

Scenario 182

NATIONAL ACTION PLAN [2014]

PAK-ARMY RETALIATED FAST:

On 24th December 2014; after a marathon meeting, the country's political leadership approved a comprehensive plan of action against terrorism in a move described by Prime Minister Nawaz Sharif as a 'defining moment' in the fight against terrorism.

The 20-point National Action Plan [NAP] that envisaged establishment of special courts for speedy trial of terror suspects and a crackdown on *ji-hadi* and sectarian outfits was announced by the prime minister in a late night televised address to the nation same day following a long meeting of the heads of all parliamentary parties at the Prime Minister House. The prime minister said that:

'Over the 16th December's Peshawar school massacre, a line has been drawn. On one side are coward terrorists and on the other side stands the whole nation.

The Army Public School Peshawar atrocity has changed Pakistan. We need to eradicate the mindset of terrorism to defeat extremism and sectarianism.'

Elaborating the 20-points' NAP, PM Sharif said that execution of convicted terrorists would continue. A week before the premier had revoked a six-year moratorium on the death penalty in terrorism-related cases. Six convicted terrorists were hanged immediately after lifting of the ban.

Special trial courts were to be set up across the country for two years in order to ensure speedy trial of terror suspects. A 5,000 strong dedicated counter-terrorism force was announced for deployment across the four provinces and FATA.

PM Nawaz Sharif said that no armed militias would be allowed to function in the country and funding of terrorists and terrorist organisations would

be choked, while effective steps would be taken to ensure that proscribed organisations don't re-emerge under different names.

Jihadi organisations fighting in Indian-held Kashmir or elsewhere would be disarmed and a crackdown would be launched against them immediately. Leaders of those groups would be tried in the special courts. Their offices would be sealed and their charity works would be stopped.

Similarly, the NAP envisaged registration and regulation of all *Madaris* [religious schools]. Interestingly, during the meeting of the parliamentary parties, almost all participants agreed with JUI[F] Chief Maulana Fazlur Rehman that this issue should not be discussed as it would create uproar in the country.

"First fight with terrorists, then focus on Madrassa reforms," Maulana Fazlur Rehman said in the meeting. However, the meeting decided that *Madaris* established without an NOC or occupying illegal state lands should be banned.

It is on record that the action against terrorists in Balochistan and Karachi, and militancy in Punjab dominated the debate during the meeting. Under the NAP, it was decided that the Karachi operation would be taken to its logical conclusion, while there would be zero tolerance for militancy in Punjab. In Balochistan, the provincial government would be empowered to start political reconciliation with complete ownership by all stakeholders. The PM reiterated that:

"This agreement is a defining moment for Pakistan. We will eliminate terrorists from this country."

"We have backing of the nation. Our resolve to fight terror is a strong message for those who have been trying to destroy Pakistan."

"Time for half-baked decisions is over. We agree that we have to implement the plan immediately."

Army Chief Gen Raheel Sharif also briefed the participants about his meeting with the Afghan and ISAF commanders, who had assured him of their full support in fighting militants. The meeting was told that the Army had already launched selective operations against terrorists and killed 2,100 terrorists during **Zarb e Azb** and **Khyber I** operations.

Following was the summary of the short-term National Action Plan [NAP] against terrorism announced by PM Nawaz Sharif in that televised address to the nation:

- 1- *'Execution of convicted terrorists will continue.*
- 2- *Establishment of special trial courts for two years for speedy trial of terror suspects.*
- 3- *A commitment to ensure that no armed militias be allowed to function in country.*
- 4- *Strengthening and activation of NACTA.*
- 5- *Countering hate speech and extremist material.*
- 6- *Choking financing for terrorists and terrorist organisations.*
- 7- *Ensuring against re-emergence of proscribed organisations.*
- 8- *Establishing and deploying a dedicated counter-terrorism force.*
- 9- *Taking effective steps against religious persecution.*
- 10- *Registration and regulation of madrassas.*
- 11- *Ban on glorification of terrorism and terrorist organisations through print and electronic media.*
- 12- *Administrative and development reforms in Fata with immediate focus on return of IDPs.*
- 13- *Dismantling communication networks of terrorist organisations.*
- 14- *Tangible measures against abuse of internet and social media for terrorism and sectarianism.*
- 15- *Zero tolerance for militancy in Punjab.*
- 16- *Taking the ongoing operation in Karachi to its logical conclusion.*
- 17- *Empowering Balochistan government for political reconciliation with complete ownership by all stakeholders.*
- 18- *Dealing firmly with sectarian terrorists.*
- 19- *Formulation of a comprehensive policy to deal with the issue of Afghan refugees, beginning with registration of all unregistered illegal refugees.*
- 20- *Revamping & reforming the criminal justice system, to strengthen counter-terrorism departments including granting of powers to the provincial CIDs to intercept terrorist communications.'*

CONSTITUTIONAL MILITARY COURTS:

After the terrorists attack on the Army Public School Peshawar on 16th December 2014, the Pak-Army immediately decided to take terrorism relating matters in their own hands. As ***the normal judicial machinery had totally failed since two decades due to various reasons and factors*** [to be explained in the next paragraphs], the Pak-Army asked the PM Na-

waz Sharif to come forward with the aims, determined intentions and aspirations to make out military courts to bring speedy trials for the terrorists.

The political government of PML[N] had the reservations that some of their corrupt team members and certain key figures of other parties especially the PPP, MQM, ANP and PML[Q] could also suffer in the military courts due to their shady activities. A series of meetings amongst the PM and the Army Chief were held during the next two days to reach consensus on the blueprints of the strategy to be shaped.

The PM Nawaz Sharif held a high powered meeting on **26th December 2014** to discuss implementation of the 20-point resolution on anti-terror measures. PM Sharif spent the whole earlier day in consultations with his political and legal advisers to find out how quickly the government could act upon the recommendations which he highlighted one by one in his speech late on 24th December's night.

During that marathon meeting of parliamentary parties, the MQM was the first to express its discomfort over the prospect of military courts. The PPP and ANP, too, opposed the proposal. Senator Aitzaz Ahsan of PPP argued that such courts had no place in a working constitutional democracy and the PPP had always opposed formation of such speedy courts.

It was Senator Mushahid Hussain of PML[Q] who took the dissenting parties head on. Mr Hussain's argument was that the late Z A Bhutto had assumed the charge of Chief Martial Law Administrator in December 1971 because it was a need of the hour. Senator Mushahid contended that:

"We have un-precedented circumstances now which call for un-precedented measures. How and why the anti-terrorism courts were set up during the 90s.

.... and that the 2014's Pakistan Protection Act had failed to deliver because of the same out-dated judicial system and [1935's] Police Rules.

Therefore, we have to go for out-of-the-box solution Recalling that the US had also adopted similar measures after 9/11 episode of 2001."

Senator Rehman Malik, the former interior minister, enthusiastically spoke for the military courts, and also played a key role in convincing Asif Ali

Zardari over a telephone call about the need for drastic measures. Khurshid Shah of the PPP, the Leader of Opposition, was also in favour of the move.

Hasil Bizenjo said that setting up of the military courts was being done by a democratically elected government through a constitutional amendment, not through a military order, therefore, **"we should be rest assured, and they will operate within given rules and regulations."** Aftab Sherpao also supported the decision.

The PTI leaders initially adopted a wait and see attitude. Once they realised that majority of the participants were in favour of the idea, PTI Chairman Imran Khan came out in support of the proposal. However, Mr Khan suggested the government to take immediate measures to ban all armed groups across the country regardless of their party affiliations. Prime Minister **Nawaz Sharif willingly accepted it but never acted upon.**

"If we do not set up special trial courts supervised by military officers, chances of extrajudicial killings will increase manifold," was one of the arguments which were presented during the 10-hour long session of the heads of parliamentary parties that eventually approved formation of military courts to try terror suspects.

Referring to the **'Dawn of 26th December 2014;** it was the MQM which throughout the meeting opposed the decision. The party's main concern was that since it had suffered in the past because of such measures, it couldn't support the suggestion.

The PM Nawaz Sharif, supported by the army chief, made several attempts to dispel MQM's apprehensions. Many telephone calls were made to MQM's Chief Altaf Hussain to bring him on board. Senator Ishaq Dar assured him the government would provide whatever guarantees he sought against the misuse of military courts.

The ANP, another party which didn't like the idea of military courts, wasted no time after the PM addressed Ghulam Ahmad Bilour in a serious tone:

"If we failed this time; neither mine nor your children will forgive us. The ANP has suffered a lot at the hands of these terrorists. So let's bring them to book."

Mr Bilour, along with his party senator Afrasiab Khattak, left the room and within no time took the consent of party Chief Asfandyar Wali Khan, who was not present in the meeting, perhaps from Dubai he was speaking.

At the end of that day of 26th December 2014; finally an assurance by Army Chief Gen Raheel Sharif prevailed that only "**jet black terrorists**" [hardened criminals] who had committed violent crimes would be tried by the proposed special trial courts; thus reluctant parties like the MQM, ANP and PPP agreed to support the move.

Gen Raheel Sharif explained that the military had its own legal system with certain checks and balances which guard against misuse of authority by the officers. Moreover, **'the proposed military courts will only take the cases approved by the federal government'**.

*[Later it proved that this clause of '**Federal Government's Approval**' played havoc in the implementation of NAP. Till ending 2016, the PML[N] government was sitting over 113 such files in which about 300 terrorists were sentenced to death by those special military courts – not permitted to go ahead.*

*PM Nawaz Sharif could not stand by his own words. Invariably, all the punished terrorists sent their **MERCY APPEALS** to the president of Pakistan. President was not able to decline or accept those mercy appeals without the approval from PM Secretariat.*

The PM and its rogue team dishonestly devised a way to fizzle out their core responsibility by simply not allowing the President to decline those mercy petitions.

*The 300 terrorists / death convicts were simply waiting for another jail-break – '**The Living History of Pakistan**' Vol-II Scenario 129 titled as '**Jail-Breaks in Pakistan [2012-13]** is referred.]*

The political and military leadership of the country, after an exhaustive meeting, had agreed over the formation of military courts to expedite terrorism related cases. The meeting unanimously resolved that the 20 points enunciated in the APC resolution of 24th December would be acted upon expeditiously.

The Multi-Party Conference, in fact the APC, had unanimously proposed the **National Action Plan** [NAP] and a draft of the amendment bill in this regard was finalised to be tabled in the National Assembly on **3rd January 2015** – at last the crook politicians joined hands to tackle terrorism.

The Army Chief Gen Raheel Sharif, during the MPC had told that **special courts were not desired by the Pakistan Army** but they were needed

due to extraordinary times. Chairing the conference at the PM House, PM had to hold that there had been adequate debate on the NAP for 15 days. **"There is no room for further debate in the Parliament".**

On 3rd January 2015, the PML[N] government's Minister for Information and Broadcasting Senator Pervaiz Rashid introduced '**The Constitution (21st Amendment) Bill 2015**' and '**The Pakistan Army Act, 1952 (Amendment) Bill 2015**' in presence of PM Nawaz Sharif and lawmakers from treasury and opposition benches. That day's proceeding lasted for only 10 minutes and was adjourned till next working day [Monday the 5th January 2015] soon after the introduction of two highly important bills.

The 21st Amendment to the Constitution was aimed to provide constitutional cover to trial of offences relating to terrorism by military courts while amendment to the Pakistan Army Act 1952 would extend the jurisdiction of military courts to try terrorists including civilians. The said amendment had to remain in force for two years from the date of its commencement which would cease to be part of the Constitution and would stand repealed on the expiration of the period.

The said amendment to the Constitution provided that the provisions of Article 175 would have no application to the trial of persons under any of the Pakistan Army Act 1952, the Pakistan Army Act 1953, the Pakistan Navy Act 1961 and the Protection of Pakistan Act, 2014. These special laws relating to forces were entered in the first schedule of the Constitution.

[The first schedule of Pakistan's Constitution contains laws which are exempted from operation of Article 8 (1) of the Constitution:

"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] and (2) [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'

These articles are part of Chapter 1 of the Constitution relating to the fundamental rights.]

As per amendment to the **Pakistan Army Act 1952**, a new sub-section (4) was added according to which the federal government would have powers to transfer any proceedings in respect of any person accused of falling under any offence in jurisdiction of the Pakistan Army Act pending with any court to the military court under this Act.

The new sub-section (5) in the **Pakistan Army Act 1952** said that any proceedings transferred under sub-section (4) would be deemed to have been instituted under this Act. The sub-section (6) said where a case would be transferred under sub-section (4), it would not be necessary for the military court to record evidence which had already been recorded.

The **Pakistan Army (Amendment) Act 2015** came into force at once, was to remain there in force for two years from the date of its commencement and would cease to form part of the Act and would stand repealed on the expiration of the said period ***unless extended by resolution passed by each house of Parliament.***

The objective statement said that '*apprehensions [continued to exist] of grave and unprecedented threat to the integrity of Pakistan by the raising of arms and insurgency using the name of religion and a sect by groups of foreign and locally funded elements including warriors using the name of the religion or a sect who are to be severely dealt with under the law.*'

[Astonishingly, when the bills were tabled, the PTI leader Imran Khan and his legislators stayed away from the Parliament. Imran Khan had left the country for London that morning much before the commencement of the National Assembly session.]

The bills were passed unanimously without debate from either side in the Parliament. The constitutional amendment bill required two-thirds majority of the total participants in both the 342-seat National Assembly and the 104-seat Senate; the Army Act required a simple majority. On the first day, there were only 218 members turned up in the NA, but next day the government could count 228 members while 69 were required in the Senate.

The two bills went unopposed after 247 Members of the National Assembly along with the Senate voted in favour of the laws aimed to set up constitutionally protected military courts to try civilian terrorism suspects.

Members of the National Assembly belonging to the ***PTI of Imran Khan, Jamaat e Islami (JI)*** and ***Jamiat Ulema e Islam [F] (JUI-F)*** abstained from voting. The Prime Minister Nawaz Sharif said:

"This highly important bill was created with the help of everyone's common agreement.

The parties that were in disagreement of this law [the PTI, JI & JUI-F], we understood their point of view and tried our best to address their reservations and their point of view was also accommodated. Therefore if they could not vote for it at the National Assembly I would urge them to vote for it in the Senate.

Through this bill, we can overcome the last 60 years of unrest which should have ended years ago."

Leader of Opposition in National Assembly, Syed Khurshid Shah of the PPP, delivered the opening speech of the session during which he said that:

'We have not been in favour of military courts in the past but the Pakistani public's safety is our priority and it is the government's responsibility to keep the masses safe in this country.

The Parliament is going to vote to save Pakistan. The bitter pill of this new law is being swallowed for the security of Pakistan.

Murdering one person is like killing all humanity. It doesn't matter if the person is from grammar school, Aitcheson or a government school – there will be no difference between any terrorist.'

Around 150 parliamentarians from various political parties were attending the breakfast meeting called by the prime minister on that morning [Tuesday; **6th January 2015**]; JUI-F Chief Maulana Fazlur Rehman and Aftab Ahmad Khan Sherpao did not attend that breakfast and the subsequent meeting held in the Speaker's Lounge. The PM took the guest parliamentarians into confidence on bills empowering military courts and assured them that the law would not be misused.

The Pakistan Army (Amendment) added two key new sub-clauses in the existing act describing people or groups that could be punished under the new law. The sub-clauses (iii) and (iv), to be inserted in clause (d) of subsection (1) of section 2, after sub-clause (ii) were:

(iii) Any person who is or claims or is known to belong to any terrorist group or organisation using the name of religion or a sect and raises arms or wage war against Pakistan or attacks the armed forces of Pakistan and law enforcement agencies, or attacks any civil or military installation in Pakistan or kidnaps any person for ransom or causes death of any person or injury, or is in possession, storage, fabrication or transport of explosives, firearms, instru-

ments, articles, suicide jackets or vehicles designed to be used for terrorist acts, or receives or provides funding from any foreign or local sources for such illegal activities and acts or does any act to overawe the state or any section of the public or a sect or a religious minority or to create terror or insecurity in Pakistan or attempts to commit any of the said acts, within or outside Pakistan shall be punished under this act;

(iv): Any person who is or claims or is known to belong to any terrorist group or organisation using the name of religion or a sect, commits an offence mentioned at serial Nos. (i), (ii), (iii), (v), (vi), (vii), (viii)), (ix), (x), (xi) (xii), (xiii), (xv), (xvi), (xvii) and (xx) in the schedule to the Protection of Pakistan Act 2014 (X of 2014).

However, according to an official press release, the law minister had sent a letter to the National Assembly Secretary giving notice of an amendment to his draft bill to insert in the above-mentioned sub-clause (iv) to include any person who ***"raises arms or wages war against Pakistan"*** among those to be punished.

The bill explained that the expression "**sect**" would mean a sect of religion and ***"does not include any political party registered under any law for the time being in force"***.

Text of 21st Amendment: Whereas extraordinary situation and circumstances existed which demanded special measure for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and for prevention of acts threatening the security of Pakistan by the terror-in groups formed in the name of religion or a sect and also by the members of any private armies, armed groups, wings and militia;

And whereas there existed grave and unprecedented threat to the integrity of Pakistan by the raising of arms and insurgency in name of religion and sects, and foreign and locally funded anti-state elements including warriors in the name of the religion or sect;

And whereas it was expedient that the said terrorists groups including any such terrorists fighting in the name of religion or sect captured or to be captured in combat with the Armed Forces or otherwise should be tried by the courts established under the Acts mentioned hereinafter in section 2;

And whereas the people of Pakistan expressed their firm resolve through their chosen representatives in the all parties conference held in aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar;

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war on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan it was expedient to provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan;

It is now enacted as under:

Short title and commencement: — (1) This Act may be called the Constitution (Twenty First Amendment) Act, 2014.

(2) It shall come into force at once.

(3) It shall extend to the whole of Pakistan.

(4) The provisions of this Act shall remain in force for a period of two (2) years from the date of its enactment and shall cease to form part of the Constitution and shall stand repealed on the expiration of the said period.

Amendment of Article 175 of the Constitution: After Article 175(3) the following proviso shall be added namely:

"Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No.6, 7 & 8 of section 3 of this Act who claims or is known to belong to any terrorist group or organisation formed in the name of religion or sect.

Amendment in the First Schedule of the Constitution: In the First Schedule, In Part I (III), after entry 5, the following new entries shall be made:

The Pakistan Army Act 1952

The Pakistan Air Force Act 1953

The Pakistan Navy Ordinance 1961

The Protection of Pakistan Act, 2014

Overriding effect:- The provisions of this Act shall have effect, notwithstanding, anything contained In the Constitution, any law for the time being in force or any Judgment of a court including the Supreme Court.

STATUS QUO FORCES OPPOSED IT:

Though the 21st Constitutional Amendment was passed unanimously in a meeting of Pakistan's parliamentary leadership but there were forces of status quo, mostly comprising of or sponsored by some retired judges or some lawyer's chambers, who never wanted to bring the country's 160 years old Pakistan Penal Code [PPC], Evidence Act & Criminal Procedure Code [CrPC] up to the standards of cotemporary laws of the other countries – because the sale at their law-shops could go down.

These status quo factions always opposed any other form of courts, whether military tribunals in Karachi or *Sharia Jirgas* in Swat, because the judges used the summary procedures and admitted all convincing evidences to reach the final conclusion as per their consciousness.

In the name of democracy and Human Rights these '***so called democrats & flag bearers of humanity***' had always chosen to stand by the killers and terrorists to provide them 'justice' [*Like with the six killers in Peshawar Massacre of December 2014*] - but NEVER thought of giving justice to 153 families whose children and beloved family members were slaughtered and cut into pieces like sheep & goats.

Those 'Democrats & flag bearers of Human Rights' agitated the media saying that Pakistan's political leadership proved unable to defend the constitutional and democratic roots of the system.

They forgot that Generals were on right path when they planned providing justice to about 47000 families whose darlings had been killed in terrorist attacks since 2001 – where their puppet courts and coward judges let all the terrorists off, invariably in all cases, putting their guns on the shoulders of '*legal & procedural lacunas*' of which Pakistani Human Rights Expert Lawyers were the masters.

They never thought of sitting together and think – ***that how the killers and terrorists should be punished AND what changes in the laws should be suggested.***

Instead they always convened huge media conferences for –

- *that the culprits were picked by the police in WRONG WAY;*
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- *that they have not followed CORRECT procedures;*
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- *that they have not been interrogated in CORRECT way;*
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- *that they are not being treated as per requirements of Human Rights Manuals;*
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- *that they are not being given access to their lawyers;*
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- *that their confessions before police are not admissible in courts;*
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- *that police should bring EYE WITNESSES to that killing event;*
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- *that EYE WITNESS should recognise the killer in the court.*

Had the Parliamentarians, senior judges, eminent jurists and Human Rights Leaders suggested cogent answers to the above [and tens of more alike] questions to improve the judicial requirements to extend fruit of justice to the affected families of killed ones – the questions of MILITARY COURTS could automatically be subsided.

Ultimately, the above mentioned legal community itself suffered; tens of lawyers were burnt alive and target killed in Karachi during the last decade and 70 were torn into pieces in Quetta blast **on 8th August 2016**. Was their any conviction in any case – **NO**; because there was no eye-witness.

When 21st Amendment passed, the Human Rights NGOs trumpeted that:

'The politicians have agreed to distort the principle of separation of powers, smash the edifice of rights upon which the Constitution is built and essentially give up on fixing frail state institutions.

We need a coherent strategy to fight militancy and political and military leaders to work together. But military courts are not the answer.'

The Human Rights NGOs and the big Law Chambers always used to cry over such situations in the past, too. They only remained confined to warn the media and the sitting governments to '*improve the situation*' or to refrain from doing this or that – using cosmetic phrases. However, these NGOs or the successive Bar Associations of the superior courts never passed a resolution:

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- *to suggest the successive governments that the Evidence Act, PPC, CrPC and the Police Act of 1861 be re-written keeping in view the changing social needs and patterns of crime;*
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- *to apprise the superior courts that what court procedures are being practiced in other developed [Islamic, Democratic or Socialist] countries; what kinds of evidences are admissible in their courts;*
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- *to inform the governments and the superior courts to adopt any model court system from any developed nation to IMPART QUICK JUSTICE to the people;*
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- *to help the parliament to re-write the Police Act of 1861 & Police Rules of 1934; how can one expect speedy justice in this atomic age but relying on 85-160 years old testaments.*

Unless the above mentioned intellects rise up with new enlightened laws, rules and procedures, the necessity of military courts would prevail.

On 5th January 2015; when the said military courts were being suggested, the ISPR quoted Army Chief Gen Raheel Sharif as having told the Multi-Party Conference in Islamabad that:

"The military courts are not the desire of the army but need of extraordinary times".

During an earlier day's corps commanders' meeting, the military leadership had resolved for "*bold & meaningful decisions needed to ensure stern action against terrorists and their sympathisers*" and warned that the "***much wider political consensus should not be lost to smaller issues***".

It was a sad time for democracy gurus, senior judges and senior Bar Associations when an army chief was so openly directing the country's political process. Like living nations they should have pondered that:

'.....how they could achieve those goals; and what improvements in their legal and procedural hierarchy were needed; and how could they prove themselves capable of holding the leadership – which the military commanders were aimed to accomplish.'

In other words, the military commanders were doing the civil or political job indicating that their democratic leadership, parliamentary system and their members were all impotent.

Secondly; it was the Parliament's prerogative to amend the Constitution, but they remained dormant during the whole period of six years since 2008 because of tussle between parliament and the Iftikhar Chaudhry-led Supreme Court. It was never too late to inject the new blood of fresh legislation, only requiring the needed majority on the parliamentary floor, to bring the legal system at par with the developed nations. Military courts would have gone back in their barracks much earlier.

On 6th January 2015; a voice from one Mrs Haq appeared on the internet media saying that;

'In Germany, military courts have a civilian structure. It is four tiered; the courts have jurisdiction over military disciplinary offences and complaints by the members of the Armed Forces are staffed by professional civilian judges and military lay judges. There are disciplinary attorneys, legal advisors as well as legal instructors for the military judicial system.

In United Kingdom, the military court is headed by a Judge Advocate General, who is a civilian with at least 10 years of experience as a barrister, advocate or a solicitor.

What is being done in Pakistan?'

It was good food for thought but the writer could not explain [*might be due to shortage of space*] the background atmosphere of the judicial systems in the two countries. Firstly; that how those countries keep on improving their laws with the rise of emergencies around them.

In UK, only one terrorist event of **7th July 2005** [*in which 52 persons were killed and about 700 were injured in London Bombing*] had jolted the whole government machinery and Parliament, the police and judiciary.

All they joined their heads together, framed new legislation for Anti-Terrorism, improved old procedures, enhanced the police powers of search and arrest, enhanced magisterial powers of remanding the suspects up to 60 days, summary hearing procedures were introduced and the courts were made to sit and hear those cases on priority; sometimes day & night in shifts – so that the cause of justice is not lost.

Till today [**ending 2016**] no such event could be repeated in complete eleven years – because the suspects were promptly tried and sent to prisons for the rest of their lives.

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Even otherwise, the police reports are admissible in the British and European courts as valid evidence. Police always appear as key-witness and their statements are believed though encountered and cross examined as usual – judges and police are equally respected, trusted and believed.

The British and European Courts release their hearing schedules of cases sixty to ninety days before; sending notices to police and all others. When the court is held, it hears the case on regular basis with no interruption or '**dates / tareekhs**' in between. The case once started in the court has to be finished within a day, 2 days, 3 days... it may take a month or so BUT no adjournment on any count whatsoever.

Unlike Pakistan, a case in the English or European courts cannot linger on for years and decades like Air Martial Asghar Khan Case which took 16 years to decide; sometimes due to non availability of witnesses; sometimes due to absence of one side lawyers; or over-burden of prosecutors; or due to Judges on leave; or that workers of PPP or PML[N] attacked the courts; or judges could not reach court premises due to PTI's Dharna in Islamabad; or road blocked by MQM activists in Karachi – in short No Gimmicks.

Mrs Haq's sentiments are understandable but Pakistan could also make out the system like that of UK or Germany that is what the people needed - NOT to be dealt with 1861's Police Act or 1934's Police Rules or 1878's CrPC or centuries old the ONLY requirement of Eye Witness to provide an excuse for coward judges.

Earlier; an editorial note of a leading newspaper daily dated **3rd January 2015** had rightly pointed out that:

'.....nothing — absolutely nothing — has prevented the government or parliament from urgently strengthening the existing legal system and judicial process other than the government & parliament itself.

Had the same time and effort spent on winning consensus for military courts gone into urgent reforms and administrative steps to fix the criminal justice structure, the existing system could have been brought into some semblance of shape to deal with terrorism.

Sadly, the political leadership has abdicated its democratic responsibilities. Surrender perhaps comes easily.'

SC VERDICT ON CONST'L AMENDMENTS:

On 28th January 2015, a 3-judge bench accepted pleas against 21st Constitutional amendment for regular hearing and sought concise statements from the federal and provincial governments.

Later, **a 17-judge full court of the Supreme Court**, headed by CJP Nasirul Mulk, clubbed the 18th and 21st constitutional amendment cases and heard the arguments for several weeks. During lengthy legal battle, the SC examined petitions challenging the procedure of judge's appointment under the 18th Amendment and the establishment of military courts under the 21st Amendment.

On 26th June 2015, the full court reserved its ruling on the case. A total of 35 constitutional petitions were before the court of which 20 challenged the 18th Amendment and 15 challenged the 21st Amendment. The main three questions before the court were:

- whether the Constitution has a basic structure or not;
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- if it has a basic structure then whether a constitutional amendment can be struck down on the basis of it; and
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- whether the parliament has the power to alter the basic structure of the Constitution.

Military courts were empowered to try militant suspects until January 2017. The army announced the first verdicts and sentences from the new military courts in April 2015. Six militants were condemned to death and another jailed for life, all on terrorism charges. The top court **on 15th April 2015** ordered a stay on execution of those six militants, after a petition seeking a halt to the implementation of death sentences awarded by military courts was filed by the Supreme Court Bar Association [SCBA].

On 5th August 2015, in a landmark judgment, the Supreme Court of Pakistan dismissed all the 35 petitions individually filed, some against the 18th Amendment and some against establishment of the military courts through 21st Amendment. The Chief Justice Nasirul Mulk announced the judgment laying foundations of balanced power structure amongst the three pillars of the state; Judiciary, the Parliament and Executive.

A 17-judge full bench dismissed petitions against the 18th Constitutional Amendment in a wide 14-3 decision. The apex court, in an 11-6 decision, also dismissed the petitions against the 21st Constitutional Amendment,

wherein military courts were established to try militants but stated that all decisions of military courts would be subject to judicial review, if the higher courts moved.

Reforming CJP Chaudhry's Legacy: The core issue was that whether or not the Supreme Court could sit in judgment over provisions of the Constitution itself. The apex court was also faced with the seemingly undefeated constitutional questions concerning defection clauses, which were introduced through 18th Amendment.

This Constitutional Amendment, enacted in 2010 by PPP's civilian government, in the aftermath of a decade-long military rule, inserted several key changes in the Constitution. Some of those changes, such as the constitutional command for local governments [Article 140A] was widely hailed and accepted. Others, however, were more controversial in nature.

CJP Iftikhar M Chaudhary's Court, after the judgment in *Sindh High Court Bar Association* Case, had '**illogically**' removed over 100 PCO judges, thus the parliamentarians unanimously decided to amend the process of judicial appointments through introduction of Article 175A, making the process more democratic in nature. Article 63A was also included:

'Giving Party Chief the power to recommend disqualification of any member of the Parliamentary Party, in case such member resigns from the Party, or deviates from party line in matters concerning the election of PM / CM, voting of no-confidence motions, or passing of a Money Bill and Constitutional Amendments'.

Article 63A was not liked by the general populace because it wrecked the basic purpose of the democracy, but over the judicial appointment process [Article 175A], the CJP Chaudhry's Court, interpreted and nearly stopped in October 2010 the actually prescribed route declaring it against the *Basic Structure of Pakistan's Constitution* and the Parliament kept mum.

Definitely a sort of constitutional compromise, the Parliament enacted the 19th Constitutional Amendment, which increased representation of judges in the Judicial Commission, confirming their dominance over the appointment process – but virtually paralysing its own Parliamentary Committee.

The constitutional autonomy of Parliamentary Committee and the President, in the process of judicial appointments, was also cut to size through *Munir Hussain Bhatti's* case (**PLD 2011 SC 407**) and the **Presidential Reference No. 1 of 2012**, in fact undoing the entire paradigm of judicial appointments that was conceived by 18th Amendment.

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Then the 21st Constitutional Amendment: in the wake of the unprecedented tragedy in Army Public School Peshawar on 16th December 2014, this package was designed to achieve two objectives:

- *Trying religious terrorists in military courts (through amendment of section 2 of the Army Act, which extends its jurisdiction to terrorists waging war 'using the name of religion or a sect'.*
-
- *Lending constitutional protection to the establishment and proceedings of military courts through exempting military laws from the protection of Article 8 of the Constitution [Fundamental Rights], and exempting such proceedings from the bar of Article 175(3) [separation of powers].*

As a result of these enactments, military trials of religious terrorists could be held under the Army Act, outside the gates of fundamental rights, by serving Army officers, which would not be challenged on the basis of constitutional principle of due process or 'separation of powers'.

As a result, the legal perception in Pakistan encompassed three different forums for adjudication of similar or identical offences: firstly, the Sessions Courts for the trial of regular murder and connected offences; secondly, the Anti-Terrorist Courts for trial of all terrorism offences but not normally connected with religion; and thirdly, the Military Courts for trying terrorist suspects using **'the name of religion or a sect'** to justify their crimes.

Some jurists contested that through SC's this judgment, the existence of military courts and their constitutional protection, allowed **'doctrine of necessity'**, which was buried some years earlier amidst high trumpeted tunes, to be a legitimate constitutional excuse again. The eminent real danger was to expect its usage as a defence again, tomorrow, if some military adventurer decided to depose democracy in Pakistan.

The ruling appeared as a major turning point in the political history of Pakistan wherein the SC settled down some core issues once and for all; it determined answers to vital questions regarding powers of the three main organs of state detailed above. This exhaustive judgment – authored in parts by 10 different judges, spanning over 900 pages – provided competing judicial philosophies of different members of SC's that Bench.

A candid opinion appeared in daily **'the Nation'** of **10th August 2015** on the first and the most important issue is worth mention here. It mentioned that Justice Saqib Nisar's opinion, while agreeing with the majority of the

Bench, exhaustively traced the ambit and applicability of the **Basic Structure Doctrine**, in order to relentlessly answer a singular question:

Does the "constituent power" to amend the Constitution lie ***"with an unelected judiciary, although certainly acting with the utmost good faith and in the national interest, OR with the chosen representatives of the people, even though they may not always come up to the just expectations?"***.

Through a jurisprudential discourse, over a 160 pages long, Justice Saqib Nisar declared that, within our democratic paradigm and constitutional framework, **"the latter and not the former"** are the real custodians of supreme political and lawmaking power.

It should be kept in mind that the '**Basic Structure Doctrine**' is an elusive constitutional idea that deems certain principles to be so fundamental & supra-constitutional in nature that even a constitutional amendment, carried by the full force of a transparently elected Parliament, cannot change or amend the same. And that [an unelected] judiciary is the sole determinant and custodian of this Basic Structure.

Justice Saqib Nisar's opinion obliterated the idea of an un-amendable Basic Structure, chosen at the whim of un-elected judges like CJP Iftikhar Chaudhry, over and above the express provisions of the Constitution. Justice Nisar's opinion was, no doubt, a passionate cry in defence of democratic theory – hats off to his spirits and farsightedness.

Justice Nisar's written opinion through this judgment made no excuses for the elected representatives, and their track record of being **"corrupt and incompetent"**. However, Mr Justice argued that:

"....if the elected representatives do fail on this score that is most emphatically not an argument which justifies a dilution of the democratic principle."

While accepting that decisions of the elected representatives have, in the past, defied our democratic ethos and public interest, Justice Nisar parted with the past practice of defending a chequered judicial legacy, and asked ***"Is the record of the judiciary that much better?"***

Saad Rasool, in the aforementioned citation, correctly identified that:

'...the truth is that we live in the cusp of a defining moment in history. We are faced with a war from within, which threatens to shake the very foundations of our existence.

We are governed by forces of status quo; we have a broken electoral system, a sclerotic economy, and a pervious empire of law that lives in the shade of a corrupted religious philosophy.

During such times even, we should celebrate intrepid judges, like Justice Saqib Nisar, who are willing to constrict their own judicial authority, in order to expand and flourish the spirit of democracy.'

In fact, with that marvellous judgment, the era of CJP Chaudhary's brand of justice had come to an end in Pakistan. And, in its wake, a new judicial philosophy had taken the helm of affairs; a philosophy that was neither insecure of, nor threatened by, other branches of the government.

Coming back to the main judgment; it appeared that two things had perhaps influenced the honourable judges: one that the military courts and the 21st amendment were only for two years. And that they were not under any individual's discretion but through a constitutional amendment which ensured they would cease to exist after two years.

This time-framed strategy for achievement of quick justice was enough to satisfy the judges as well as the fact that this amendment was passed unanimously by the Parliament.

The military, which initiated action against terrorists; Parliament, whose resolution created space for establishment of military courts, and then the Supreme Court's decision proved that the military, Parliament and Supreme Court were all on the same page regarding terrorism menace in Pakistan.

The said judgment of the SC was given by the full court of 17 judges; 11 judges agreed to the main context whereas the 6 judges added their dissenting notes based on different opinions. Major 25-page dissenting note was from the senior most justice Jawwad S Khawaja, who occupied the chair of Chief Justice of Pakistan on 17th August 2015 because of retirement of CJP Nasirul Mulk.

[It was in fact a reflection of the true spirit of judicial independence within the apex court that each judge had come up with his own opinion and analysis.]

A difference of opinion among judges is always present in such major legal cases in developed nations. A senior lawyer held:

'If we want to make unanimous decisions like in former CJP Iftikhar M Chaudhry's era, then we will have to differentiate between a military unit and the Supreme Court. Our mindset, which does not tolerate difference of opinion, needs to be changed.'

In fact, those closest to the Bench would vouch for the fact that during the initial challenge to 18th Constitutional Amendment, in 2010, CJP Chaudhary had stopped just shy of striking down the said Amendment, and declaring a Basic Structure for the Constitution, simply because a 17 – 0 consensus for such a judgment could not be reached on the Bench. As a result, a compromised interim order was delivered instead.

Through the SC's this latest judgment, the shackles of that bygone era finally melted away, making way for each judge to speak his mind, even while disagreeing with fellow members of the Bench. And the credit, in this regard, should be attributed to the CJP Nasirul-Mulk.

Legal experts held the opinion that the apex court's decision proved that ***'it cannot interfere in laws passed unanimously by elected representatives'***, whereas CJP Iftikhar M Chaudhry had passed few judgments portraying that the Parliament could make laws but subject to certain limitations and not beyond the given structure of the Constitution.

It meant that the Parliament should make laws which should have in-built approval of the apex court. Many fingers were raised over such decisions emanated through CJP Chaudhry's judiciary but the intelligentsia remained silent because of CJP's personal wishes – or from his terror of *'Contempt of Court proceedings'*.

However, during proceedings of the said case, visible division was witnessed among judges regarding the basic structure theory and powers of the Parliament and the Supreme Court; therefore, dissenting voices were expected in the ruling. Referring to the media interviews of the day, a senior lawyer Babar Sattar commented that:

'When it has been written in the Constitution, then can a 17-judge bench second-guess the wisdom of an amendment passed unanimously by Parliament?'

This was the decision that the Supreme Court had to take. And they have decided that if Parliament passes something by two-thirds majority then we cannot interfere in their decision.

And it is a positive sign that there was a divided opinion, because if all 17 judges give the same opinion then it may appear as if they were being dictated by someone - a welcome decision.'

In detailed judgement, the CJP Nasirul Mulk declared that '*the superior judiciary has the authority to review any ruling of military courts on grounds of coram non judice* [being without jurisdiction or suffering from *malafide*]. The superior judiciary had the authority to review the government's selection of cases for trial under the Army Act 1952, however, any order passed, decision taken or sentence awarded was subject to judicial review.

APS CARNAGE HELPERS SENTENCED:

After the SC's landmark decision of **5th August 2015**, putting their weight in favour of the military courts, the first decision appeared just a week after whereas the normal courts could not convict even a single person during the last fifteen years – hats off to the 160 years old laws of Evidence and Criminal Procedure Codes.

On 13th August 2015, Pakistan's military Chief Gen Raheel Sharif approved death sentences for six men convicted in last year's devastating attack on Army Public School [APS] Peshawar; while another man was sentenced to life in prison.

Pak-Army's Inter Services Public Relations [ISPR] issued a statement that a military court convicted the defendants in the case. The military statement listed the roles of the convicted men in militant attacks, saying that 'the convicts were given fair trial by following all the legal formalities and providing them legal aid and defence counsels.'

Six of the defendants belonged to a little known militant group, ***Toheed-wal Jihad Group***, while the seventh was a member of the outlawed Pakistani Taliban, an anti-government organization. The six defendants - civilians convicted of aiding six gunmen who attacked the army school had confessed before the court.

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The alleged mastermind of the attack, a Pakistani Taliban commander known as Khalifa Omer Mansour [who was later killed in a drone attack in Balochistan in 2016], was then at large and believed to be in Afghanistan.

*[As detailed in the previous chapter of this book, **Scenario 175**, the attack of 16th December 2014 on the Army Public School in Peshawar had left 153 people dead, including 125 students. The Pakistani Taliban (TTP) had claimed responsibility.]*

The general populace were extremely joyful all over the country and appreciated those convictions as it provided the families of killed children a little solace. They demanded that the masterminds should also be brought to book, tried and awarded exemplary punishment.

Following a legal challenge on parliament's decision in January 2015, Pakistan's Supreme Court ruled in July 2015 that closed military courts were legal and could pass death sentences on civilians if involved in terrorism related activities.

The **Los Angeles Times** of **13th August 2015** remarked:

'The December School attack was seen as having hardened Pakistan's resolve to fight jihadist militants along its lawless border with Afghanistan. Pakistan, a nuclear-armed nation of 190 million, is plagued by a Taliban insurgency, sectarian violence and militancy.

Since January [2015], military courts have heard at least 100 militants' cases including this Peshawar School tragedy and the decision were kept pending due to Supreme Court's stay order in April this year.'

Chief of *Awami National Party* Asfand Yar Wali, in December 2015, raised very valid points on the 'implementation & progress' of the NAP. Mr Wali contended that:

- *In mid 2015, the son of Hikmet Yar Gulbadin was seen in an open political gathering of Swabi – why action under NAP was not taken against him.*
-
- *After NAP Accord, Afghanistan was made to believe that terrorists were equal enemies of Afghanistan & Pakistan. Afghanistan had sent about 70-80 dead bodies in November 2015, reportedly from*

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Dir district; why the PML[N] government did not mention it to the media that how those persons went there and for what purpose.

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- *Still in some mosques, some people are seen collecting money for 'Afghan Jihad' after the Friday prayer – why so.*

In fact, Mr Wali was correct to point out that unless the government close those *Madrassas* which take huge money from foreign governments allegedly like Saudia, Dubai, Qatar and Iran, the terrorism cannot be tackled. The factories of terror productions would continue to run if proper measures were not taken sincerely.