

The Right to a Fair Trial and the Military Justice System in Pakistan

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Key words

Fair trial, military justice, independent and impartial tribunal, equality before the courts, due process, terrorism and trial of civilians by military courts.

Abstract

This article analyses the military justice system of Pakistan to determine to what extent it is compatible with fair trial standards recognised by human rights law and the constitution of Pakistan. It sets out the fair trial tests and apply them to the military justice system of Pakistan. The analysis reveals that the military justice system blatantly violates fair trial standards: it is part of the Executive and is neither independent nor impartial. It runs as a detached parallel departmental justice system to the national justice system. The author also argues that the majority judgement in the 2015 Military Courts Case did not apply the correct legal tests and wrongly held that the military justice system meets the fair trial standards. It is per in curiam. The author offers recommendations for reforming the military justice system proposing that Pakistan might learn from the successful reformation of the British military justice system.

On 16 December 2014, a splinter group of the Pakistani Taliban attacked an Army Public School in Peshawar, Pakistan. Around 141 children and school's staff were killed in the attack.² The tragic incident shocked the nation. The political leadership of the country woke up, in a much unified fashion, to the threat of terrorism. So were the law enforcement agencies and the armed forces of Pakistan. The military establishment was keenly pursuing a proposal to prosecute terror suspects in military courts for some years but the proposal did not attract political consensus. The Army Public School attack provided the military a strong ground they needed for developing political consensus around its proposal. On 7 January 2015 the Pakistan Army Act 1952 (Army Act) was amended extending the jurisdiction of military courts to try civilians, i.e. a particular terrorist suspects 'claiming or are known

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² Dawn, '[Taliban massacre 131 schoolchildren: Principal among 141 dead in attack on Army Public School, Peshawar](http://www.dawn.com/news/1151361)' (Karachi, 17 December 2014) <<http://www.dawn.com/news/1151361>> accessed 17 November 2016. The Pakistani Taliban said that the attack was carried out in response to killing of their members in the military custody, the military targets the Taliban's families etc. The Afghan Taliban, however, condemned the attack. See Dawn, '[Afghan Taliban condemn Peshawar school attack](http://www.dawn.com/news/1151407)' (Karachi, 17 December 2014) <<http://www.dawn.com/news/1151407>> accessed 17 November 2016.

to belong to any terrorist group or organisation using the name of religion or a sect'.³ Terrorist suspects of other denominations such as nationalist organisations waging war against Pakistan were left out.⁴ The government did not provide any explanation as to why only a particular type of terrorist group was targeted but the statement of objectives to the Bill said:

An extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist group using the name of religion or a sect and members of such armed groups, wings and militia. There exists grave and unprecedented threat to the integrity of Pakistan by raising of arms and insurrection using name of religion or a sect by groups of foreign and locally funded elements using name of religion or a sect who are to be severely dealt with under the law.

These objectives are not different from those provided for other anti-terrorism laws, e.g. objectives provided for the Anti-terrorism Act 1997 (ATA) were 'to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences'.⁵ Objectives for the Protection of Pakistan Act 2014 (PPA) were to provide 'for protection against waging of war against Pakistan, prevention of acts threatening the security or Pakistan and for speedy trial of [those] offences'.⁶ The amendment in the Army Act did not create new offences. It only extended the jurisdiction of military courts to a particular category of terror suspects, i.e. those 'using name of religion or a sect'.⁷

On 7 January 2015, Article 175 of the Constitution of Pakistan 1973 was also amended providing protection to trial of civilians under the Army Act, the Pakistan Air Force Act 1953, the Pakistan Navy Ordinance 1961 and the Protection of Pakistan Act 2014⁸ by military courts. The government also lifted moratorium from death penalty.⁹ As both amendments contained sun-set clauses, the new legal framework provided a two year window – till 6 January 2017 - to the military for the prosecution of terror suspects in military courts.¹⁰

³ See the Pakistan Army (Amendment) Act 2015.

⁴ There are many nationalist organisations fighting the security forces of Pakistan, e.g. Baloch Liberation Army.

⁵ See, preamble, Anti-terrorism Act 1997.

⁶ See, preamble, Protection of Pakistan Act 2014.

⁷ See preamble of the Pakistan Army (Amendment) Act 2015.

⁸ See, preamble, the Constitution (Twenty First Amendment) Act 2015.

⁹ See Dawn, 'Death penalty moratorium lifted completely in Pakistan: Officials' (Karachi, 10 March 2015) <<http://www.dawn.com/news/1168652>> accessed 15 September 2016.

¹⁰ The expiry date falls on 6 January 2017 if the law is not amended further.

In the aftermath of the Army Public School attack and the newly emerged national political consensus, the public debate on the trial of civilians by military courts was cautious but some muted voices termed the amendment against the right to a fair trial. Some saw it as a 'soft coup'.¹¹ The trials of terror suspects were very secretive. Even families of the under trial suspects did not know the location and date of trials. Most of them were sentenced to death and some were executed promptly.¹²

Various Bar Associations, human rights advocates and organisations questioned the constitutionality of the trial of civilians by military courts. They challenged the amended Army Act and some other constitutional amendments in the Supreme Court of Pakistan. In August 2015, in the *District Bar Association Rawalpindi v Federation of Pakistan* (known as the *military courts case*),¹³ the Supreme Court ruled by a majority of 11 votes to 6 that the amendment of the Army Act is constitutional and that, as held by senior courts before, the military justice system meets the requirements of fair trial standards and if the system is considered fair for services personnel, it should be considered so for terror suspects as well.¹⁴ In subsequent legal challenges to trials of civilians by military courts, the Supreme Court relied on the *military court case* judgement closing the door for legal challenges for foreseeable future.¹⁵

The trial of civilians by military courts was an ad hoc arrangement for dealing with 'hard core terrorists'.¹⁶ On 8 January 2017, the Army said that 'The military courts have ceased to function on expiry of mandated period' and that 'during the period of its validity, 274 cases were referred to Military Courts. Of these 161 were awarded death penalty (12 executed) and 113 were awarded imprisonment of varying duration. The cases were dealt through due process of law in Military Courts'.¹⁷ From behind the scene, the powerful military exerted pressure on the government and

¹¹ The Express Tribune, '[Roundtable talk: 'Establishment of military courts led to a soft coup'](http://tribune.com.pk/story/848564/roundtable-talk-establishment-of-military-courts-led-to-a-soft-coup/) - The Express Tribune' (Karachi, 15 March 2015) <<http://tribune.com.pk/story/848564/roundtable-talk-establishment-of-military-courts-led-to-a-soft-coup/>> accessed 15 September 2016.

¹² International commission of Jurists, '[Pakistan: trials of civilians before military tribunals a subversion of justice | ICJ](http://www.icj.org/pakistan-trials-of-civilians-before-military-tribunals-a-subversion-of-justice-|-ICJ/)' (Geneva, 15 April 2015) <[http://www.icj.org/pakistan-trials-of-civilians-before-military-tribunals-a-subversion-of-justice](http://www.icj.org/pakistan-trials-of-civilians-before-military-tribunals-a-subversion-of-justice-|-ICJ/)> accessed 15 September 2016.

¹³ *District Bar Association Rawalpindi v Federation of Pakistan*, All Pakistan Legal Decisions 2015 Supreme Court 402, [163]. All Pakistan Legal Decisions is abbreviated as PLD.

¹⁴ *ibid* [163].

¹⁵ See *Said Zaman Khan and others v Federation of Pakistan*, Supreme Court of Pakistan (Islamabad, 29 August 2016) (unreported) <<http://www.supremecourt.gov.pk/web/page.asp?id=2277>> accessed 15 September 2016.

¹⁶ The military terms those tried and convicted by court martial as 'hard core terrorists', see ISPR '[Chief of the Army Staff confirms death sentences of hard-core terrorists](https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=3310)' (Rawalpindi, 3 May 2016) <https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=3310> accessed 15 September 2016.

¹⁷ ISPR, '[Press Release No PR12/2017-ISPR](https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=3670)' (Rawalpindi, 8 January 2017) <https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=3670> accessed 12 January 2017.

other political parties to extend the jurisdiction of military courts for trying military suspects. They army succeeded and on 30 March 2017 the Pakistan Army (Amendment) Act 2017 was passed with retrospective effect from 7 January 2017. The jurisdiction of military courts to try terror suspects was extended for a further two year period, i.e. till 29 March 2019. The same reasons, as in 2015, were cited as justification for the extension.

In 2015 the public debate focused on trial of civilians by military courts. The Supreme Court also remained focused on this issue. A closer scrutiny of the Army Act and the Pakistan Army Act Rules 1954 (Army Rules) reveals a significant lack of fair trial safeguards in the military justice system of Pakistan but this broader and a fundamental issue whether the military justice system itself meets the fair trial standards escaped public and judicial scrutiny. The purpose of this article is to analyse the military justice system to determine to what extent it is compatible with fair trial standards. I take the view that all servicemen, women and those subject to the Army Act are entitled to a fair trial. The donning of military uniform nor the demands of their employment must not deprive soldiers of their basic human right to a fair trial. I adopt the approach that once the military justice system is reformed bringing it in line with fair trial standards, then trial of civilians by military courts, in exceptional circumstances, will be less problematic.

This article is divided into three sections. The first section outlines the legal framework and tests for assessing the right to a fair trial under international human rights law and Pakistani law. The second section is divided into three sub-sections. Sub-section A introduces the military justice system whereas sub-section B applies the tests to the military justice system of Pakistan to determine to what extent it complies with the fair trial standards. I argue that the military justice system does not meet the fair trial standards such as trial by an independent and impartial tribunal, equality before courts and a review by a higher tribunal. Sub-section C critically evaluate the legal soundness of the majority judgement in the *military courts case* where it was held that the military justice system meets the fair trial standards and trial of civilians by military courts do not breach their right to a fair trial. My main argument is that the majority judgement is based on the case of *Ali*. *Ali* is based on an incomplete Munir's criteria. The majority judgement did not take account of, as it was required by law to do so, the post 2010 legal framework. The third section sums up the discussion and makes recommendations to reform the military justice system suggesting that Pakistan might learn from the British experience of reforming their military justice system.

I. The right to a fair trial: the legal tests

Pakistan acceded to the International Covenant on Civil and Political Rights 1966 (ICCPR) on 23 June 2010.¹⁸ Pakistan also introduced the right to a fair trial as a new fundamental right in its constitution in April 2010.¹⁹ These two developments ushered in a new era in the legal landscape of Pakistan. The legal framework consists of international and domestic law.

A. International human rights law

Two human rights instruments are relevant for the discussion of the right to a fair trial in the legal context of Pakistan: the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR).²⁰ They are relevant because Pakistan voted in favour of the UDHR²¹ and acceded to ICCPR on 23 June 2010. The Supreme Court of Pakistan has also recognised the customary and binding nature of UDHR on Pakistani courts.²²

The right to a fair trial was first recognised by Article 10 of UDHR: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.²³ By acceding to ICCPR, Pakistan has undertaken to respect and to ensure to all individuals the Convention rights 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.²⁴ Article 14 recognises the right to a fair trial and lists its constituent elements: equality before the courts and tribunals; a fair and public hearing by an independent and impartial tribunal and presumption of innocence. In addition, Article 14 provides certain minimum guarantees: the person charged must be informed of the charge in a language he/she understands, to have adequate time and facilities for preparing their defence, trial without undue delay in their

¹⁸ United Nations Treaty Collection, 'Status of Treaties' (18 April 2017) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en> accessed 18 April 2017.

¹⁹ International Covenant on Civil and Political Rights (ICCPR), Article 2(2) (United Nations, 16 December 1966) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> accessed 18 April 2017.

²⁰ Several other international human rights instruments have recognised and guaranteed the right to a fair trial: Article 40 of the Convention on the Rights of the Child 1989, Articles 7 and 26 of the African Charter on Human and Peoples Rights 1981, Article 8 of the American Convention on Human Rights 1969, Articles 13 and 16 of the Arab Charter on Human Rights 2004.

²¹ See UN General Assembly, Voting Record: [Voting Record UNDHR](#) (New York, 10 December 1948) <<http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~!909326~!0&ri=1&aspect=power&menu=search&source=~!horizon>> accessed 15 September 2016.

²² PLD 2007 Supreme Court 642, [38].

²³ Universal Declaration of Human Rights, Article 10 (United Nations, 10 December 1948) <<http://www.un.org/en/universal-declaration-human-rights/>> accessed 18 April 2017.

²⁴ ICCPR Article 2(1) (n 19).

presence, to be represented in person or by a counsel of his/her choice, to examine witnesses, have the assistance of an interpreter and that no one shall be compelled to give evidence against oneself or confess to guilt. Article 14 requires to take into account the age of juveniles and provides for the right of appeal to a higher tribunal for reviewing conviction and sentence. Article 14 prohibits double jeopardy and requires compensation where there is a miscarriage of justice.

The three limbs of the test, i.e. 'equality before the courts and tribunals', 'independent and impartial tribunal' and 'conviction and sentence being reviewed by a higher tribunal' need elaboration as this article focuses mainly on those aspects of the right to a fair trial in the military justice system of Pakistan.

Equality before courts

Equality before the courts and tribunals includes guarantees such as equal access, equality of arms and non-discriminatory treatment of parties to the proceedings.²⁵

'Access to administration of justice must effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice'.²⁶ 'This guarantee also prohibits any distinction regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds'.²⁷ 'The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way'.²⁸

Equality of arms ensures that the same procedural rights are provided to all parties. All distinctions must be 'based on law and can be justified on objective and reasonable grounds without entailing actual disadvantage or other unfairness to the defendant'.²⁹

'Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings'.³⁰ If certain categories of cases are determined under 'exceptional criminal procedures

²⁵ Human Rights Committee, General Comment No 32, 'Article 14: Right to Equality before Courts and Tribunals and Fair Trial', 23 August 2007 [8].

²⁶ *ibid* [9].

²⁷ *ibid*.

²⁸ *ibid* [10].

²⁹ Communication No. 1347/2005, *Dudko v. Australia* (views adopted on 23 July 2007) [7.4].

³⁰ General Comment No 32, [14] (n 25).

or by specially constituted courts or tribunals',³¹ 'objective and reasonable grounds must be provided to justify the distinction'.³² In *Dudko v Australia*, at [7.4.] the Human Rights Committee (HRC) said:

When a defendant is not given an opportunity equal to that of the State party in the adjudication of a hearing bearing on the determination of a criminal charge, the principles of fairness and equality are engaged. It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the [defendant].³³

Independence and impartiality of tribunals

'The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature'.³⁴

Impartiality has two aspects. 'First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other'.³⁵ 'Second, the tribunal must also appear to a reasonable observer to be impartial'.³⁶ 'The right to be tried by an independent and impartial tribunal is an absolute right'.³⁷

Review by a higher tribunal

'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal'.³⁸ 'The right to have one's conviction and sentence reviewed by a higher tribunal ... imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due

³¹ *ibid.*

³² *ibid.*

³³ See *Dudko v. Australia* [7.4]. See also Concluding Observation, Ireland CCPR/C/IRL/CO/3 30 July 2008 [20].

³⁴ General Comment No 32 [19], (n 25)

³⁵ Communication No. 387/1989, *Karttunen v. Finland* (views adopted on 23 October 1992), [7.2].

³⁶ General Comment No 32 [21], (n 25).

³⁷ Communication No. 263/1987, *Gonzalez del Rio v. Peru* (views adopted don 6 November 1990), [5.2].

³⁸ ICCPR, Article 14 (5), (n 19).

consideration of the nature of the case'.³⁹ 'The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement and to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal'.⁴⁰ 'A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant'.⁴¹ The right of appeal is of particular importance in cases involving death penalty⁴² but is not confined to the most serious offences.

The analysis of the relevant provisions of international human rights law, jurisprudence of the Human Rights Committee and cases from other jurisdictions⁴³ reflect consensus on the absolute nature of the right to a fair trial and its constituents elements such as equality before courts, trial by an independent and impartial tribunal and the right to review one's conviction and sentence by a higher tribunal.

Trial of civilians by military courts

Military courts may try service personnel for military offences subject to the provisions of Article 14.⁴⁴ The ICCPR does not prohibit the trial of civilians in military or special courts either but such trials must be 'in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned'.⁴⁵ 'It is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14'.⁴⁶ The trial of civilians by military courts, however, should be exceptional.⁴⁷ In *Madani v Algeria*, the Human Rights Committee said:

³⁹ Communication No. 1100/2002, [48]; see also *Bandajevsky v. Belarus* (views adopted on 26 March 2006), [10.13]; Communication No. 985/2001, *Aliboeva v. Tajikistan* (views adopted on 18 October 2005), [6.5]; Communication No. 973/2001, *Khalilova v. Tajikistan*, (views adopted on 18 October 2005), [7.5]; Communication No. 623-627/1995, *Domukovsky et al. v. Georgia* (views adopted on 6 April 1998), [18.11]; Communication No. 964/2001, *Saidova v. Tajikistan* (views adopted on 18 July 2004), [6.5]; Communication No. 802/1998, *Rogerson v. Australia* (views adopted on 3 April 2002), [7.5]; Communication No. 662/1995, *Lumley v. Jamaica* (views adopted on 31 March 1999), [7.3].

⁴⁰ *Lumley v. Jamaica* [7.5]. See also General Comment No 32, [49].

⁴¹ General Comment No 32 [48] (n 25).

⁴² *ibid* [51].

⁴³ See *Duran and Ugarte v Peru* 2000 Inter-American Court of Human Rights [117], *Michel Genereux v Her Majesty the Queen* [1992] 1RCS (Canada), *Palamara-Iribarne v Chile* 2005 Inter-American Court of Human Rights, *Findlay v UK* [1997] ECHR 22107/93, *Cooper v UK* [2003] ECHR 48843/99, *Morris v UK* (2002) 34 European Human Rights Reports 52, *Grievs v UK* (2004) 39 European Human Rights Reports 2, *R v Spear* [2002] UKHL 31.

⁴⁴ General Comment No 32 [22], (n 25).

⁴⁵ *ibid* [22].

⁴⁶ *ibid*.

⁴⁷ *ibid*.

The State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14.⁴⁸

‘The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*’.⁴⁹ The international trend ‘towards excluding the criminal jurisdiction of military courts over civilians’ is growing.⁵⁰

B. Pakistani law

Pakistan is a dualist state and the ICCPR does not apply directly in domestic courts⁵¹ but it can be used to complement or fill in vacuum in domestic law.⁵² Pakistani law recognises the right to a fair trial. All its elements are reflected in the constitution and other laws. The 1973 constitution did not have a stand-alone provision till it was amended on 19 April 2010 recognising the right to a fair trial as a fundamental right. Article 10-A states that ‘for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process’. The Supreme Court of Pakistan said that in Article 10-A ‘the legislature did not define or describe the requisites of a ‘fair trial’’. However, ‘by not defining the term the legislature perhaps intended to give it the same meaning as is broadly universally recognized’.⁵³ ‘The principle of right to ‘fair trial’ has been acknowledged and recognized by [Pakistani] courts since long and is by now well entrenched in [Pakistani] jurisprudence’.⁵⁴ In *Memon*, the Supreme Court said that ‘the right of access to justice

⁴⁸ Communication No. 1172/2003, (views adopted on 28 March 2007), [8.7].

⁴⁹ *ibid* [44].

⁵⁰ See report of the Human Rights Commission E/CN.4./2006/58, principle 5 and commentary on it.

⁵¹ Since 1947 Pakistan has adopted the dualist approach. There is no provision in the 1973 constitution giving direct effect to international treaties in domestic law. For giving effect to international treaties in domestic law, an act of parliament is required, e.g. the *Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Award) Act 2011* provides recognition and enforcement of foreign agreements and awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

⁵² See *Pakistan Muslim League v Federation of Pakistan* PLD 2007 SC, [38].

⁵³ See Human Rights Commission [33], (n 48). This interpretation is in line with the approach of the Supreme Court of Pakistan towards international human rights treaties: it takes guidance from them when there is a gap in Pakistan law, see Human Rights Case No. 29388-K of 2013, PLD 2014 SC 305.

⁵⁴ *Syed Yousef Raza Gilani Case*, *Suo Motu* case No 4 of 2012, PLD 2012 SC 553, [25].

is internationally well-recognised human right and is now being implemented and executed by granting relief under the Constitutional provisions. Article 10 of Universal Declaration of Human Rights and Article 14 of the United Nations Convention on Civil and Political Rights recognize the right of fair trial by an independent and impartial Tribunal established by law'.⁵⁵

Other elements of the right to a fair trial such as presumption of innocence,⁵⁶ to be informed of the charge and cause of the charge,⁵⁷ adequate time and facilities for preparation,⁵⁸ counsel of one's choice,⁵⁹ to be tried without undue delay,⁶⁰ to have the assistance of an interpreter,⁶¹ to examine witnesses,⁶² not to be compelled to testify against oneself,⁶³ taking the age of juveniles into consideration,⁶⁴ prohibition of double jeopardy⁶⁵ and to have one's conviction and sentence reviewed by a higher tribunal according to law⁶⁶ are guaranteed by general and special laws.

Equality before courts

The constitution of Pakistan does not contain a stand-alone provision on the right to equality before courts but the language of Articles 4 and 9 and its interpretation by the superior courts suggests towards the existence of the right to equality before courts. Article 4 states that 'to enjoy the protection of law and to be treated *in accordance with the law* is the inalienable right of every citizen' [emphasis added]. Article 9 states that 'no person shall be deprived of life or liberty save *in accordance with law*' [emphasis added]. The Supreme Court of Pakistan has construed the phrase 'in accordance with law' liberally and has read many elements of the right to a fair trial into it. In *Arif*, the Supreme Court said that the right of access to justice is a well-recognised right and is equally found in the doctrine of 'due process of law'. It 'includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal'.⁶⁷ 'Due process of law' also

⁵⁵ *Government of Baluchistan v Azizullah Memon*, PLD 1993 SC 341, [5].

⁵⁶ See *Sikandar* PLD 1985 SC 11 reaffirmed in *Butt* 2013 SCMR 565.

⁵⁷ Constitution of Pakistan 1973, Article 10 of the constitution, ss 80 and 340 of the Code of Criminal Procedure 1898.

⁵⁸ *ibid*.

⁵⁹ *ibid*, Article 10.

⁶⁰ Section 344 of the Code of Criminal Procedure 1898 and *Haider* 2013 SCMR 1683.

⁶¹ Section 361 of the Code of Criminal Procedure 1898.

⁶² Section 241 of the Code of Criminal Procedure 1898.

⁶³ Article 13 of the constitution.

⁶⁴ Juvenile Justice System Ordinance 2000.

⁶⁵ Article 13 of the constitution and s 403 of the Code of Criminal Procedure 1898.

⁶⁶ See Chapter XXXI of the Code of Criminal Procedure 1898.

⁶⁷ *Muhammad Nadeem Arif v Inspector General of Police, Punjab*, 2011 SCMR 408, [10]. See also *Sharaf Faridi v The Federation of Pakistan*, PLD 1989 Karachi 404; *Fauji Foundation v Shamimur Rehman* PLD 1983 SC 457 and *Muhammad Ashraf v The State* PLD 2011 Federal Shariat Court 114. See also PLD 2013 SC 501.

includes that the accused shall have due notice of proceedings which affect his rights, he shall be given a reasonable opportunity to defend, that the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality and that it is a Court of competent jurisdiction.⁶⁸ In *Sarfraz*, the Supreme Court called fair trial as an inalienable right.⁶⁹

Article 10(1) provides for elements falling under the 'equality of arms' category, e.g. that an arrested person 'shall not be denied the right to consult and be defended by a legal practitioner of his choice'. Where an individual cannot afford to have a lawyer, one should be provided at the expense of state.⁷⁰ The lawyer must be given a reasonable opportunity to prepare and defend his client.⁷¹ Several provisions of the Code of the Criminal Procedure 1898 provides for rights such as the assistance of an interpreter⁷² and supply of relevant documents to the accused.⁷³

Article 25 of the constitution guarantees equality before law and equal protection of law. The Supreme Court on a number of occasions had elaborated criteria for the application of the equality provision. On discrimination, in *Memon*,⁷⁴ the Supreme Court said:

Although class legislation has been forbidden, it permits reasonable classification for the purpose of legislation. Permissible classification is allowed provided the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and such classification and differentia must be on rational relation to the objects sought to be achieved by the Act. There should be a nexus between the classification and the objects of the Act.

Independence and impartiality of tribunals

'The independence of judiciary is one of the salient features of [... the Pakistani] Constitution. The preamble to the Constitution provides that ... the independence of the judiciary shall be fully secured. The Objectives Resolution ... also commands that independence of judiciary has to be fully secured.

⁶⁸ *Sharaf Faridi v The Federation of Pakistan*, PLD 1989 Karachi 404, see also PLD 1983 SC 457.

⁶⁹ *Sarfraz Saleem v Federation of Pakistan*, PLD 2014 SC 232. See also *Watan Party v Federation of Pakistan*, PLD 2012 SC 292, Contempt proceedings against Syed Yousef Raza Gillani, PLD 2012 SC 533.

⁷⁰ *Hakim Khan v The State*, PLD 1975 Supreme Court 1.

⁷¹ *Moslemuddin Skidar v Chief Secretary of the East Pakistan*, PLD 1957 Dacca 101. See also section 340 of the Code of the Criminal Procedure 1898.

⁷² Section 361 of the Code of Criminal Procedure 1898.

⁷³ Section 265-C. See also PLD 2003 Lahore 290.

⁷⁴ *Government of Baluchistan v Azizullah Memon*, PLD 1993 SC 341, [5]. See also *Sherwani v Government of Pakistan*, 1991 SCMR 1041.

The superior Courts have elaborately interpreted the words 'fully' and 'secured' to elucidate the concept of 'independence of judiciary'.⁷⁵ In an Islamic state such as Pakistan, all judicial and executive authorities are equally responsible for dispensation of justice and are supposed to be vigilant about the rights and duties of the people and also the legal and moral obligation to perform their function with complete impartiality, neutrality and honesty in all respect free of all sort of influences.⁷⁶ In *Faridi*, the Supreme Court said that the independence of judiciary means: '(a) that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and (b) that the judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature'.⁷⁷ Threat to independence of judiciary amounts to 'denial of access to justice'.⁷⁸ Independence of judiciary cannot be achieved without complete judicial, administrative and financial independence.⁷⁹

The method of appointment and security of tenures of the judges have close nexus with the independence of judiciary.⁸⁰ The constitution provides for the 'separation of judiciary from the executive'⁸¹ qualifications for the appointment of judges, procedure of appointment, service conditions, salary, and pension.⁸² Judicial accountability is a key principle of the Pakistani judicial system. The constitution provides the forum, procedure and grounds for the removal of judges. A judge cannot be removed from service except on the specified grounds and according to the prescribed procedure. The Supreme Court and High Courts have also been given a degree of financial autonomy.⁸³ The constitution and law have ensured the independence and impartiality of judiciary.

Review by a higher tribunal

The constitution and law guarantee the right to appeal and review by a higher tribunal. The right to appeal and judicial review is also entrenched within the hierarchical jurisdictional judicial structure of Pakistan. Pakistani law guarantees the right to appeal from various lower first instance courts to the

⁷⁵ *Sh. Riaz-ul-Haq v Federation of Pakistan*, PLD 2013 SC 501 [30].

⁷⁶ *ibid* [70].

⁷⁷ *Government of Sindh v Sharaf Faridi*, PLD 1994 SC 105 [1].

⁷⁸ *Sh. Riaz-ul-Haq v Federation of Pakistan*, PLD 2013 SC 501 [30]. See also *Al-Jehad v Federation of Pakistan*, PLD 1996 SC 324.

⁷⁹ *Sharaf Faridi's case*. See also *Upgradation of judicial officers*, Suo Motu case No 16 of 2009, 2010 GBLR 160, [18].

⁸⁰ *ibid*, [29-30].

⁸¹ Constitution of Pakistan, Article 175 (3)

⁸² Constitution of Pakistan, Article 197 (A)

⁸³ See *Sharaf Faridi* (n 74).

district courts⁸⁴ followed by the right of appeal to the superior courts. The High Court has appellate jurisdiction.⁸⁵ The Supreme Court of Pakistan has also appellate jurisdiction.⁸⁶ The Federal Shariat Court of Pakistan has appellate jurisdiction and review power over cases involving Islamic law.⁸⁷

II. Military courts and the fair trial tests

Section II is divided into three sub-sections. Sub-section A introduces readers to the military justice system in Pakistan and provides a context for further discussion. Sub-section B applies the tests set out in section I to the military justice system. The main argument is that the military justice system do not meet the basic elements of the right to a fair trial such as trial by an independent and impartial tribunal, equality before the courts and a review by a higher tribunal. Sub-section C analysis the legal soundness of the majority judgement reasoning the military courts case. The main argument is that the majority judgement is legally flawed and is per in curiam.

A. *The military justice system*

The aim of the military justice system is to maintain effective discipline in the armed forces of Pakistan. The military courts consist of four tiers: general court martial, district court martial, field general court martial and summary court martial.⁸⁸ The Army Act and the Pakistan Army Act Rules 1954 (Army Rules) deal with the jurisdiction, composition, convening and dissolution of military courts in a comprehensive manner. The Army Rules focus on the rights and duties of the prosecution and defence and provides procedural rules. Where matters are not covered by the Army Act and Army Rules, the Code of Criminal Procedure 1898 applies.

General Court Martial

The general court martial is the highest trial court with the jurisdiction to try any offence, any person subject to the Army Act and may award any sentence under the Army Act.⁸⁹ A general court martial is convened by the COAS or an officer authorised by him.⁹⁰ The convening officer may dissolve the general court martial if it appears to him that the continuance of the trial is impossible or inexpedient for the exigencies of the service or the necessity of the discipline. The Army Act sets out a minimum number of five officers for a competent general court martial. At least four officers must have held

⁸⁴ See chapter 31 and 32 of the Code of Criminal Procedure 1898.

⁸⁵ Constitution of Pakistan, Article 199.

⁸⁶ Constitution of Pakistan, Article 185

⁸⁷ Constitution of Pakistan, Articles 303D and 303DD.

⁸⁸ Section 80, Pakistan Army Act 1952.

⁸⁹ *ibid*, Section 97.

⁹⁰ *ibid*, Section 81.

commission for at least two years and must not be below the rank of a Captain.⁹¹ All members of the general court martial should be, as far as it seems practicable to the convening officer, from different corps or units but in no case all should come from the corps or unit of the accused.⁹² If the person under trial is a Muslim, so should be members of the general court martial, i.e. the confirming officer, president, other members of the court and the judge advocate.⁹³ The Army Act and the Army Rules do not require members of the general court martial to have legal qualification or training but a judge advocate - who is required to be a legally qualified and trained person⁹⁴ - shall attend every general court martial.⁹⁵ If a judge advocate is not available, the convening officer is authorised to appoint another qualified person for attending the general court martial.⁹⁶ Without the participation of the judge advocate or a substitute, the proceedings of the general court martial are invalid.⁹⁷

Field General Court Martial

The Federal Government or the COAS have powers to convene a field general court martial but in practice the power is exercised by the COAS through his senior military officials. An officer not below the rank of a Brigadier is also empowered to convene a field general court martial if on active service and if in his opinion 'it is not practicable with due regard to discipline and the exigencies of the service to try the alleged offender by a general court martial'.⁹⁸ A field general court martial consists of at least three officers.⁹⁹ Like a general court martial, a field general court martial can be dissolved by the convening officer if the court is reduced below the minimum required number or if it appears to the convening officer that 'the exigencies of the service or the necessities of discipline render it impossible or inexpedient to continue the trial'.¹⁰⁰

A field general court martial has the same power to try any person subject to the Army Act and pass any sentence. The rationale for field general court martial is based on pragmatism and exigencies of military service as in every case it might not be possible to convene a general court martial and the trial has to take place in the field where a military unit is based. The judge advocate 'may' attend a

⁹¹ *ibid*, section 86.

⁹² Army Rules, rule 30.

⁹³ Pakistan Army Act, section 102A.

⁹⁴ See r 88 Note para 3 of the Army Rules.

⁹⁵ Pakistan Army Act, section 103.

⁹⁶ *ibid*.

⁹⁷ See Note to Rule 88.

⁹⁸ Pakistan Army Act, section 84.

⁹⁹ *ibid*, section 87.

¹⁰⁰ *ibid*, section 89.

field general court martial.¹⁰¹ The Army Act and the Army Rules do not provide criteria as to how it will be determined that the attendance of judge advocate is or is not required.

District Court Martial

A district court martial may be convened by an officer who is authorised to convene a general court martial or an officer authorised by such authority.¹⁰² A district court martial shall consist of at least three officers each of whom has held commission for a minimum two years.¹⁰³ There is no bar, like in the case of general court martial, that all members of the district court martial must not belong to the corps or unit of the accused. This means that colleagues from the same corps or unit may try their own colleagues.¹⁰⁴ A district court martial has the power to try any person except an officer, junior commissioned officer or a warrant officer and may pass a sentence not exceeding two years but cannot pass a sentence under hadd (Islamic law) such as stoning, imputation and whipping. Like a field general court martial, a judge advocate 'may' attend a district court martial. A district court martial is a trial court for relatively less serious offences and some of the stringent requirements such as the compulsory attendance of the judge advocate in its proceedings or to bar members of the same corps or unit to sit on a district court martial do not apply.

Summary Court Martial

A summary court martial is a first instance court for relatively minor offences. The trial of serious offences such as murder and mutiny requires a reference to an officer empowered to convene a district or field general court martial unless there is a grave reason that an immediate action is required for preventing detriment to the discipline of the army in which case the summary court martial may try those offences.¹⁰⁵ It means that exceptionally it may try serious offences. A summary court martial may pass any sentence not exceeding one year or where the presiding officer is below the rank of Major, exceeding three months.¹⁰⁶ It does not have jurisdiction to try offences punishable under hadd (Islamic law).¹⁰⁷ The attendance of judge advocate is not required for a summary trial. The only safeguard provided is that the summary court martial should be held by an officer not below the rank of a Captain and the presence of two additional officers is required throughout the trial as

¹⁰¹ *ibid*, section 103.

¹⁰² *ibid*, section 82.

¹⁰³ *Ibid*, section 86.

¹⁰⁴ Army Rules, rule 31, Note 1(a).

¹⁰⁵ Pakistan Army Act, section 99. See also Rule 114 of the Pakistan Army Act Rules 1954.

¹⁰⁶ *ibid*, section 101.

¹⁰⁷ *ibid*, section 99.

without their attendance the trial is null and void.¹⁰⁸ A summary court may try any person subject to the Army Act except an officer, junior commissioned officer or warrant officer.¹⁰⁹ The Army Act and the Army Rules have not provided any justification for excluding the above officers from the jurisdiction of the summary court martial and reserving it only for the trial of low ranking officers and soldiers. The distinction is based on the rank of the person tried rather than on the seriousness of the offence. The convening officer may dissolve a summary court martial if it appears to him that continuance of the trial is impossible or inexpedient for the exigencies of the service or the necessity of the discipline.

The role of Judge Advocate

The judge advocate has been given wide powers and duties. He is required to give legal opinion to the prosecution and defence on a question of law; whether consulted or not he has to inform the court of any irregularity; defect in the charge or composition of the court and shall give advice on any matter before the court martial. His opinion is legally binding on the court but may be ignored for very 'weighty reasons'.¹¹⁰ The Army Act does not define what constitutes a weighty reason. At the conclusion of the case, the judge advocate shall sum up the evidence and give his opinion upon the law relating to the case before the court proceeds for deliberation. The court may record that they have decided the matter on the basis of the legal opinion provided by the judge advocate. The judge advocate shares with the president of the court the responsibility to ensure that the accused is not disadvantaged in any way.¹¹¹ His attendance in the trial before the general court martial is compulsory but he may attend field general court martial, district court martial and the military court of appeals. He is not required to attend summary court martial. As a general rule the President of every court martial is responsible for the proper conduct of trial and to ensure that the accused receives a fair trial¹¹² but neither the Army Act nor the Army Rules provides that the President should have legal qualification or training which makes it difficult for him to determine whether or not the requirements of a fair trial are met.

Confirmation and revision of findings and sentences

¹⁰⁸ See Notes to section 88.

¹⁰⁹ Pakistan Army Act, section 100.

¹¹⁰ Rule 89(6).

¹¹¹ Rule 89(7).

¹¹² Army Rules, rule 63.

Findings or sentences of all tiers of courts martial are not valid unless confirmed by a competent authority¹¹³ in a manner prescribed by the Army Act.¹¹⁴ The COAS or an officer authorised by him may confirm the finding and sentence of the general court martial.¹¹⁵ The convening officer or an authority superior to him may confirm the finding and sentence of the field general court martial.¹¹⁶ The finding and sentence of a district court martial may be confirmed by someone authorised to convene a general court martial, i.e. the COAS or someone authorised by him.¹¹⁷ The finding and sentence of the summary court martial do not require confirmation unless the officer holding the trial has less than five year service and is not on active service in which case it must be approved by an officer authorised to convene a district court.¹¹⁸ The proceedings of a summary court martial, however, should be transmitted to a reviewing authority for a review.¹¹⁹ A sentence of death, imprisonment and dismissal must be confirmed by the COAS.¹²⁰ The confirming authority has been given wide powers: it may mitigate, remit or commute sentences.¹²¹

The confirming authority has also the power to order revision of finding and sentence by the same court which passed the original finding and sentence.¹²² If a guilty decision is found to be invalid for any reason or cannot be supported by evidence, the COAS or the Federal Government may substitute it for a valid decision.¹²³

Executive remedy against decisions of military courts

The Army Act allows an aggrieved person a remedy against the finding and sentence of the general court martial, field general court martial and district court martial to submit a petition to the confirming authority and after confirmation to the COAS or the Federal Government against such finding or sentence. A similar remedy is available against the finding and sentence of the summary court martial.¹²⁴ The Federal Government, the COAS or any other authorised officer may annul any proceedings of any court martial on the ground that they are illegal or unjust.

Right of appeal to the military Court of Appeals

¹¹³ Pakistan Army Act, section 119.

¹¹⁴ *ibid*, sections 120-126.

¹¹⁵ *ibid*, section 120.

¹¹⁶ *ibid*, Section 123.

¹¹⁷ *ibid*, section 121.

¹¹⁸ *ibid*, section 127.

¹¹⁹ *ibid*, section 128.

¹²⁰ *ibid*, section 122.

¹²¹ *ibid*, section 124.

¹²² *ibid*, section 126.

¹²³ *ibid*, section 129.

¹²⁴ *ibid*, section 131.

The Army Act bars appeals to ordinary courts. Section 131 states that ‘for the removal of doubt it is hereby declared that no appeal or application shall lie in respect of any proceeding or a decision of court martial to any court exercising any jurisdiction’.¹²⁵ But appeal to a military Court of Appeals is allowed in a limited number of cases.

Section 133A allows an aggrieved person the right of appeal to the Court of Appeals, within sixty days, for Islamic law (hadd) cases which consists of the COAS or an officer authorised by him. Any hadd sentence passed by a court martial cannot be executed till the Court of Appeals confirms it. The Court of Appeals has been invested with wide powers. ‘It may confirm the finding or sentence or both, substitute a valid finding or sentence for an invalid finding or sentence, call any witness for additional evidence, annul the proceedings of the court martial on the ground that they are illegal or unjust; or order retrial of the accused by a fresh court’.¹²⁶ The decision of the Court of Appeals for hadd cases shall be final and shall not be called into question before any court or other authority’.¹²⁷ The Army Act and the Army Rules do not provide any qualification for a person sitting in the Court of Appeals except that the person sitting in it should be a Muslim. Rule 193 of the Army Rules, however, states that the judge advocate ‘may’ attend the Court of Appeals¹²⁸ and at the end of hearing sums up the evidence and advise the court on relevant law.¹²⁹ As the attendance of the judge advocate is optional, it might be the case that a senior military officer is the sole decision maker without having proper legal qualification and training or the benefit of the legal assistance provided by the judge advocate.

Section 113B also allows the right of appeal in cases where a death sentence, imprisonment for life or more than three months is awarded or someone is dismissed from service. The aggrieved person may prefer an appeal, within forty days, to the Court of Appeals consisting of the COAS or one or more officers, not below the rank of Brigadier or Major General.¹³⁰ In contrast to the Court of Appeals for hadd cases, the Court of Appeals for this category of cases consists of more than one persons. The Army Act, however, as usual does not mention the legal qualification or training of the members of the Court of Appeals but a judge advocate ‘may’ attend the proceedings. The Court of Appeals has the power to accept or reject the appeal as a whole or in part, substitute an invalid finding or sentence with a valid finding or sentence, call any witnesses to give evidence and be cross examined, annul the

¹²⁵ *ibid*, section 131.

¹²⁶ *ibid*, section 133A.

¹²⁷ *ibid*.

¹²⁸ Army Rules, rule 191.

¹²⁹ *ibid*, rule 200.

¹³⁰ Pakistan Army Act, section 133B.

proceedings of the court martial on the ground that they are 'illegal or unjust', order retrial by a fresh court, remit the whole or part of the punishment or commute the punishment.¹³¹ The decision of the Court of Appeals is final and shall not be called in question before any court or other authority'.¹³²

B. Application of the tests

Independence of military courts

The military courts do not seem independent. The Federal Government has control and command over the armed forces of Pakistan.¹³³ The Federal Government grants commission in the armed forces and may dismiss any person, including the COAS.¹³⁴ All military officers work under the Ministry of Defence including the judge advocate. The judge advocate has no connection with the Ministry of Law and Justice or with the Attorney General's office. All those involved in the proceedings of the military courts are part of and dependent on the Executive branch from appointment till retirement.

The military courts are convened and dissolved by the COAS or officers authorised by him. They are appointed on a case by case basis, i.e. they are appointed on temporary basis and there is no security of tenure as judges. Their promotion, transfers and suspension are within the hands of the COAS and officers subordinate to and authorised by him. The annual confidential performance reports of the members of the court martial are produced by their senior military officers. The judicial function of the members of courts martial are not exempt from evaluation. Pay rise and other military awards, honours, decorations are all assessed and determined by immediate senior military officers. Dismissal from service is also investigated and determined within the army. Members of the military courts are neither legally qualified nor trained. The judge advocate, who is legally qualified and trained, is required to attend and advise the General Court Martial on points of law but his attendance in other tiers of court martial is not compulsory. The relevant law does not provide any criteria as to how it will be decided that in a given case the attendance of judge advocate is or is not required. This effectively means that accused are tried by a panel of lay military officers.

Neither the Army Act nor the Army Rules touch on the independence of the judge advocate. The judge advocate is appointed by the convening officer like other members of the court¹³⁵ and he acts as the

¹³¹ Ibid.

¹³² Ibid.

¹³³ Constitution of Pakistan, Article 243.

¹³⁴ Pakistan Army Act, section 16.

¹³⁵ *ibid*, section 103.

representative of the Judge Advocate General of the Army (JAG).¹³⁶ The JAG acts as a legal adviser to the COAS and the Ministry of Defence.¹³⁷ The JAG is appointed by the Federal Government (i.e. the Ministry of Defence) but he acts under the supervision of the COAS.¹³⁸ Junior judge advocates are appointed by the COAS. They are promoted and their performance monitored by the Army. No safeguards are provided within any of the relevant law and regulations – the Army Act, the Army Rules, the Army Regulations (Rules) 1998 and the Army Regulations (Instructions) 2006 – as to how the independence of military courts will be ensured.

Impartiality of military courts

Given that the military justice system is managed by the military leadership itself, it is hard to be seen as an impartial system by a reasonable observer. Rule 31 of the Army Rules provides certain safeguards to ensure impartiality by disqualifying certain individuals from sitting on general court martial: the convening officer, the commanding officer of the accused or the corps to which the accused belongs, the prosecutor or a witness for the prosecution, someone who has taken part in the investigation or inquiry of the case under consideration or someone who has personal interest in the case. This is encouraging that those closely associated with the investigatory process or the accused are disqualified but it is, per se, not sufficient as all other individuals involved are not given guarantees in respect of their promotion, transfer, suspension, annual confidential performance reports, pay rise and dismissal by the military chain of command. They are potentially susceptible to pressure and influence. Rule 89(8) of the Army Rules requires the judge advocate to maintain his impartiality but safeguards for ensuring impartiality are not provided. Like all other individuals involved in the military justice system, the judge advocate comes under the chain of military command and is susceptible to pressure and influence.

Equality before the court

The Army Act and Army Rules guarantee several elements of the principle of equality before the court. The accused is allowed access to the court, a lawyer, documentary evidence, to cross examine witnesses, produce witnesses in one's favour and a reasonable time to prepare defence¹³⁹ but evidence suggests a wide gap between theory and practice:

¹³⁶ Army Rules, rule 89(2).

¹³⁷ The Army Regulations 1998, Vol I (Rules), Rule 24.

¹³⁸ *ibid.*

¹³⁹ Army Rules; rr 13-15 and 23.

The military can, and sometimes does, dissolve and reprimand courts that reach verdicts they disagree with, then order repeated retrials, according to court documents and former military officials. 'This happens often. The military is command-oriented, right from arrest until execution', said a former military judge.

[A] former military legal adviser ... said the military sometimes prevented suspects from having lawyers, making convictions easier.... He said he knew of more than 100 cases where the military used the charges to bypass civilian courts and try a defendant suspected of a different crime.¹⁴⁰

Civilians tried by military courts particularly seem disadvantaged. The military courts convicted around 95 people. 'There have been no acquittals'.¹⁴¹ 'At least 27 convicts have filed appeals with civilian courts, alleging coercion of confessions and denial of access to lawyers and to evidence used against them'.¹⁴²

One of the convicts, [...] was already on trial for murder in a civilian court when he disappeared from Lahore's central jail in April 2015, according to his family and lawyers. Five months later, his family read a press release saying he had been sentenced to death by a military court. His lawyers say they still do not know what evidence was used against him Even after the family filed an appeal with the Lahore High Court, [the] lawyers said they were not allowed to view the military's evidence.¹⁴³

Lawyers who appeared before military courts have been regularly raising fair trial concerns:

The counsel, who did not want to be identified, had also appeared for an accused before a field general court martial trying some accused persons charged with the attack on General

¹⁴⁰ Katherine Houreld, 'Worries grow as new courts hand Pakistan army more power' Reuters (Pakistan, 25 May 2015) <<http://www.reuters.com/article/us-pakistan-military-courts-insight-idUSKBN0ML2PD20150325>> accessed 21 July 2016.

¹⁴¹ Dawn, 'All eyes on SC as judgment imminent in military courts' abuse claims' (Karachi, 28 June 2016) <<http://www.dawn.com/news/1267785/all-eyes-on-sc-as-judgment-imminent-in-military-courts-abuse-claims>> accessed 19 July 2016.

¹⁴² *ibid.*

¹⁴³ Asad Hashim, 'Insight - Pakistan's new military courts challenged over abuse claims' Reuters (Pakistan, 28 June 2016) <<http://uk.reuters.com/article/uk-pakistan-military-courts-insight-idUKKCN0ZD30R>> accessed 21 July 2016.

Pervez Musharraf in December 2003. He said that during the trial he had to visit the Attock Fort but was not provided the relevant documents.

One of the lawyers appearing in such cases believes that appearance before a court martial was only waste of time as he faced handicap in defending his client due to lack of provision of important documents attached to the trial.¹⁴⁴

The military tends not to disclose the location of the trials to the relatives of the accused and the public. Most of the trials are secretive¹⁴⁵ and are neither accessible to relatives of the accused nor to the public.

Review by a high tribunal

The Army Act allows a review by the Court of Appeals in hadd (Islamic law) cases and cases involving death penalty, life imprisonment and for imprisonment up to three months but the jurisdiction of all other courts, including the High Court, Federal Shariat Court and the Supreme Court of Pakistan, is ousted. Like all military courts, the Court of Appeals is convened and managed by the military officials. The strict military chain of command rule applies to the convening officer, judge advocate and other members of the military courts and once findings and sentences are confirmed by a senior officer or the COAS, it is highly unlikely that those findings and sentences will be changed. The Court of Appeals is invested with wide powers but it does not seem to be an independent and impartial tribunal and any review by such a tribunal is less likely to inspire confidence either in the accused or the public. The Army Act also provides other executive forums for seeking remedies against the decisions of military courts, e.g. complaints to the COAS or the Federal Government. But access to the superior courts, available to ordinary litigants, is denied to those subject to the Army Act.

The military justice system: a legal island

The military justice system is a legal island within the judicial structure of Pakistan running as a parallel and detached departmental / Executive justice system. Military courts seem neither independent nor impartial. Military courts are special courts established and governed by a special law. They are not administered and managed by the High Court or the Supreme Court. Their judicial functions are also

¹⁴⁴ Waseem Ahmad Shah, 'Focus on inconsistencies in Army Act' *Dawn* (Karachi, 18 November 2012) <<http://www.dawn.com/news/765116/focus-on-inconsistencies-in-army-act/print>> accessed 21 July 2016.

¹⁴⁵ International Commission of Jurists, 'Pakistan: military trials for civilians, questions and answers' (Geneva, April 2015) <<http://www.icj.org/pakistan-trials-of-civilians-before-military-tribunals-a-subversion-of-justice/>> accessed 21 July 2016.

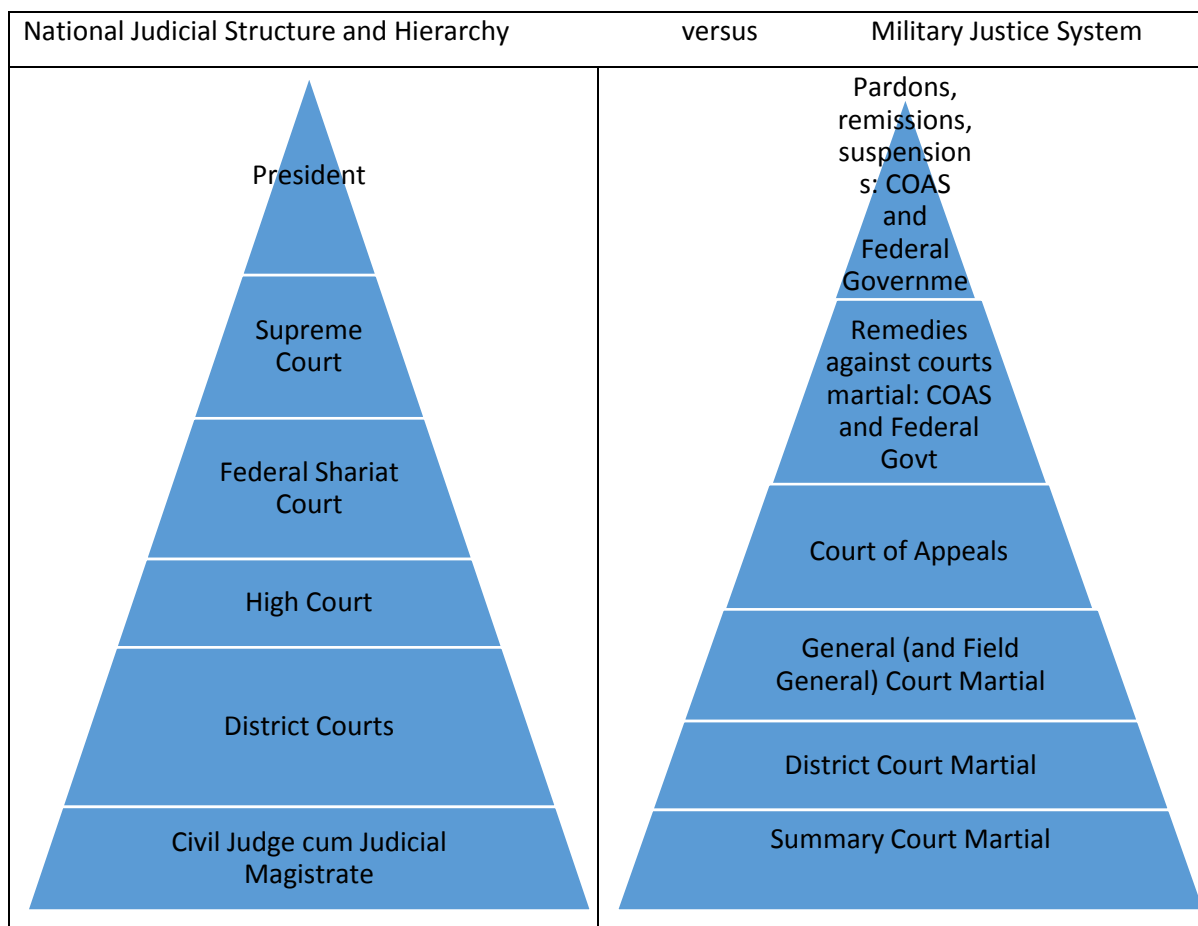
excluded from the supervision of the High Court and the Supreme Court. There is no right of appeal against decisions of military courts either to the High Court or the Supreme Court on issues of substantial or procedural law or convictions and sentences.¹⁴⁶ But the two recognised grounds for judicial review by the High Court or the Supreme Court are '*coram non iudice*' and '*mala fide*'.¹⁴⁷ The question of being *coram non iudice* does not arise as military courts are constituted under the Army Act and have solid legal foundation. In theory a judicial review may be brought on the ground of *mala fide* but in practice it is extremely hard as the High Courts tend to hold that Article 199(3) of the constitution does not allow them to review actions 'by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any laws relating to any of those Forces in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law'. The power to pardon, remission and suspension lies with the COAS and the Federal Government.¹⁴⁸ Forums for redress are provided but they are part and parcel of the Executive.

The below table demonstrates how the military justice system operates as an independent parallel system.

¹⁴⁶ See Pakistan Army Act, s 133.

¹⁴⁷ See *Military courts case* [73] (n 13).

¹⁴⁸ Pakistan Army Act, section 143.



C. The military courts case: an appraisal

In the *military courts case*, the central issue, in respect of the military courts, was whether the trial of civilians by military courts was against the right to a fair trial. Relying mainly on the case of *Ali*,¹⁴⁹ the Supreme Court held at [163] by a majority of 11 votes to 6 that:

The process and procedure followed by the forums, established under the Pakistan Army Act, have come up for scrutiny before this Court and found to be satisfactory and consistent with the recognized principles of criminal justice. In [*Ali* 1975] the procedure to be followed for trials under the Pakistan Army Act was dilated upon in great length ... and found to be in conformity with the generally accepted and recognized principles of criminal justice. A similar view was also expressed by this Court in ... *Mrs. Shahida Zahir Abbasi* [1996]... The provisions of the Pakistan Army Act were scrutinized by the Federal Shariat Court in ... *Col. (R) Muhammad Akram* [2009]... and generally passed muster. The procedure which was found

¹⁴⁹ *Brig Retd F B Ali v The State*, PLD 1975 SC 506.

acceptable for officers and men of the Pakistan Army can hardly be termed as unacceptable for trial of terrorists, who acts as enemies of the State.

It has already been established above that trials by the military courts fall foul of the fair trial standards. Here I argue that the majority judgement is *per in curiam*.

First, all cases cited in support of its conclusion are based on the ratio of *Ali*. The case of *Ali* was decided on the basis of an incomplete criteria under general law. Brig (Retd.) F. B. Ali and other military officers were accused of waging war against the state by plotting to overpower and arrest the senior military leadership and to assume power in the country by means of a criminal force. They were arrested and tried by a general court martial. They objected to their trial by a military court, inter alia, on the ground of general prejudice and being without jurisdiction. The military court overruled their objections and Ali, together with others, was convicted and sentenced. Brigadier Ali submitted a writ petition in the High Court on the above grounds but was rejected. The Supreme Court of Pakistan granted leave to appeal on 18 March 1975. All judges gave separate opinions. In a separate opinion Justice Anwarul Haq wrote:

Coming now to the substance of the contention raised on behalf of the appellants with reference to Fundamental Right No. I [i.e. No person shall be deprived of life or liberty save in accordance with law], our attention was drawn by Mr. M. Anwar to the criteria of a fair trial as enumerated on page 197 of the Constitution of the Islamic Republic of Pakistan (1962) by Mr. M. Munir, a former Chief Justice of Pakistan. According to the learned author, in a criminal trial, an accused person has under the *general law* some important rights [emphasis added]. These are:

- (1) The right to know before the trial the charge and the evidence against him;
- (2) The right to cross-examine the prosecution witnesses;
- (3) The right to produce evidence in defence;
- (4) The right to appeal or to apply for revision;
- (5) The right to be represented by counsel;
- (6) The right to have the case decided by the Judge who heard the evidence;
- (7) The right to trial by jury or with the aid of assessors;
- (8) The right to certain presumptions and defences; and
- (9) The right to apply for transfer of the case to another Court.

Justice Haq further said that:

The right mentioned at No. 7 is no longer operative in Pakistan as the requirement of a trial by jury or with the aid of assessors was dispensed with long ago. The other rights enumerated by Mr. Munir are clearly available in a trial by a Court Martial. Although there is no appeal to a higher court, yet the convicted accused has a right of revision to the Commander-in-chief of the Pakistan Army or to the Federal Government under sections 131 and 167 of the Pakistan Army Act. It is true that a Court Martial is not required to write a detailed judgment, as is commonly done by the ordinary criminal Courts of the country, yet this is obviously not one of the essentials of a fair trial, it being intended more for the benefit of the appellate Court rather than for that of the accused.

The list of key elements for fair trial provided by Munir is derived from general law such as the Code of Criminal Procedure of Pakistan. It does not touch on constitutional guarantees or derive guidance from international human rights law. This is why the list is limited missing key elements of the right to a fair trial such as trial by an independent and impartial tribunal.¹⁵⁰

Second, the correct criteria in 1975 was contained in Articles 9 and 10 of the 1973 constitution and the UDHR and ICCPR. Justice Haq should have sought guidance from the Universal Declaration of Human Rights 1948 and although in 1975 Pakistan was not party to it but could have sought guidance from International Covenant on Civil and Political Rights 1966. In *Ali* Justice Haq relied on an incomplete criteria provided by Munir and is *per in curiam*.¹⁵¹

Ali became the key precedent and was followed by superior courts in subsequent cases without deeper analysis or re-evaluation in light of the legal developments. In 1996 in *Shahida Zahir Abbasi*¹⁵² at [290], the Supreme Court of Pakistan relied on *Ali*: 'From [*Ali*], it is quite clear that the rules of procedure applicable for trial of a person in a criminal case before a Military Court do not violate any accepted judicial principle governing trial of an accused person'. In 2009 in *Muhammad Akram*, the Federal Shariat of Pakistan relied on *Abbasi* and *Ali*: 'in the case of *Miss Shahida Zahir Abbasi* [...] our

¹⁵⁰ The comment of Justice Haq that a reasoned judgment is meant for the appellate court is incorrect. A reasoned judgement is for the benefit of the accused so that he can make a meaningful appeal. How can an accused make a decision to appeal unless a fully reasoned judgment is provided to him?

¹⁵¹ It is interesting to note that other judges neither used the criteria nor clearly agreed with Justice Haq on this point. Only Justice Ahmed said: 'I agree'.

¹⁵² PLD 1996 SC 632.

Supreme Court had held that 'the procedure prescribed for trial before Military Court is in no way contrary to the concept of a fair trial in a criminal case'.¹⁵³

Third, with respect to the Supreme Court of Pakistan, in the *military courts case*, the majority seriously failed to apply its judicial mind to the matter before it in light of the correct legal test contained in the UDHR, ICCPR, Articles, 9, 10, 10-A of the constitution and authoritative pronouncements of the Supreme Court on the right to a fair trial. The Munir criteria, on which *Ali* was decided, is incomplete and the legal framework had developed since *Ali* was decided in 1975. First, Article 10-A was included in the 1973 constitution in 2010. In 2012 in *Gillani*, the Supreme Court said that 'the inclusion of the principle of right to a 'fair trial' is now a constitutionally guaranteed fundamental right and has been raised to a higher pedestal; consequently a law, or custom or usage having the force of law, which is inconsistent with the right to a 'fair trial' would be void'.¹⁵⁴ Second, Pakistan had acquired new international human rights obligations in 2010 by acceding to the ICCPR. The superior courts also had started referring to international human rights law. In *Gillani*, the Supreme Court said that 'the legislature did not define or describe the requisites of a 'fair trial'. By not defining the term the legislature, perhaps it intended to give it the same meaning as is broadly universally recognized'.¹⁵⁵ In *Pakistan Muslim League*, the Supreme Court said that 'although the Human Rights Declaration is not a legally binding treaty, its provisions are considered customary international law and binding, as such, on all member States of the United Nations and therefore on Pakistan'.¹⁵⁶ The Supreme Court, in considering the *military courts case*, was bound to abandon the incomplete Munir's criteria and rely on the correct legal tests under the constitution, case law of the Supreme Court and human rights law. The majority conveniently fudged the issue in two senses. First, the majority adopted the court's historic approach by taking refuge behind Article 8(3), i.e. it does not allow the court to assess the compatibility of military justice system with fundamental rights such as the right to a fair trial.¹⁵⁷ Second, despite taking shelter behind Article 8(3), relying on *Ali*, they called from behind Article 8(3) that the trial of civilians by military courts meets fair trial standards.¹⁵⁸ This unfortunate precedent of relying on Article 8(3) was followed in another case. On 29 August 2016, a five member bench of the

¹⁵³ PLD 2009 FSC 36, [30].

¹⁵⁴ *ibid*, [25].

¹⁵⁵ *Syed Yousef Raza Gillani Case*, [24] (n 57).

¹⁵⁶ *Pakistan Muslim League*, [38] (n 52).

¹⁵⁷ See *military courts case*, [161 – 174] (n 13).

¹⁵⁸ This unfortunate precedent of relying on Article 8(3) was followed in another case. On 29 August 2016, a five member bench of the Supreme Court headed by the Chief Justice of Pakistan did not grant leave to appeal against sixteen death sentences passed by the military courts against terror suspects: see *Said Zaman Khan and others v Federation of Pakistan*, Supreme Court of Pakistan (Islamabad, 29 August 2016) (unreported) <<http://www.supremecourt.gov.pk/web/page.asp?id=2277>> accessed 15 September 2016.

Supreme Court headed by the Chief Justice of Pakistan did not grant leave to appeal against sixteen death sentences passed by the military courts against terror suspects.

The Article 8(3) (a) conundrum

Article 8(1) states that 'any law, or any custom or usage having the force of law, in so far as it is inconsistent with [fundamental rights], shall, to the extent of such inconsistency, be void'.¹⁵⁹ The effect of this provision is that any law that is inconsistent with the constitutionally recognised fundamental rights is void. Article 8(2) prohibits the enactment of inconsistent laws with fundamental rights. Article 8(3) (a), however, excludes certain laws from the operation of Article 8(1). These laws include 'any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them'.¹⁶⁰ The 'Army Act 1952 is one of those pieces of legislation which is protected under Article 8(3) (a) of the Constitution from being challenged on the ground of its consistency with [fundamental rights]'.¹⁶¹

In post 2010 changed legal landscape, this is not the correct approach for five reasons. First, the right to a fair trial was recognised as a fundamental right in 2010 by inserting Article 10-A in the constitution. Second, Pakistan acquired international human rights obligations by acceding to the ICCPR in 2010. Third, the Supreme Court has through its judgments displayed a change of attitude towards international human rights law and the right to a fair trial, i.e. it tends to rely and give preference to human rights law. Fourth, elements of the right to a fair trial such as trial by an independent and impartial tribunal are of absolute nature and non-compliance with absolute rights is not permitted on any ground. Finally Article 8(3) (a) together with Article 199(3) has created a legal space where fundamental rights and human rights law do not apply. This legally protected space from judicial scrutiny, i.e. the military justice system, is against the spirit of constitution and human rights law.

Supreme Court on trial of civilians by military courts

The trial of civilians by military courts is not justified as it does not meet the exceptionality and fair trial criteria. Regarding trial of civilians by military courts, in the *military courts case*, the Supreme Court at [163] said: 'The procedure which was found acceptable for officers and men of the Pakistan Army can hardly be termed as unacceptable for trial of terrorists, who acts as enemies of the State'.

¹⁵⁹ Constitution of Pakistan, Article 8(1).

¹⁶⁰ *ibid*, Article 8(3) (a).

¹⁶¹ PLD 1996 SC 650.

The Supreme Court, with respect, failed to apply the correct legal test. First, the majority did not apply the correct legal test in light of the changed legal framework so it cannot be sustained that the military justice system meets the fair trial standards. Second, it did not apply the correct legal test for trial of civilians by military courts, i.e. a state has to show that ordinary courts have failed to function and other high security courts are unable to work and that the trial by special or military courts conforms to the standards of fair trial.

This exceptional criteria is not met in this case for two reasons. First, as a matter of fact, ordinary courts in Pakistan are functioning normally. Special Anti-Terrorists courts are established since 1997 to deal with terrorism cases. They are working normally as well.¹⁶² It is true that the conviction ratio in terrorism cases is very low but it is not due to a lack of functioning of ordinary courts or special courts. The main reason for the low conviction rate is seriously weak and flawed investigation and lack of reliable evidence. There are instances of convictions by the Anti-Terrorist courts where reliable evidence was produced.¹⁶³ It is interesting to note that military is part of the joint investigation team (JIT) for investigating terrorism cases.¹⁶⁴ The Army Amendment Act 2015 has neither changed the composition nor extended powers of the JIT. It begs the question as to why the military courts are able to convict on the basis of evidence collected by the JIT but ordinary courts and Anti-Terrorist Courts were not applying the same standard of proof. The need was to improve investigation and provide better protection to witnesses, lawyers and judges.

Second, as established above, the military courts do not meet the requirements of fair trial. Had the majority applied the correct legal test, it would have found no justification for trial of civilians by military courts.

III: Conclusion

Those subject to the Army Act have the right to a fair trial. The military justice system does not meet the standards of fair trial denying those subject to the Army Act the right to a fair trial. The majority judgment in the military courts case is per in curiam. There is no justification for trial of civilians by military courts. The military justice system is outdated and needs large scale reformation.

¹⁶² See a list of Anti-Terrorism courts operating in the Khyber Pakhtunkhwa province: http://www.peshawarhighcourt.gov.pk/special_courts.php accessed 16 September 2016. I am also aware that the international community is supporting Pakistan to improve its civil law enforcement agencies. The European Union, US Aid and the UK are providing support to the civil law enforcement agencies to enable to them to deal with the problem of terrorism more effectively.

¹⁶³ Judgments passed by Anti-Terrorism Court, Mardan, Pakistan. On file with the author.

¹⁶⁴ Anti-Terrorism Act 1997, section 19.

Recommendations

1. The military justice system cannot run as a parallel and detached system from the national judicial system. There is no justification for having two totally separate systems: one for ordinary people and one for armed forces. The military is doing great injustice to itself by shielding itself from the supervision of superior courts. The military can and should have their own justice system consisting of the four tiers: summary court martial, district court martial, field general court martial and general court martial but safeguards must be put in place to ensure independence and impartiality of judges, prosecutors, judge advocate, investigators and witnesses. Administratively, military courts should remain under the military command but at the appeal stage, the military justice system must be merged with the national judicial system. The bar to appeal to ordinary courts should be abolished and findings and sentences of all tiers of military courts should be appealable to the High Court and, in *hadd* cases as is already the case, to the Federal Shariat Court. All death sentences passed by military courts must, like death sentences passed by ordinary courts, be confirmed by and appealed to the High Court. The military Court of Appeals must be abolished. The military justice system must be brought under the judicial supervision of superior courts.

2. The judge advocate should be an independent person and his independence and impartiality must be clearly safeguarded by ensuring tenure of service, promotion, pay rise, transfer and cessation of functions etc. The attendance of JAG at all tiers of courts martial should be compulsory.

3. Those who sit on courts martial, their judicial functions must be excluded from consideration in annual performance reports, promotion, pay raise, transfer, determination of awards, medals etc.

4. Articles 8(3) (a) and 199(3) of the constitution are against the letter and spirit of the constitution and human rights law as they create a legal space where fundamental rights and human rights law are not applicable, i.e. the services personnel are deprived of some of the most important human rights such as the right to a fair trial. In the current legal landscape, this is untenable legally. This is unacceptable morally.

5. The Pakistani military justice system is based on the British colonial laws closely resembling the British military justice system. The European Court of Human Rights (ECtHR) gave strong blows to the British military justice system by declaring most of its aspects incompatible with the right to a fair trial especially the independence and role of judge advocate, separation of Executive and the

right of appeal to an ordinary higher court.¹⁶⁵ In response to those judgments, the British military justice system went through major changes in 1996.¹⁶⁶ Those changes were assessed by the ECtHR and the British courts in subsequent cases and found to be compatible with fair trial standards.¹⁶⁷ Pakistan might want to study and learn from the British experience of reformation.

6. The powerful military establishment has always resisted changes to the military justice system or to put it differently, they have always been able to legally shield themselves against proper and full judicial scrutiny by the superior courts. The military establishment needs to show a more sensible and logical approach by letting themselves to be judicially scrutinised by superior courts. This will only strengthen the military justice system, enhance the morale, effectiveness and image of the armed forces of Pakistan rather than undermining the force.

¹⁶⁵ See *Findlay v United Kingdom* [1997] ECHR 22107/93, *Morris v United Kingdom* (2002) EHRR 34 52 and *Grievs v United Kingdom* (2004) 39 EHRR 2. On trial of civilians by military courts, see *Martin v United Kingdom* (2007) 44 EHRR 31.

¹⁶⁶ See UK Armed Services Act 1996 <<http://www.legislation.gov.uk/ukpga/1996/46/contents>> accessed 18 April 2017.

¹⁶⁷ See *Cooper v United Kingdom* [2003] ECHR 48843/99 and *R v Spear and others* [2002] UKHL 31, 3 All ER 1074.