt-is-trying-to-link-religion-with-terrorism-jui-f-chief/>

¹³ 'Lawyers to protest against military courts', *The Express Tribune*, 2 February 2015, accessed at: <http://tribune.com.pk/story/831380/lawyers-to-protest-against-military-courts/>

¹⁴ 'Survival and existence come first', *Pakistan Today*, 29 January 2015, accessed at: <http://www.pakistantoday.com.pk/2015/01/29/comment/sc-and-21st-amendment/>

requires extraordinary measures. Survival and existence come first.¹⁵

Re-reading 21st Amendment through the lens of exceptionalism

The popular media as well as semi-academic scholarship has been discussing the 21st Amendment using the following vocabulary:

- treacherous and invisible enemy,
- situation of war, state of war,
- extraordinary measures,
- survival and existence,
- speedy trials of offences,
- threatening the security of Pakistan,
- waging of war,
- existential threat,
- threat to territorial integrity,

Through these security articulations, the sometimes old ‘friends’ and strategic assets were thus renamed as ‘enemies’ that are threatening Pakistan’s existence and sovereignty. Ole Waever (and Barry Buzan of the Copenhagen School) argues that ‘issues are ‘securitized’ by security elites and state agents through ‘speech-acts’, whereby they attempt to convince their audience that a particular issue is a security problem and so bring about certain forms of political and social mobilization’.¹⁶ Waever’s explanation of the securitization thesis suggests that ‘there are no events that in themselves dictate particular political responses, but, rather, any event or issue can be turned into a security issue through particular strategies’.¹⁷ Thus a particular security situation turns out to be a social construction rather than an objective condition. The meaning of a security issue prevails within a security discourse, where the discourse itself is product of power-knowledge arrangement.

For Carl Schmitt, Agamben and securitization theory, the concepts of threat, danger, necessity and security are found at the center of the discourse of exceptionalism, invoking a legitimacy that is supposedly deeper and profound than that of the law and the ‘norm’.

¹⁵ *Ibid.*

¹⁶ Andrew W. Neal, *Exceptionalism and the Politics of Counterterrorism: Liberty, Security and the War on Terror*, Routledge, 2010, p.103; also see Ole Wæver, ‘Securitization and Desecuritization’. In *On Security*, edited by Ronnie D. Lipschutz (New York; Chichester: Columbia University Press, 1995), p.55.

¹⁷ Andres W. Neal, *ibid.*, p.103.

Foucault through his archeological method, critiques, disperses and problematizes this discourse of exceptionalism. Carl Schmitt defines exceptionalism as the domination of the ruling classes manifested as the sovereign decision on the exception.¹⁸ Agamben considers exceptionalism as the sovereign decision on bare life and political life.¹⁹ The securitization theory describes it as elites declaring issues to be security problems.²⁰

Even the issue of ‘facilitating terrorism’ may be highly contested one. In the past, during Afghan War in the 80s, several prominent political and military figures have been ‘facilitating’ the now militants then mujahideen. While commenting on this issue, in another context though, eminent scholar in legal history, W Wesley Pue, wrote,

Bizarrely, *knowing* facilitation can happen even though no terrorist activity was in fact carried out, where the ‘facilitator’ does not know ‘that a particular activity is facilitated’, and where no particular terrorist activity was foreseen or planned at the time it was facilitated.²¹

Pue discusses at length how the insistence on *facilitation* could lead to misleading conclusions by bringing diverse and irrelevant empirical examples (such as charities and civil society organizations) under the purview of facilitation clause.²²

Foucault refers to three different power discourses in its historical contexts: First is the sovereign power of the monarch which is characterized by extremely emblematic punishment and torture.²³ The monarchical sovereign power is gradually replaced by the emergence of discourses of contract and right, in ‘which punishment is enacted not on behalf of the King, but on behalf of society in recompense for the injuries done to it by crime and violence’.²⁴ The third mechanism of

¹⁸ For Schmitt’s concept of sovereignty, see, Carl Schmitt, tr. by George Schwab, *Political Theology: Four Chapters on the Concept of Sovereignty*, The MIT Press, 1985.

¹⁹ For a detailed discussion on the state of exception, see, Giorgio Agamben, tr. by Kevin Attell, *State of Exception*, The University of Chicago Press, 2005.

²⁰ Andrew W. Neal, *op.cit.*, p.132.

²¹ W. Wesley Pue, ‘War on Terror: Constitutional Governance in a State of Permanent Warfare’, Laskin Lecture in Public Law, Osgoode Hall Law School, 2002, p.5.

²² *Ibid.*

²³ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Ed, tr. by Allan Sheridan, Vintage Books.

²⁴ Andrew W. Neal, *op.cit.*, p.125.

power, he calls, disciplinary power, ‘a less explicit and more meticulously concrete form of power. “Disciplinary power” derives from the assemblage of multiple new technologies, knowledges, micro-mechanisms and tactics constructed around producing and regulating ever-more utile, efficient and productive forms of life at the individual and in turn social level’.²⁵

The making of 16/12 (Peshawar tragedy)

On 16 December 2014, a school under the military administration, Army Public School, was attacked by a group of militants killing at least 150 innocent students and staff including the Principal. The tragic news spread out in all corners across the globe and infuriated the general public. The horrific killings of school kids added salt to injury of the masses.

While consuming, as well as passing through, this truth-making struggle by regime of truth, we could have easily recalled another tragic event, the 11 September, when everything was transformed into ‘exceptional times’. On 16 December everything changed, and, thus, we were communicated to be confronted with exceptional new circumstances entailing exceptional and extraordinary responses, a sudden irruption. Some are bound to reflect and make sense of why our policy making machine failed or overlooked inauguration of a new chapter in our history on 12 May and other such horrific events in our recent political history? Why for example other such matching tragedies failed to initiate a state of emergency, a state of siege, a moment of truth? The Peshawar tragedy turned out to be an acclaimed existential threat to the security and continuity of the state, necessitating a call for urgency; a moment to withdraw from some of our basic fundamental freedoms so that to make ourselves and our future generations secure. It seemed as if the tragic event in Peshawar was long awaited site for generating ‘discourses of threat, urgency, emergency and exception’. The meaning and interpretation of the event was thoroughly incorporated into a regime of legitimation for exceptional sovereign practices (such as torture, and detention without trial) promulgated in the 21st Amendment.

In Pakistan, the project of counter-terrorism, in its entirety, consisting of a ‘hard component’ (which is legal, coercive, bodily punishment), and a ‘soft component’ (which consists of various de-radicalization programs including the ones in the de-radicalization camps of Sabawoon and Raastoon in Swat valley) can be understood through Foucault in the ‘exceptional’ synthesis of the modalities of archaic

²⁵ *Ibid.*

sovereignty and disciplinary power. The sovereign leaves a mark of terrifying might on the body of the condemned man; and a civilizing imprint through various practices of de-radicalization. If the 16/12 (Peshawar tragedy) are interpreted and reproduced as symbolic crime against the sovereignty of Pakistan, then the purpose of exceptionalism through 21st Amendment and the overall de-radicalization move is not simply to apprehend, investigate, punish and restore law and order but the 'terrifying restoration of sovereignty'. In a more nuanced analysis, Andrew Neal, tries to understand contemporary exceptionalism which is equally applicable to our case in Pakistan. For Andrew Neal, 'contemporary exceptionalism should be described and analyzed as a novel recombination of already-existing discourses, mechanisms and modalities of power, some in active use already, others reawakened from dormancy'.²⁶

Towards conclusion – security-liberty trade-off

Both in continuity and rupture from the domestic and global war on terror, the discourse thus created around Peshawar tragedy and the 21st Constitutional Amendment enters into the popular liberty versus security debate. The civil liberties are subject to a struggle between those would defend it from the state (the critics for example) and those who would defend it from the terrorists/Taliban. And the liberty itself has to play an ambiguous role in the discourse of exceptionalism: 'contradictorily, standing for both individual freedoms and state security practices.' The exceptionalism thus conceived and propagated generate several critical questions: how are key political ideas (such as liberty and security) being used in a discourse of exceptionalism that works to legitimate exceptional practices? How do claims about imperatives and necessities are sold as more authentic than law?

The disciplinary practices ensued after the 21st Amendment have resulted into stretching of the war on terror from the 'battlefield' into a 'battlespace'. Phil Agre conceptualizes 'battlespace' as 'a conception of military matters that includes absolutely everything'.²⁷ The

²⁶ *Ibid.*, p.124.

²⁷ Phil Agre, 'Imagining the next War: infrastructural warfare and the conditions of democracy', *Radical Urban Theory*, [WWW document]. URL <http://www.mail-archive.com/cypherpunks@minder.net/msg08308.html>, accessed on 23 May and November 2015.

battlespace thus includes every part and parcel of life, from the everyday spaces of urban life to the cyberspace.²⁸

The recent counter-terrorism discourse and the subsequent 21st Constitutional Amendment in Pakistan may not be read in isolation from a series of such legal and constitutional developments in the US and the West dealing with the constructed category of 'aliens'. David Cole discusses the Bush Administration has pursued a relentless policy of pursuit and persecution of 'terrorism' and 'terrorists.' The word terrorism itself has given the administration in the US a wide canvas on which to operate. Its policy includes not only direct military intervention and preemptive measures for rooting out terrorism, but also to capture, detain and persecute all those accused of being involved and associated with terrorist networks. President Bush designated the over 650 prisoners (captured in Afghanistan and Iraq after 2001) as 'enemy combatants' as opposed to POWs (who would be entitled to the protections of the Geneva Conventions). These 'enemy combatants' are not entitled to attorneys or even to hearings to determine if they are wrongfully held. Reportedly, concerned agencies in the US have increasingly been involved in secret detentions without charge, tortures etc. flouting basic human rights principles. To explain the parallels, Prof Cole relates today's 'War on Terror' to the Cold War and discusses several cases in which he represented defendants alleged to be communists, or were alleged to be aiding and abetting communist organizations. Then the governments modus operandi was: target, snoop, charge, and deport (even at that time, the FBI admitted that it never found evidence of criminal or terrorist activity, yet insisted on deportation proceedings).²⁹

²⁸ Stephen Graham, 'When Life itself is War: On the Urbanization of Urban and Security Doctrine', *International Journal of Urban and Regional Research*, 36:1 (2012), pp.136-55.

²⁹ David Cole, *op.cit.*