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## No Sunset for Pakistan's Secret Military Courts

A failure of justice and a black mark on Pakistan's global image.

By Maria Kari  
April 24, 2017

On April 10 Pakistan found guilty and sentenced to death Indian citizen Kulbhushan Jadhav on charges of espionage.

As a retired naval officer, Jadhav would not have been subject to military justice in India. But a temporary amendment to the Pakistani constitution (originally known as the 21st Amendment, now the 28th Amendment) allows Pakistan to try civilians who have been accused of acts of terrorism or treason in secret military proceedings.

Not much information is available on the inner mechanisms of these courts. What we do know is that they tend to typically operate without being curtailed by the usual checks and balances put in place to rein in civilian courts.

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This unchecked freedom means Pakistani military tribunals, since their full-fledged introduction in 2015, have been operating in a clandestine fashion that is undoubtedly in gross violation of the basic tenets of international human rights law.

Such hearings are typically closed not only to the public but also to the accused's legal counsel, if they even have any, and to their family members. The latter is one of the chief complaints lodged against Pakistan's military courts as family members have started publicly speaking out against the lack of information given to them over reasons for the arrest and where the accused is being held.

In fact, many families wind up reporting detained family members as missing, and only come to know of their whereabouts after the outcome of the trial is reported by the media.

What little we have come to know of Pakistan's secret military courts — information usually gleaned through some of the more high profile cases — makes one thing resoundingly clear: Pakistan has repeatedly failed to fix its civilian justice system and instead has chosen to rely on the almighty military, prolonging both the suffering of its people and its already poorly mismanaged global image.

And make no mistake. This repeated choice to wield military justice as a sword instead of a shield is not merely an unconscionable miscarriage of justice, it is a travesty of the highest order.

### **The Pakistani Army: Second Only to God**

Pakistan's civilian courts have long been considered failed corrupt institutions.

This is a country where lawyers and the judiciary are frequent targets — sometimes with devastating results — and where the army is second only to god.

But what really tilted the scales of justice into the current mishmash of civilian cum military justice was the largest terrorist attack to take place on Pakistani soil. In December 2014, the Tehrik-i-Taliban (TTP) attacked Peshawar's Army Public School leaving 141 dead of which 134 were children under the age of 18.

The attack left the country reeling. Kneecapped by horror, there was an immediate shift in antiterrorism policy stemming from the public's demand for swift retribution.

In an unprecedented move, the government and all opposition parties came together, putting aside their usual hemming and hawing along with their tendency to turn a blind eye to the local Taliban factions. The need to finally do something, and to do it fast was great. And so, within days, the government lifted its longstanding moratorium on the death penalty (since then 400 people have been executed) and the 21st Amendment was penned into existence.

But the 21st Amendment was supposed to be a temporary salve on the wounds of a bleeding nation. Specifically, it came with a sunset clause that allowed military justice to replace civilian justice *only* for a term of two years. In that time the regular courts were to get their act together.

The sun should have set on the 21st Amendment's sunset clause on January 7 of this year.

But in a depressingly unsurprising turn of events the Sharif government hustled hard — definitely harder than it hustled in improving its judiciary — and managed to convince parliament to extend the 21st Amendment for an additional two years.

And just like that, Pakistan added yet another notch to its belt of bad decisions.

## **Military Injustice**

Statistics obtained by *The Diplomat* show that since their inception in 2015, military courts across Pakistan have convicted around 274 people. One hundred and forty-four of these convicts allegedly “confessed” to their crimes. Legal experts who spoke to *The Diplomat* expressed skepticism over what one law professor referred to as “an artificial and unequivocally engineered confession rate.”

Such remarkable consistency in securing a confession is troublesome because, according to military justice expert and Yale law professor Eugene Fidell, “there is no way of telling how reliable the confession is and under what circumstances it has been obtained.”

The ridiculously high rate of confessions and their questionable voluntariness is not the only troubling aspect of Pakistan’s military courts. It is also the fact that people are being prosecuted by secret tribunals for offences committed long before the 21st Amendment was passed in 2015.

Pakistan is not oblivious to the humanitarian black hole it has let itself be sucked into.

Indeed, in the aftermath of the Jadhav death sentence (which the Pakistan army went ahead with without ever involving the civilian government) there has been increased concerns over an already rocky India-Pakistan relationship and worries that the decision might further destabilize the region.

But these concerns are not enough to compel action. In the past two years, Pakistan has consistently failed to do anything about revamping its civilian courts. And, earlier this year, when the sun finally set on the 21st Amendment, it was apparent that no progress had been made in the past two years. Even the most vehemently anti-military justice lawmakers and parliamentarians found themselves with no choice but to get on board with the Sharif government’s proposal for another two-year extension.

Senator Farhatullah Babar of the Pakistan Peoples Party (PPP), speaking to *The Diplomat*, insists that, in principle, his party remains very opposed to military courts because they “are dangerous [and] create a parallel judicial system which not only goes against Pakistan’s constitution but also against the norms of democracy and human rights.”

Yet despite its principled stance Babar concedes that “at the same time the party does not wish to appear as going against national political consensus in fighting militants, which is why [we] said that if other political parties [agreed to] military courts then [we] would also go along with them — with a caveat.”

The caveat to which he refers is a list of safeguards submitted by the PPP earlier this year in response to the Sharif government's proposed legislation to extend the 21st Amendment.

This list of safeguards, most of which have since been adopted by the government, is very basic — a sort of Code of Hammurabi written up to guarantee that the most vulnerable be protected against the highest-placed oppressor.

Sounds great, except that that the actual Code of Hammurabi dates to 1792 B.C. and for a country's lawmakers to have to *demand* that an accused be given the right to choose counsel, to be read their rights upon arrest, and to be brought before a court within 24 hours after being arrested is not a noble ask. It is offensive and it is laughable.

Or, in the words of Professor Eugene Fidell, "it is political make-belief."

Still, opposition parties continue to succumb to the pressure including the dream party of Pakistan's youth, the Pakistan Tehreek-e-Insaf (PTI) — a party that has historically stood in firm opposition to many of the Sharif government's proposed injustices.

Similar to the sentiments expressed by the PPP, PTI spokesperson Fawad Hussain maintains his party remains opposed to a parallel judiciary and secret army-run courts. But, he adds that PTI must ultimately accept the proposed extension because of the lack of alternatives available.

### **The 28th Amendment: An Unconstitutional Constitutional Amendment**

Right now Pakistan is the only South Asian country actively using military tribunals to try its citizenry. In doing so, the country is running afoul of its obligations under international human rights law, which restricts the jurisdiction of military tribunals solely to military offences committed by military personnel.

Even after taking into consideration PPP's list of safeguards, Pakistan's military courts are not likely to become bastions of justice and integrity. Granting an accused the right to choose a lawyer and informing his or her family of the charges leveled against him is not exactly Arthur pulling the sword from the stone.

It is the bare minimum required of a so-called democratic and free country.

Nevertheless, these are the very changes the President of Pakistan assented to at the end of March.

But does this mean an accused person can expect a fair and transparent trial before a military tribunal? Not likely. Yet, this is what Pakistani politicians are peddling as the truth, and what mainstream liberal English-language media outlets are passing off as an acceptable compromise in the form of numerous articles and opinion pieces.

If one charts the course of military justice in recent history it quickly becomes evident that granting unchecked power to a non-neutral army judge in a closed, secret proceeding is a recipe for disaster. It comes as no surprise that such proceedings are prone to being horribly abused.

From Egypt's love affair of military courts set up to punish members of the Muslim Brotherhood, to ongoing military injustices in Lebanon, Cameroon, and Uganda, it is consistently those countries whose commitment to democratic principles is most weak that are most susceptible to perpetrating a most regressive and abusive military legal system on its own people.

Ideals tell us something important about what we would like to be. But compromises tell us who we are.

And what Pakistan's latest compromise tells us is how callously and comfortably she is willing to distill the rights of her citizenry to a mere footnote in the annals of an increasingly humiliating history.