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**RESEARCH PAPER**

# The Military Trial of the Civilians: The Limits of Interpretation and Unwritten Judicial Policy in Pakistan

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**ABSTRACT**

This article provides overview of the history of civilians' military trials under highly debated Principle of Necessity. The objective is to show the functioning of the courts on the basis of unwritten law and unwritten judicial policy in the operation of the legal system in matters involving civilians' trials in military courts vis-a-vis the constitutionally granted fundamental rights of due process and a fair trial. This is accomplished by giving brief background, extensive case law and by conducting cross-sectional analysis of the relevant constitutional provisions. This article has concluded that these Courts' attitude might be described as "in defence of leftover continuity." It doesn't seem like the same has the intention of permanently resolving the finding. It is suggested that there is need to arrest the unwritten law based approach of the courts and that it is vital to refrain from making additional decisions when doing so is not required.

**KEYWORDS** Fair Trial, Interpretation, Military Trial, Necessity Principle, Proclamation of Emergency, Unwritten Judicial Policy

## Introduction

In political science and constitutional law, the constitution is a consensus document that governs a polity's operations. Fundamental rights are basic human rights that all citizens of a nation with a civilised system of government are naturally entitled to. Except for those that have a legitimate connection to the purpose of the proclamation of emergency in the event of necessity, none of these protections may be removed. However, the risks to human liberty are terrifying to consider if the government is granted arbitrary and unrestricted authority to suspend fundamental rights. Such surrender of power can result in chaos and dictatorship which the courts cannot tolerate.

## Literature Review

In his treatise, Montesquieu lists the three pillars of the state—the legislative, executive, and judicial branches—and the idea of separation of powers (Montesquieu, transl. Nugent, 2011). Since there existed a division of powers in England in practice but not in the constitution, he has based his views on practice rather than English law. It should be noted that, in contrast to the Constitution of Pakistan, the US Constitution does not grant the Supreme Court the authority to overturn laws, but it does express this in the situation of separation of powers (Marbury vs. Madison, 1803).

It should be highlighted, nevertheless, that the Pakistani Superior Judiciary has been vacillating back and forth and then starting over, even though it has the authority to overturn any law that violates the Constitution or fundamental rights (Constitution, 1973), (SSGC vs. FOP, 2018), (Shahid Pervaiz vs. Ejaz Ahmad, 2017). According to the instance of a case (Zafar Ali Shah vs. Gen. P. Musharraf, 2000) the list of reasons may be numerous, but it

is not all-inclusive. The erosion of the judiciary and a lack of moral authority have also been factors (DBA, Rwp. vs. FoP, 2015).

Nonetheless, the authorities in Pakistan occasionally do unwarranted activities. For instance, the ruling rendered by the SC declaring that the creation of Military Courts was beyond the bounds of the Constitution (Liaquat Hussain vs. FOP, 1999), (Ordinance (XII, 1998) led to a campaign of slander against the judiciary for preventing the establishment of Military Courts as a means of delivering justice quickly. The supposedly well-thought-out design damaged the judiciary's reputation. Despite the court's ruling in the Mohtarma Benazir Bhutto case that "tapping of telephones and eaves-dropping was immoral, illegal, and unconstitutional" (Benazir vs. President, 1998) even the phones of judges of the Superior Courts and other prominent figures have been being tapped.

The Benazir Bhutto case involved the SCP storming, which finally resulted in issuing contempt notices against the contestants in a pending appeal(Benazir vs. President, 1998). Since the government's moral and constitutional authority was completely undermined, the extra-constitutional action of the Armed Forces taking over the nation's affairs for a transitional period in order to prevent further destabilisation was justified on the grounds that the Constitution did not provide a solution to the crisis (Zafar Ali Shah vs. Gen. P. Musharraf, 2000).

## Material and Methods

This study focusses on doctrinal legal research, which critically examines the phenomena of unwritten law as the foundation for the operation of the nation's constitutional courts by taking into account significant constitutional case law and specific constitutional provisions.

The illiberal constitutionalism that results from Pakistan's unwritten, unconstitutional constitutionalism-based judicial policy is examined using qualitative research technique. The debate will assess the constitutional judiciary's expansion into other state organs' jurisdictions based on phenomena originating from said judicial policy, both theoretically and factually. In Pakistan, this has led to the emergence of illiberal constitutionalism.

Naturally, a component of this research would be the constitutional case law. Law reviews, classic books, and articles by other academics would also be used as a source of information to reach a rational conclusion in this discussion. The study would examine the hesitant actions taken by Pakistan's higher courts in response to counter movements by the ruling class on written constitutionalism. Ultimately, it is concluded that a determination of such an unwritten judicial policy is necessary.

## Results and Discussion

To start, despite Ayub Khan’s imposition of martial law in Pakistan, all courts were allowed to carry out their duties as usual, with a marked division between the authority of the military courts and regular courts (Proclamation, 1969). The Supreme Court (SC) and High Court (HC) judges were to remain in their positions (PCO, 1969). The Constitution of 1962 was to govern the nation, but the Chief Martial Law Administrator (CMLA) was to occasionally issue regulations or orders. Even under martial law, the HC and SC's jurisdiction was maintained, and their continuation was confirmed (PCO, 1969). However, "not because they have no jurisdiction but because their jurisdiction can at any time be ended by show or use of force by the military," (Umar vs. Crown, 1953) CMLA orders are unable to create justiciable issues before the civil courts.

Comparatively speaking, one cannot agree with the Indian Supreme Court's position that the President may suspend the enforcement of any of the Fundamental Rights guaranteed by the 1949 Constitution while an emergency is in effect (Yaqub etc. vs. J & K, 1968), and that wherever such a suspension is made, it is in the nation's best interests and no additional evidence is required (Defence of India Rules, 1962). The fact remains that only those Fundamental Rights that are related to the reasons behind the Proclamation of Emergency may be suspended, and that too for a limited period of time and for a limited purpose, and only when it does not encroach on the jurisdiction of other organs (Mir Hassan's case, 1969).

**The Justiciability of Civilians' Military Trial**

There are immense questions hovering around the viability of civilian trials in military courts. These questions include constitutionality issues regarding such courts, procedural application-or lack thereof-in such cases (Humana Rights Practices Reports, 2017, 2022), (UPR Report, 2023), and the rationale behind it concerning the presence of ordinary and plenary courts with respect to the theory of equal protection of the laws. There can be no doubt that the idea of equal protection of laws-mask they say-the phrase as coined in the American Constitution does not provide for any exact definition. In other words, "no general rule protecting laws that shall cover every particular case can ever be formed; infallible tests that include all cases growing out of constitutional clauses can never exist. Besides, it would be impracticable and unwise to try to draw generalizations on the subject; each case should be decided as it arises."(American Jurisprudence, Vol. 12, 1958), (Tinsley vs. Anderson, 1898) The US SC has gone to hold that a state may treat trials under varying circumstances of even the same class of offences in different fashions (Graham vs. West Virginia, 1912). However, these issues have not yet been resolved in Pakistan.

It was noted that the Chief Martial Law Administrator established the special military courts (Presidential Order, 1982), (C.M.L.A. Order I, 1982) that tried and sentenced all of the petitioners in Ghulam Mustafa case, except those in writ petition No.659/86 (who were Ex-Army Officers) (Khar vs. Pakistan, 1988). It should be noted that the law stipulates that "a Field General Court Martial shall consist of not less than 3 Army Officers" (Pakistan Army Act, 1952). In the aforementioned case, it was argued that these courts must always consist of three Army Officers, with the Magistrate or a Sessions Judge serving as the four (M.L.O. No. 4, 1982). As the number of Army officers was less than three their decisions were alleged to be unlawful. However, the Court observed that there was nothing in the presented precedents (Commissioner vs. Ekbal & Co., 1945), (Urban District Council vs. Taff Vale Railway Company, 1909) to render assistance in adjudicating upon the issue before them (Ghulam Mustafa Khar vs. Pakistan, 1988).

Similarly, in a case, the justification for the establishment of the military courts allegedly came from alleged contribution in bringing normalcy in Sindh (Liaquat Hussain vs. FOP, 1999). The issue to be turned inside out in consideration is whether the establishment of military courts-NOT constitutionally necessitated had contributed to some extent in the control of the law and order situation or whether the delay in disposal of cases by the courts existed under general laws and special laws, would provide grounds on which the courts would recognize their validity. The same could not be sustained on some unwritten ground of expediency (Ata Elahi vs. Parveen Zohra, 1958), (Jibendra Kishore Achharyya vs. East Pakistan, 1957), (Noorani vs. Secretary, 1957), (Waris Meah vs. State, 1957). Obviously such an unwritten move cannot sustain in view of written dictates of law. "There is no rule for determining when classification for the police power is reasonable. It is a matter for judicial determination, but in determining the question of reasonableness the Courts must find some economic, political, or other social interest to be secured, and some relation of the classification to the objects sought to be accomplished. In doing this the Courts may consider matters of common knowledge, chatters of common

report, the history of the times, and to sustain it they will assume every state of facts which can be conceived of as existing at the time of legislation. The fact that only one person or one object or one business or one locality is affected is not proof of denial of the equal protection of the laws. For such proof it must be shown that there is no reasonable basis for the classification" (Willis, 1936).

It must be appreciated that the acceptance of idea of Necessity (State vs. Dosso, 1958) by SC adversely affected democratic tradition in the Country and the same adversely effected the judicial system of the country as well (Liaquat Hussain vs. FOP, 1999). The fact remains that the Necessity Principle cannot be entreated to allow violation of the Constitution, especially in view of the idea of high treason (Constitution of Islamic Republic of Pakistan, 1973). It may be pointed out that concept of Martial Law has also been idealized till the framing of the regular legal regime (Liaquat Hussain vs. FOP, 1999) on the basis of unwritten law. Factually, acts of Armed Forces in excess of their jurisdiction are exceptionable.

Generally, on the basis of heinousness of the crime or the need to prevent certain anti-social acts, it may be advisable to make special classification. In order, however, to show the validity of a classification, it is incumbent to prove that such classification is based on reasonable distinctions or is based on the consideration of reasons and should be on actual or substantial difference or distinction. (Brig. F.B. Ali Case, 1975). For the Civilian to be subjected to Martial Law, a nexus has to be established with armed forces. This nexus must be close and direct (Pakistan Army Act, 1952).

F.B. Ali's case endorsed subsection (d) of section 2(1) of the P.A.A of 1952, holding it constitutional and valid due to the competence of Parliament to make such law being directly related to item 1 about the Defence of Pakistan (third schedule of the 1962 Constitution). The Third Schedule related to matters on which the Central Legislature had exclusive power to legislate; item 1 relates to the Defence of Pakistan; item 48 relates to matters that fall under the purview of the Central Legislature or relate to the Centre; item 49 deals with matters that are incidental or ancillary to any matter included in that Schedule. On the other hand, where the law does not make any classification but delegates the power to an outside authority without laying down any guidelines, a valid complaint can arise on the ground that discrimination is sanctioned by the law itself (Waris Meah vs. State, 1957), (J. K. Achharya vs. Province of East Pakistan, 1957).

The fact remains, as such, that phrase should be construed to imply that the Armed Forces should be called "in aid of civil power" (Constitution, 1973), which makes it clear that the military courts cannot substitute Civil Courts. The Armed Forces should plainly remain highly subordinated to be governed by the civil power and the State, as might otherwise seem plain from an exact reading of the Constitution providing control and command of the Armed Forces to the Federal Government (Constitution, 1973).

The necessity of the Armed Forces for the preservation of the society of Pakistan cannot be under estimated (Miss Benazir Bhutto vs. FOP, 1988), (D. Soran vs. State, 1954), (R. Lal vs. U.P., 1957), (Virendra vs. Punjab, 1957). It need not be emphasized that, during any emergency and until terrorist threats and internal disturbances are removed, the Armed Forces will act in aid of the civil power when called upon to do so, according to law. However, they must certainly not be allowed to substitute ordinary civil courts. (Mack, Corpus Juris Secundum, Vol. VI, 1937) while acting `in aid of civil power'. Comparatively speaking, it is quite obvious that even under the American written constitution where Martial Law is provided the establishment of Courts by Military Commanders is not recognized (Keeton and Schwarzenberger, 1965).

The phrase 'in aid of civil power' signifies that the civil power may require assistance to perform its functions, but that does not indicate the assumption of civil

powers, particularly the questioning of judicial powers, which belong to the judiciary. This is the basic constitutional premise that prescribes full judicial independence (Constitution, 1973).

Examining Articles 175, 203, and 245 in connection with the SCP's ruling unmistakably indicates that the military courts are parallel courts, which was not warranted (Mehram Ali vs. FOP, 1998). A plain reading of Article 245 would show that Martial Law in any form is not intended.

It has never been the case from the other side of the table that the ordinary courts are not functioning. They may not be deciding the cases expeditiously for different reasons. In that case the proper course is to take appropriate measures instead. In no case permission can be granted to hide behind the Necessity Principle. For example, a plea was raised in a case (Nusrat Bhutto case, 1977) that this Principle was not outdated and could be invoked in the said case for a `limited purpose'. However, the same plea could not be countenanced on the ground that any deviation from the Constitution may lead to anarchy (Attorney General vs. Mustafa Ibrahim, 1964).

In one case, SCP took the view that the acts of the usurper might be excused and legitimized by invoking the law of necessity (Asma Jilani vs. Govt. of the Punjab, 1972). From this standpoint, any law that is challenged becomes ultra vires the Constitution even when it seeks to justify the trial of civilians that does not fall within the purview of PAA 1952, was deemed incapable of being validated on the anvil of state necessity (LDA vs. Ms. Imrana Tiwana, 2015), (Pakcom Limited vs. FOP, 2011).

The argument is that military courts are sanctioned by Article 245 but utterly is in contradiction of the theory of necessity to the extent that the doctrine would apply only if an act is rendered illegal due to the bona fide performance thereof with a view to seccuring the polity from potential ruin by the terrorists.

The courts function to remedy the backlog and expeditious disposal of terrorism cases and, in this backdrop, the guidelines and recommendations provided by to the SCP are expected to evaluate proper functioning of the courts geared towards administering justice in accordance with the Constitution and the law, for example in the National Judicial Policy. The functioning of these courts does not permit their functioning alongside military courts by virtue of any unwritten practice.

The concept of independence of Judiciary is very near and dear to law but it is set at naught with the promulgation of a piece of legislation at the hands of powers to be. The fact remains that the independence of the Judiciary means Judges are to decide matters freely before him in accordance with his assessment of the facts and his understanding of the law without extraneous pressures from any quarter (Sikandar Hayat Maken vs. FOP, 2021). The Judiciary is independent and has jurisdiction over judicial matters (Liaquat Hussain vs. FOP, 1999). It would be pertinent to remember here that even otherwise, the SCP vide its judgment in the Sharaf Afridi has also separated the Judiciary from the Executive (Govt. of Sind vs. Sharaf Afridi, 1994), (Younas Abbas vs. ASJ Chakwal, 2016).

The Pakistan Army (Amendment) Act and 26th Constitution (Amendment) Act, 2024 bring to mind Act X of 1977 by which PAA, 1952 was amended. It appears imperative to note that this amendment in the Army Act had “in fact resulted in the displacement of the ordinary criminal Courts in the District of Lahore by the military courts" (Darvesh M. Arbey vs. FOP, 1977).

It is, therefore, obvious that when there is no nexus but even then the military courts try the civilians as against with the object for which they are said to have come into being, they cannot be said to be acting in aid of the civil power but in derogation of the

same. In another case it was said that the Act X of 1977 being ultra vires to in case of Darvesh M. Arbey, Military Tribunals had no authority to deal with cases transferred to them under said Act of 1977. Decisions passed by military fora were held to be without any legal substance and ineffective (Iqbal Ahmad Khan case, 1977).

In a case it was observed that immunity provided under the Constitution would not save Martial Law authorities completely from scrutiny of Superior Courts (Bachal Memon vs. Sindh, 1987) and therefore Art.270-A (2) did not provide a complete bar in respect of their actions (Bachal Memon vs. Tanveer Shah, 2014). Similarly in another case it was said that "where interpretation of Constitutional instrument is involved, jurisdiction of High Court is unaffected"(Muhammad Anwar Durrani's case, 1989), (Manzoor Ahmad Wattoo case, 1997).

In other words, this decision held that neither Article 245 of the Constitution nor the relevant provision in the list of subjects entitled the legislature to enact a nicety whereby military courts were constituted or summoned in place of ordinary criminal and civil courts (Z. A. Babu vs. Govt. of the Punjab, 1997).

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In a case (i.e., Zafar Ali Shah vs. Gen. Pervez Musharraf, 2000), it was acknowledged by the court that it itself was under an obligation to do everything it had to protect institutional values concerning the independence of the Judiciary. Such independence would therefore protect the fabric of the state and ensure the Fundamental Rights including the right to dignity (Constitution, 1973), (Shultziner and Carmi, 2014), and a fair trial (Protocol 1, 1977). However, the query which remains at large to this date is, exactly which provision of what law so bound the court? The statutes under which military courts were organized would, as such, be in the nature of Legislative sub-Constitution and therefore not saved, and were subsequently declared unconstitutional (PSM vs. Azam Katper, 2002), (Mobeen us Salam vs. FOP, 2006), (Moizuddin vs. Mansoor Khalil, 2017).

It is to be remembered that the SCP in Syed Zafar Ali Shah, supra was faced with an extra-constitutional situation where the Constitution provided no solution to situation as on 12th October, 1999. However, in the wake of 9th May, 2023 incident in the background of arrest of Pakistan Tehreek-a- Insaf (PTI) leader Imran Khan there were no such circumstances but even then the SCP allowed the trial of civilians by the military courts. However, it is also to be noted that despite holding certain piece of legislation created by or under the Martial Law regime to be not tenable being violative of Constitutional provisions, oxymoronically the superior courts of Pakistan have been validating the extra constitutional steps by declining the prayed relief on the ground that the same was barred by the said piece of legislation made by the extra constitutional regime (Dr. Muhammad Elias Dubash vs. PST, 1982), (Shabbir Ahmad vs. WAPDA, 1982), (Punjab vs. Akram Shah, 1984), (Punjab vs. Saleem Gardezi, 1985), (Nazir Mohammad Khan vs. Pakistan, 1986); (Abdul Ghaffar Lakhani vs. Federal Govt., 1986). However, it must be appreciated that Article 245 does not by itself create the law but enables the making of a law, which should have nexus with the phrase 'to act in aid of civil power' (Sh. Liaquat Hussain vs. FOP, 1999).

It is important to note that regarding military trial three kinds of civilians may be put on trial under the PAA (Ordinance No.III, 1967). Persons who fall in third category are those who claim or are known to belong to any terrorist group or organization misusing the name of religion or a sect. The relevant provision was protected through 21st Constitution (Amendment) Act, 2015. Thereafter, Amendment was made in PAA through Amendment Act 2017 and the same was protected through 23rd Constitution (Amendment)

Act, 2017 and the period of trial of civilians under PAA was extended for further period of two years commencing from 07 January 2017. So, trial of civilians in third category under PAA is no more available as the provision of law authorising civilians' trials has ceased to exist.

The first category is of those civilians who seduce or attempt to seduce any army person from his duty or allegiance to Government. In the second category, fall those civilians who have committed an offence under the Official Secret Act 1923, in relation to any work of defence etc. It means that if any person has done any offence with work of defence etc. attracting the Official Secret Act 1923, he may be put on trial under PAA. Question as to what is the work of defence is answered under the Act 1923 which mentions some prohibited places which are designated as work of defence etc. (Official Secret Act, 1923).

This analysis clearly shows that only those civilians can be tried under PAA, 1952 who approached the place of defence of Pakistan in a way prejudicial to the safety or interest of the State. It is to be remembered that before sending the case to military court, it has to be established that the place is a prohibited place duly notified as such meant for defence of Pakistan and act of the accused is for any purpose prejudicial to the safety or interest of the State. Moreover, before transfer of a case to a military court, it is to be seen as to whether the criteria set by the SCP in certain cases are fulfilled (F.B. Ali vs. State, 1975), (Mehram Ali vs. FOP, 1998), (Liaquat Hussain vs. FOP, 1999), (DBA RWP vs. FOP, 2015), (Shahida Zahir Abbasi vs. President, 1996).

As regards the procedure to be followed the Magistrate or the court is the first authority to decide the question of the jurisdiction (Cr.P.C., 1898). If Commanding Officer submits application for delivery of the accused to him, he will first hear the accused (Yousaf vs. Sindh, 2024). The reason is that not providing opportunity of hearing is against the principles of natural justice and due process of the law. In proper cases, the Magistrate will deliver the accused to the commanding officer (Cr.P.C., 1898).

However, with the observation of continuation of trial of civilians in military courts qua 9th May 2023 incidents against the PTI supporters, this procedure seems to have been pushed into oblivion. Immediately after the events of 9 and 10 May, various FIRs were registered at different police stations of the country under the Anti-Terrorism Act, 1997. These FIRs involved initially dozens and then hundreds of persons as the investigations went along.

They were almost entirely civilians, having no possible connection with the Armed Forces, except for a handful who may have been retired personnel. The cases, and thus the accused, fell within the jurisdiction of the ATCs encompassed under the Anti-Terrorism Act (ATA). However, the concerned Army authorities had been putting in repeated petitions before the ATCs under Section 549 of the CrPC seeking transfer and delivery of the accused to stand trial under various provisions of the Official Secrets Act, 1923 (PAA, 1952), (Ordinance IV, 1967).

In short, the Army authorities claimed for themselves jurisdiction over those persons to be tried at court martial. All these petitions (CP Nos. 24 to 28, and 30 of 2023) were allowed. Upon this the accused numbering somewhere around 103 were handed over into the custody of the Army authorities. This state of affairs acted very much like the fuse and caused the launching of certain petitions. It is, however, unconstitutional for a civilian to be tried by a court martial under PAA.

This arises to be remembered that these petitions were filed to declare the trials of civilians under the PAA of 1952 as violative of the Constitution. In fact, the SCP was asked as to what the written Constitution said about the subject. The SCP bifurcated the thrust of

the Constitution into two broader modalities i.e. Peacetime and Wartime, and finally held that clause (d) of subs. (1) of Section 2 is ultra vires the Constitution and of no legal effect.

The judgment was a major step in advancing the 'right to fair trial' (18th Amendment, 2010). It progressively interpreted Article 10-A, and could have profound implications for other laws that may impede the right to a fair trial (SMC No.4 of 2010, 2012), (Bashir vs. Rukhsar, 2020), (A. D. Khan vs. ECP, 2020), (Aftab Shahban Mirani vs. President, 1998), (New Jubilee Insurance Company Ltd. vs. NBP, 1999), (ECHR, 1966). The decision was a serious attempt to revisit the laws that have not been examined since the inclusion of the right to fair trial in 2010 (Naveed Asghar vs. State, 2021).

The verdict was likely to increase public confidence in the judiciary which had suffered since May 9th due to orders being openly flouted without significant consequences. It also implied that the expectations that the new CJP would align with these interests were misplaced and that the much cherished concept of at least one appeal against decision of judicial forum was doomed (Pakistan vs. The General Public, 1989), (Muhammad Mubeen-us-Salam vs. FOP, 2006).

According to the majority view of 5-1, a six-member Supreme Court Bench conditionally stayed its unanimous ruling of Oct 23rd, 2023, that had nullified military trials of 103 civilians, pending a final judgment (Jawwad S. Khawaja vs. FOP, 2023). Passing the order on a set of intra-court appeals (ICAs) challenging its previous ruling, it stated that military trials of civilians for their alleged role in the riots of May 9th would continue, against its previous precedents (FOP vs. Ghulam Mustafa Khar, 1989), (Akram Khan vs. Pakistan, 1969), (Karamat Ali vs. State, 1976), (Muhammad Din vs. State, PLD 1977).

There was strong condemnation from the Bars all over the country who denied accepting military courts under any circumstances as the SCP has already declared them void of jurisdiction (Daily Nation, 15.12.2023). However, the SCP appears to have moved on the strength of some unwritten law and unwritten judicial policy of complacency. It is because SCP has also held that while interpreting a question of public importance u/Art.184 (3) (SMC No.7 of 2017, 2019), the SCP is not reliant on an aggrieved person nor the traditional rule of locus standi (Pakistan Muslim League (N) vs. Federation of Pakistan, 2007), (PML (N) vs. FOP, 2007), (Justice Qazi Faez Isa vs. President, 2023).

As it stands, the right of 'access to justice to all' which obviously is an inviolable right is very well recognized (Constitution, 1973). This very same right is found within the doctrine of due process of law (Bingham, 2011). The right of access to justice encloses 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 (Willoughby, 2012), (Balochistan vs. Azizullah Memon, 1993).

However, fluctuations of the superior courts show that the unwritten judicial policy is at the helms of affairs. The SCP has allowed the trial of the civilians by military courts after holding repeatedly that the civilians cannot be tried by them unless their cases come within the mischief of the applicable law. The independence of the Court appears to have gone compromised due to certain extraneous pressures for otherwise the SCP would have not allowed pushing aside the much cherished concept of liberty of the citizens. If SCP was to go by the written law, the otherwise ensuing unwritten law based approach would not have surfaced. It is worth appreciating that matter of public importance raises questions, mainly where the breach of liberty is worried being question of public importance (Manzoor Elahi vs. FOP, 1975), (Zulfiqar Mehdi vs. PIA, 1998).

The proposed formulation allows the judiciary to claim for itself the prerogative to interpret the Constitution and to declare what the meaning of a particular provision of the Constitution is, even if it is one that ousts the jurisdiction of that very court. It must be also

remembered that there are three decisions that are to be kept in mind while construing Article 270-A (K. K. Rupani vs. State, 1960), (State vs. Zia ur Rehman, 1973), (Inayat Ullah vs. Mian Ghulam Ahmad, 1984). These precedents establish some of the fundamental principles of statute interpretation: statutes must be interpreted according to the intention of the legislature; if the statute is clear and unambiguous, a court will interpret it using its ordinary and natural meaning. In all situations, it is important to remember that the general rule is that provisions seeking to oust the jurisdiction of superior courts, even by constitutional provision, are pushed by courts to be very strictly construed. (FOP vs. Saeed Ahmad Khan, 1974).

## CONCLUSION

The right of equal protection of law and fair trial are inalienable and inviolable rights enshrined in the Constitution of Pakistan, 1973. These rights cannot be taken away from the citizens of Pakistani polity in view of case law discussed in the above lines. However, having held time and again that the civilians cannot be allowed to be tried under the military courts for it would be like sitting on the authority of the general/ordinary courts, traversing beyond that point of limitation of interpretation and in contravention of previously held rulings is like deciding more when it is not necessary to do so. The impression also arises as if the SCP has to decide in a narrow sense u/Art.184 (3) of the Constitution, 1973. Such an impression would be squarely against the earlier finding of the SCP (Imran Khan vs. Mian Nawaz Sharif, 2017). Even otherwise, this deciding more is on the basis of no written law; rather, it is in violation of written law and written judgements. Such an approach cannot be justified in presence of written law and Constitution, 1973 save for the invincible but existing unwritten judicial policy.

## Recommendations

When written dictates in the form of constitution and duly enacted laws are available, the courts must abide by the same. The written law should not be cast aside for preferring unwritten judicial policy. As such, when deciding more is not necessary the limit must be observed and what is not necessary must not be decided, especially in matters of civilians' military trial matters. It is because sacrificing the well-recognized rights and principles of natural justice on basis of unwritten judicial policy can be fretful.

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