

JUDICIAL REVIEW OF COUNTER-TERROR LEGISLATION: THE JURISPRUDENCE OF THE UNITED STATES SUPREME COURT AND THE SUPREME COURT OF PAKISTAN

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ABSTRACT

Since the attacks of 9/11, terrorism has emerged as a serious concern for national security. Both the United States and Pakistan have and continue to experience the scourge of terrorism and strive to grapple with it in a manner that is compliant with their constitution. Consequently, the counter-terrorism measures put in place by both states have been put to review by the highest constitutional courts of the states. This work attempts to analyze the jurisprudence of the United States Supreme court and the Supreme Court of Pakistan and examines whether the former has impacted the interpretation of the latter.

Keywords: Judicial Review, Judiciary, Terrorism, Legislation

INTRODUCTION

Militancy, terrorism, and religious extremism have of late appeared as factors, the repercussions of which, owing to their gravity, have compelled states to limit the fundamental guarantees contained in their constitutions with a view to safeguarding their national security. Such a situation, as noted by Justice Barak in *PAC v. Israel* is one that requires the balancing of fundamental rights on one hand with the urgent need to ensure state security. He very effectively explains that

...the struggle against terrorism is not conducted outside law, but within the law, using tools that law makes available to a democratic state. Terrorism does not justify the neglect of the accepted norms. This is how we distinguish ourselves from the terrorist themselves. They act against the law, by violating and trampling it while in its war against terrorism a democratic state acts within the framework of law and according to the law. (Ana María Salinas de Frías, 2012)

The counter-terrorism law of a state has a very complex and important relationship with the constitutional law of that state. It raises significant constitutional questions pertaining to the relationship between the various organs of the state in the context of national security. The effectiveness of the judicial intervention on issues birthing from counter-terror legislation remains questionable, however, owing to the adamancy with which the legislature and the executive continue to reassert the need for stricter security laws. (Davis, *Counter-Terrorism Judicial Review: Beyond Dichotomies*, 2014)

Counter Terrorism Judicial Review

Mark Elliot explains judicial review as a doctrine based “on the rule of law doctrine which abhors the abuse of power.” (Elliott, 2001) The incorporation of fundamental/human rights into the constitutions of states has led to an expansion of the notion of judicial review. Such an expansion is considered as being, “clearly connected with the normative belief that as much as possible, the exercise of public power ought to be capable of being subjected to judicial scrutiny.” (Davis, 2014) Judicial Review of counter-terrorism legislation is crucial owing to the negative implications such laws have the potential of exuding on the constitutional and human rights and liberties of those subject to it. Counter-terrorism judicial review has been defined as “the use of judicialized processes to challenge the state behaviors that fall into the broad category of counter-terrorism.” (Davis, *Counter-Terrorism Judicial Review: Beyond Dichotomies*, 2014)

There are nevertheless some who, in matters pertaining to terrorism have expressed their support “for judicial deference, at times bordering on abstention.” (Jens Elo Rytter, 2014)

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Counter-Terror Legislation in the United States

The United States is no different from other democratic states that continue to grapple with the increasing threats of terrorism when it comes to striking a balance between its national security concerns and the prized principles of rule of law and democracy that it has always remained committed to. (Setty, 2015) Moreover, at the domestic level due to the need to guard the nation against future threats, the authority of the police, military, and intelligence forces have witnessed an unprecedented increase. (Setty, 2015)

The US under the Bush administration by considering the acts transpiring on 9/11 as an attack on its sovereignty, chose to respond to it by taking the route of war. Though the war paradigm might have made sense at the time and served as a foundation on which the legitimacy of a military campaign could be grounded, the idea of combating Al Qaeda and the Taliban through resorting to armed violence came with its own distinct set of challenges.

Guantanamo Bay; Extending the Law to a Legal Black Hole

In the context of the United States' war against terrorism, the selection of Guantanamo Bay as a detention site for terror suspects (unlawful enemy combatants) was essentially owed to its "unique territorial and jurisdictional status in American law". (Davis, Counter Terrorism Judicial Review: Beyond Dichotomies, 2014) Motivated by the objective of avoiding oversight of domestic judicial mechanisms and applicability of international law, terror detainees were held in captivity without being afforded any possibility of having the legality of their detention reviewed. Nevertheless, the USSC did on numerous occasions, rule on and find unconstitutional the system of detention and military commissions put in place by the government in Guantanamo. (Setty, 2015) Beginning with the extension of the Habeas Corpus Statute to Guantanamo in *Rasul v. Bush*, to concluding in *Boumediene* that the executive had not effectively ousted its statutory (in *Rasul, Hamdi, and Hamdan*) and its constitutional (in *Boumediene*) habeas jurisdiction, the Supreme Court embarked on a journey wherein it dismantled the government's claims of the impossibility of jurisdiction in Guantanamo.

Judicial Review of Detention in Guantanamo (2004 – 2008)

The USSC jurisprudence quite plainly establishes that the authority of the executive is not unlimited in times of war. This principle established by the USSC while it exercised judicial review of executive powers in cases before it from 2004 to 2008, was quite significant since it was for the first time in the history of the United States that the USSC held unconstitutional a wartime measure enacted by the congress. (*Hamdi v. Rumsfeld*) While the decisions of the courts led to "optimism and hope that the judicial check on executive overreaching would be effective" (Lobel, 2014), the unwillingness of the federal courts to follow through with the decisions of the USSC have to a large extent, rendered judicial review meaningless. (Lobel, 2014) The following section analyses the USSC's decisions in *Rasul v. Bush, Hamdi v. Rumsfeld, Hamdan v. Rumsfeld*, and lastly *Boumediene v. Bush* in an attempt to glean the reasoning employed by the USSC in its review of the rights of Guantanamo detainees.

Rasul v. Bush

This case made its way to the USSC in 2004 pursuant to the rejection of a habeas corpus writ contained therein by both the District Court and the Court of Appeals. Both courts concurred in concluding that, "aliens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of habeas corpus." (*Rasul v. Bush*, 2004) In other words, what was established in both instances was that actions of the executive when committed outside of United States territory and against aliens were not subject to judicial review. Consequently, the court in this case found itself faced with two important questions. Firstly, was there any possibility of subjecting executive detentions to judicial review on the basis of habeas corpus? Secondly, whether any "right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty," is conferred by the habeas statute. (*Rasul v. Bush*, 2004) The USSC however, in its determination on the issue, while stressing upon the historic purpose (*Rasul v. Bush*, 2004) of the writ, maintained that the limits of habeas corpus had (through the habeas statute) been expanded beyond its 17th and 18th-century limits. (*Rasul v. Bush*, 2004) The USSC arrived at the determination that its earlier decision in *Eisenrager* did not control the case at hand since its petitioners were situated differently than the detainees in *Eisenrager*. (*Rasul v. Bush*, 2004) Instead of recalling the decision in *Braden*, Justice Stevens authoring the decision of the court, reiterated that "presence within the jurisdiction of the district court is not an invariable prerequisite to the exercise of district court jurisdiction under the federal habeas statute." (*Rasul v. Bush*, 2004) *Braden* thus established

Rather, because “the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,” a district court acts “within [its] respective jurisdiction” within the meaning of §2241 as long as “the custodian can be reached by service of process.” (*Rasul v. Bush*, 2004)

The ruling of the court was not well received by the government since it undid the stance that it took on Guantanamo. Basing jurisdiction on the de facto sovereignty of the United States over Guantanamo, the court rejected the government’s claim that the habeas statute did not extend to Guantanamo. (David Jenkins, 2014) Though the appellants in *Rasul* had asserted a right of access to US federal courts accruing from both statute and the constitution of the United States, the USSC grounded its jurisdiction only in the habeas statute thus leaving the determination of the constitutional claim to the future. The application of the statute was extended to Guantanamo owing to the US government’s complete and effective control over it. Consequent to the USSC verdict, the US Congress responded by putting in place the Combatant Status Review Tribunals in 2004 and enacting, the Detainee Treatment Act of 2005 (DTA). The DTA aimed at stripping the federal courts of jurisdiction over the Guantanamo detainees and in that respect it was clearly directed at undoing *Rasul*.

Hamdi v. Rumsfeld

This case is of paramount importance since it touches upon the constitutional rights of US citizens who have been detained pursuant to the AUMF as unlawful combatants. On the issue of detention, the court sided with the governments in so far as it deemed Hamdi’s detention lawful under the AUMF. (*Hamdi v. Rumsfeld*) With the question of the legality of detention settled, the court proceeded to examine the crucial issue of the process that may be, “constitutionally due to a citizen who disputes his enemy-combatant status.” (*Hamdi v. Rumsfeld*) The majority, in this case, were convinced that Hamdi had properly invoked 28 U.S.C. section 2241 to challenge his detention and was therefore entitled to, at least, the limited procedures outlined in section 2241 and its companion provisions. (*Hamdi v. Rumsfeld*) More importantly, for the purpose of balancing the competing interests of the government (asserting autonomy for the effective pursuit of its specific goals) against that of a citizen (claiming due process before being stripped of his constitutionally guaranteed right) the majority sought recourse to its Mathews test. (*Hamdi v. Rumsfeld*) By employing the test in Mathews, the weighing of “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process” help determine the due process. (*Hamdi v. Rumsfeld*) These concerns are then judiciously balanced by analyzing “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute safeguards.” We take each of these steps in turn.” (*Hamdi v. Rumsfeld*) The balancing test applied by the court thus allowed for the executive to depart from ordinary trial procedures while securing some due process for detained enemy combatants. Justice O’Connor writing for the majority explained the need in this regard, to tailor due process rights of enemy combatants to “alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” (*Hamdi v. Rumsfeld*)

The dissenters to the majority’s opinion arrived at contrasting conclusions. Justice Clarence Thomas siding with the position taken by the government suggested that the government’s decision to detain Hamdi was not subject to judicial review. Justice Antonin Scalia and Justice John Paul Stevens, on the other hand, maintained that Hamdi by virtue of his American citizenship remained fully subject to the jurisdiction of the federal court that could proceed against him either on the ground of treason or for the commission of a crime. (*Hamdi v. Rumsfeld*)

Hamdan v. Rumsfeld

The Supreme Court’s verdict in *Hamdi* prompted Congress to enact the Military Commissions Act of 2006 (MCA) under which jurisdiction in respect of the review of detention was conferred to military commissions. The primary questions calling for determination, therefore, were whether such military commissions were duly authorized and whether the MCA could strip the court of its Habeas jurisdiction over the Guantanamo detainees. Also at issue in *Hamdan* was the retrospective application of the DTA to pending habeas petitions of the Guantanamo detainees including that of Hamdan, at the time of its enactment. Although the decision in *Hamdan* came after the passage of the DTA, the latter, in the estimation of the USSC did not apply retrospectively to the case. Thus, the USSC’s interpretation of the DTA frustrating the congressional intent of ousting jurisdiction, based exercise of jurisdiction in this case instead, on *Rasul*.

The majority opinion subscribed to the view that these military commissions lacked the power to proceed since they were in violation of the three requisite conditions Prescribed under the Uniform Code of Military Justice (UCMJ), which require the use of such commissions to be in compliance with, “the American common law of war...the UCMJ itself, insofar as applicable, and with the “rules and precepts of the law of nations,”...including, inter alia, the four Geneva Conventions...” (Hamdan v. Rumsfeld, 2006) Moreover, The Court interpreting the UCMJ arrived at the conclusion that the war on terror amounts to a non-international armed conflict which is regulated by international humanitarian law, in particular the Common Article 3 of the Geneva Conventions. (Hamdan v. Rumsfeld, 2006) It must also be borne in mind the USSC in this case, as it did in Rasul, based its jurisdiction on a statute which meant that Congress could still strip the court of such statutory jurisdiction which is what it ultimately did.

Boumediene

The USSC’s decision in Hamdan prompted Congress to enact the Military Commissions Act of 2006. This legislation served a dual purpose, not only did it empower the president to convene military commissions but also to deny enemy aliens access to federal courts through by amending the DTA. (Londras, 2014) Thus, the Congress had through this enactment deprived the Guantanamo detainees of their “statutory” right of a habeas petition before a federal court, thereby rendering the rulings of the USSC in Hamdi and Rasul (where the USSC had exercised jurisdiction based on statute) inoperable. Given this context, In *Boumediene v Bush*, could “either accept that it had no habeas jurisdiction because it had been stripped by the MCA and the constitutional habeas corpus provisions did not apply or find that, to at least some extent, detainees in Guantánamo Bay were constitutional rights bearers”. (Londras, 2014) The Court chose the latter course. In holding that the MCA was not in conformity with the constitution, Justice Kennedy writing for the majority recalled that the framers of the Constitution, bearing in mind the vitality of habeas corpus for the “protection of individual liberty,” had taken great care in limiting the grounds for its suspension to “when in cases of Rebellion or Invasion the public Safety may require it.” (*Boumediene v. Bush*, , 2008) Repeating the reasoning in *Rasul*, the majority ruled that “the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty” over Guantanamo and absent any restriction in accordance with the constitutions” suspension clause, habeas corpus remained among the limited constitutional rights to those detained there. (*Boumediene v. Bush*, , 2008)

The Unique Case of Anti-terror Legislation in Pakistan.

It would be an overstatement to suggest that the phenomenon of terrorism is fairly new to Pakistan. Though very much a subject of legal discourse since the 1970’s, the relevance of anti-terror legislation has acutely increased within the last two decades. In Pakistan’s jurisprudential lexicon, the term terrorism was first used by the government of Prime Minister Zulfikar Ali Bhutto. His government, through legislation, sought to transform a certain category of ordinary criminals into terrorists, in order to the resistance it had been facing from secessionist movements. ((RSIL), 2013)Up until 1997, the Suppression of Terrorist Activities Ordinance of 1975 had remained the primary legislation on the subject ((RSIL), 2013), modified from time to time in order to cater to the changing threat of terrorism. However, with the passage of time and due to an acute escalation in terror-related incidents (among other, political, factors) the popularly elected government of Prime Minister Nawaz Sharif Promulgated Pakistan’s Anti-Terrorism Act of 1997.

Constitutionality of the Anti-Terrorism Act; *Mehram Ali v. Federation of Pakistan*

The ATA, despite having undergone several amendments since its inception, remains Pakistan’s primary anti-terrorist legislation. The Act, over the years, has not only remained at the receiving end of strong opposition by various human rights and constitutional experts/agencies in the country but has also been viewed skeptically, even at the highest factions of the judiciary. On the other hand, the effectiveness of the ATA has also remained questionable. The low rate of convictions under the act has over the recent years given rise to serious doubts as to the efficacy of the act.

The term Terrorism, as defined in the amended ATA (Anti-Terrorism Act , 1997), appears to have been imported from the UK’s Terrorism Act of 2000. (Genevieve Lennon and Clive Walker, 2015) It has been criticized as being for its extremely broad definitions that in certain instances encompass ordinary criminal acts punishable under the regular criminal legislation of the state.

Ostensibly, the primary objective to be achieved through the enactment of this special legislation was the expedited adjudication of terror-related cases. In reality, however, the ATA was an

instrument by resort to which the government sought to hijack terrorism cases through a departure from the ordinary judicial system. (Fayyaz, 2008) The Act unduly increased the scope of terrorism by adopting an unreasonably broad definition and by putting in place special anti-terrorism courts in order to expedite the trial and conviction process. ((RSIL), 2013) Similarly, provisions of the Act on extending the aid of military and civilian armed forces to counter terrorism endeavors through an unprecedented increase in their powers also raised questions of constitutionality. Of the many problematic stipulations of this hastily enacted piece of legislation, its provisions establishing of special “anti-terrorist courts” that were to function under the auspices of the executive as opposed to the judiciary were ones that raised serious separation of powers concerns. (Fayyaz, 2008) Particularly problematic was Section 19 of the Act which generated much debate as to its constitutionality. The article, in the interest of expeditious trials, required firstly, that trials be concluded within seven days of the submission of the case, secondly, that courts refrain from granting an adjournment exceeding a period of two days, and lastly for appeals to be directed to the specially created anti-terrorism appellate courts (hence ousting the jurisdiction of the High Courts and the Supreme Court). In addition, S.19 in certain circumstances allowed for the trial of the accused in absentia. The contentious provisions of the act were soon put to scrutiny by the SCP in *Mehram Ali v. Federation of Pakistan* which ultimately led to the amendment of the ATA. The Supreme Court declared that

Promotion of social justice and eradication of social evils—No objection can be taken to the establishment of Special Courts for speedy Trials and prevention of terrorist acts/heinous offences under the Anti-Terrorism Act, 1997—Such Courts being validly constituted Courts are subordinate to the High Court and have to perform judicial functions under the Constitution and provisions contained in the Act (except which have been declared ultra vires). (*Mehram Ali v. Federation Pakistan*, 1998)

This in essence meant that the anti-terrorism courts were subject to the same rules and procedures as the regular civilian judiciary was and thus was bound to follow the same or similar procedural rules as regular courts, including rules of evidence. (Ahmad, 2015) Moreover, the SCP reaffirmed the constitutionally mandated authority of the High Courts and the SCP itself to review the decisions of these specially constituted courts. (Kennedy, 2004) This led the government to reform the ATA in light of the objections made by the SCP, in order to ensure its compliance with the constitution.

Pakistan Armed Forces (Action in aid of Civilian Power) Ordinance 1999; *Liaquat Hussain v. Federation of Pakistan*

Towards the end of the year 1998, Pakistan’s Sindh province had become the epicenter of a volatile law and order situation with an acute escalation in instances of ethnic violence. For the purpose of making the environment conducive for its efforts aimed at the maintenance of peace the government not only declared an emergency in the province but also, through the promulgation of the Pakistan Armed Forces (Action in aid of Civilian Power) Ordinance (PAFO), called in the military “to establish law and order situation in the province”. (Ahmad, 2015) In an extraordinary move, the government had through the PAFO allowed for the subjection of civilians to military trials by conferring broad judicial powers upon the military units deployed in the province. Nevertheless, the PAFO’s legality was immediately questions before the SCP, which in its famous ruling in *Liaquat Hussain v. Federation of Pakistan*, declared such an exercise of judicial authority by the military, unconstitutional. (*Liaquat Hussain v. Federation of Pakistan*, 1999)

Citing its earlier ruling in *Mehram Ali*, the SCP reiterated that Military Courts even if presumed to be “special courts” remain devoid of any legality since there exist no legislative/constitutional provisions making orders of such courts appealable before the SCP or generally subordinating these courts to the SCP. (ICRC, n.d.)Therefore in the SCP’s estimation, the military courts for civilians as envisaged under the PAFO did “not fulfill the criteria of a “Court” exercising judicial functions within the purview of the guidelines provided in the case of *Mehram Ali*.” (*Liaquat Hussain v. Federation of Pakistan*, 1999) While determining the issue of subjecting civilians to military trials, the SCP sought recourse to and considered at length the jurisprudence of the USSC on the matter. (*Liaquat Hussain v. Federation of Pakistan*, 1999) The conclusion of the court, therefore, was that “the establishment of Military Courts for the trial of civilians amounts to [a] parallel system for all intents and purposes which is wholly contrary to the known existing judicial system having been set up under the Constitution and the law.” (*Liaquat Hussain v. Federation of Pakistan*, 1999) The following passage from the court’s

judgment evidences the importance it attaches to the conformity of counter-terror measures with the provisions of the constitution

No patriotic Pakistani can have any sympathy with terrorists who deserve severe punishment, but the only question at issue is, which forum is to award punishment, i.e. whether a forum as envisaged by the Constitution or by a Military Court which does not fit in within the framework of the Constitution. No doubt, that when a terrorist takes the life of an innocent person, he is violating Article 9 of the Constitution, but if the terrorist, as a retaliation, is deprived of his life by a mechanism other than through due process of law within the framework of the Constitution, it will also be violative of above Article 9. (Liaquat Hussain v. Federation of Pakistan, 1999)

The 21st Amendment, Pakistan Army Act; *District Bar Association, Rawalpindi v. Federation of Pakistan*

Pursuant to the Peshawar school massacre, the parliament of Pakistan, backed by public approval, unanimously passed a bill amending Article 175 of the country's constitution. The Preamble of the 21st amendment highlights "the unprecedented threat to the integrity of Pakistan" as the reason behind the enactment of such an exceptional measure. (News, 2015) This bill which culminated into the 21st amendment of Pakistan's 1973 constitution, altered the jurisdiction of the ordinary system of courts as a consequence of which, persons suspected of involvement in terrorist activities (as defined under the ATA) within Pakistan were made subject to the jurisdiction of military courts as opposed to the civilian judiciary. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) In other words, the amendment had the effect of ousting the jurisdiction of regular courts established under A.175 of the constitution to try terror suspects. (The Constitution of Pakistan 1973, 2015)

In the constitutional petition challenging the amendment, *District Bar Association, Rawalpindi v. Federation of Pakistan*, filed before the Supreme Court of Pakistan it was argued by the petitioners that a constitution has certain basic features which must always remain unalterable and notwithstanding the unlimited power of the parliament otherwise to amend the constitution it is not empowered to alter the basic structure of the constitution and impede the courts from reviewing its constitutionality. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) The petitioners in the case along with the dissenting judges were of the view that the 21st amendment did, in fact, alter the basic structure of the constitution by violating the separation of powers doctrine, excluding due process rights, impeding rule of law and the guarantees of fair trial. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) The Government defending the constitutional amendment recently enacted by it maintained "that terrorism is a worldwide phenomenon and many countries have opted for the trial of terrorists by the Military Courts. Such course of action has been held to be valid by their Courts" reference in this regard was made to the jurisprudence of the USSC. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015)

Justice Azmat Saeed authoring the opinion for the majority upheld the 21st amendment and the constitution of military courts thereunder as constitutional. The majority was of the view that this case was not controlled by the SCP's precedent in *Liaquat Hussain* since "the dictum as stated therein is only applicable when the armed forces have been called in aid of civil power" under A.245 of the constitution. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) It was asserted by the majority that the situation in which the 21st amendment confers jurisdiction on the military courts is that of war which renders *Liaquat Hussain* inoperable. Justice Nisar and Justice Bandial concurring with the majority, placed reliance on the jurisprudence of the USSC in the formulation of their separate opinions. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) Justice Bandial understands the decision of the USSC in *ex parte Quirin* as an authority in support of his conclusion as to the constitutionality of subjecting a civilian to trial by the military. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) He goes on to discuss the USSC ruling in *Hamdi* and while recognizing that it operates as an authorization for constituting "a duly authorized and competently constituted military tribunal" for determining the "enemy combatant" status, he nevertheless conflates this with an authorization for the trial of an unlawful combatant by such military tribunal. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) He also discusses the Third Geneva Convention of 1949 and numerous provisions of International Humanitarian Law relevant to International armed conflicts at length and draws an analogy between them and the regime established under the 21st amendment. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015)

Justice Essa with whom Justice Khawaja joined in dissent considered the 21st amendment invalid in so far as it contradicts the constitutional provisions requiring the complete separation of the executive from the judiciary. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) Taking note of the nature of this amendment, which is in the form of a proviso to A.175 he concludes that it cannot be employed to nullify the remaining provisions of the article. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015) Relying on the rulings of the SCP in *Mehram Ali and Liaquat Hussain*, Justice Essa maintained that the Provisions of A.8 and guarantees of A.4 guard against the consequences that the 21st amendment is set to cause.

Impact of USSC jurisprudence on counter-terrorism judicial review in Pakistan

The SCP while arriving at a determination in *Liaquat Hussain v. Federation of Pakistan* sought recourse to the jurisprudence of certain Commonwealth states and more noticeably, the United States of America. Reference, in particular, was made to the case *Ex Parte Milligan* wherein a US citizen, alleged of having been involved in a conspiracy against the US government and its arsenal, was sentenced to death for committing the alleged offenses after being tried before a military commission. The USSC in that instance observed that,

It is the birthright of every American citizen when charged with a crime to be tried and punished according to law ... every trial involves the exercise of judicial power and from that source did not the military commission that tried him derive their authority? Certainly, no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish, and it is not pretended that the commission was a Court ordained and established by Congress. (*Ex parte Milligan*, 1866)

The USSC arrived at the conclusion that “the President could not in the exercise of his executive authority order the trial of an American citizen by Military Commission.” (*Ex parte Milligan*, 1866) The USSC ruling in *ex parte Milligan* has been celebrated as one that safeguards the right of ordinary civilians to be tried before the regularly constituted civil judiciary of the state and contributed significantly to the decision of the Supreme Court of Pakistan (SCP) in *Liaquat Hussain v. Federation of Pakistan*.

While the SCP appears to have understood the jurisprudence of the USSC correctly in *Liaquat Hussain*, the same cannot be said of its appreciation of the said rulings in *District Bar Association Rawalpindi v. Federation of Pakistan*. Not only does the court, as evident from the opinions authored by the majority judges, misunderstand the judgments of the USSC but evaluates them in isolation from their context. While the judges claim that USSC authorizes trial by military commissions of civilians it ignores the fact that the Guantanamo jurisprudence deals primarily with the rights of non-citizen detainees, this is further obviated by the fact that the Military Commissions act of 2009 submits to its jurisdiction only an “alien unprivileged enemy belligerent.” (The Military Commission Act of 2009) It was perhaps owed to such a misunderstood transplantation of foreign jurisprudence to the Pakistani context that Justice Khawaja maintained in his dissenting opinion that constitutional law doctrines developed outside of the state need to be examined critically before being imported into the system. (*District Bar Association Rawalpindi v. Federation of Pakistan*, 2015)

CONCLUSIONS

The liberty v. security debate will always remain crucial to the anti-terrorism discourse. The liberty of individuals will continue to stand on thin ground as long as repressive counter-terrorism measures continue to be labeled as “extraordinary measures” for “extraordinary situations”. It thus falls unto the judiciary to maintain a check on the policies of the legislature/executive and to resist succumbing to any exceptionalism that aims at securing security at the cost of liberty. While the “legislature can be driven to overreact to horrific acts of terrorism and the executive may attempt to shelter failures by the overuse of secrecy” (Roach, 2009) the courts must always remain conscious of the worth of and continue to safeguard the constitutionally guaranteed rights of individuals. Nevertheless, there are constitutional grounds that may justify some special judicial restraint in terrorism cases.

Even a limited analysis of the jurisprudence of both states made in this paper obviates how divided even the highest courts in both jurisdictions can be in their review of executive/legislative authority in respect of counter-terrorism measures. Nevertheless, both the USSC and the SCP have

through their jurisprudence remained committed to the need to ensure that the government, regardless of the exigencies of the situation, remains within the confines of the constitution when enacting measures aimed at strengthening the security of the state. Justice O'Connor's statement in *Hamdi* affirms this view in so far as "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." The jurisprudence of the USSC is illustrative of its resistance to the position taken by the government on Guantanamo, through its consistent refusal to defer to the congressional claims of lack of jurisdiction. The approach of the court though by no means one of deference, may nevertheless be characterized as one of restraint. It appears that the USSC has (in all the cases discussed in this work) tried to work with the government (not against it) by pointing out the shortcomings of their counter-terrorism measures hence calling on them to reform such measures as to make them constitutionally compliant. The Supreme court of Pakistan on the other hand, with the exception of its verdict in *District Bar Association Rawalpindi v Federation of Pakistan*, has shown no deference to the government's policies on terrorism while militantly guarding its independence and definitively asserting its power of review. This strain on the government's power in cases where the nation's security remained at stake, led to many failed attempts on part of the government to bring about legislative changes aimed at countering terror as a consequence of which the government ultimately sought to and successfully achieved its aims through amending the very constitution that stood guard against its excessive powers. While the SCP as obviated from its rulings, has relied on been inspired by the jurisprudence of the USSC, its actual practice raises many concerns about the manner in which it has understood and applied the precedents of the USSC. Despite placing reliance on the USSC the SCP seems to have ignored the cautious manner in which the USSC has dealt with the cases concerning executive authority in times of war and restrained from encroaching upon the turf of the executive. Moreover, the SCP appears to take these determinations of the USSC divorced from their specific context, as a result, transforming considerably the meaning that was assigned to them originally by the USSC.

Countering terrorism, within the confines of the constitution necessitates the initiation of a dialogue between the Executive/Legislature and the Judiciary. The exercise of executive/legislative authority in respect of measures aimed at countering terrorism without the possibility of judicial oversight spells grave consequences for the constitutionally protected rights of individual liberty and due process. Similarly, in exercising the power of judicial review in such matters the courts must remain careful in ensuring that they do not intrude upon the authority of the executive and unnecessarily burden in matters pertaining to national security. A dialogue thus, necessarily entails that the judiciary plays its active part in invalidating unconstitutional counter-terrorism measures put in place by the executive/legislature in a manner that does not impair the ability of the state to "combat terrorism by other less rights-invasive but equally as effective means". (Roach, 2009) This essentially would require the executive/legislature to stop viewing judicial review in such cases as an encroachment of its authority in matters pertaining to national security."

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