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Questions of norms

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The ongoing hearing of the petition challenging the 21st Amendment in the Supreme Court has brought forth some extremely important issues that deserve more attention in the public discourse.

The argument on instituting military courts has expanded to questions about the limits of parliament's powers while making

constitutional amendments, as well as questions about the Supreme Court's power to annul such amendments. Since the constitution is mute on both questions, the Zafar Ali Shah v Federation case (May 2000) was referred to by the attorneys; in this case the apex court had given Gen Musharraf the liberty to amend the constitution save its "basic structure".

The constitution had no explicit mention of a 'basic structure', like there wasn't any mention of the 'doctrine of necessity' in 1955 in world jurisprudence. These terms had been adopted by the Supreme Court in exercising its interpretative powers.

Defending the government's position on the 21st Amendment, the counsel on behalf of the federation also argued that the conflicting ideals of socialism and Islam in the original constitution of Pakistan of 1973 rendered the document 'inferior' to what we have today. He did not elaborate whether it was the 8th or the 18th Amendment that enriched the constitution because both are part of it. The eighth served the interests of a dictatorship whereas the eighteenth served democracy.

The petitioner's counsel, representing different bar associations, also

mentioned that the Objectives Resolution, now the preface of the constitution, wasn't agreed upon by the minority representatives of constituent assembly (then 1/3 of the assembly). The bench asked the counsel if a remedy was available in the system. 'None but a referendum' was the answer by the counsel; however, he failed to mention how the embedded religious exceptionalism had created gaps in democracy.

The petitioner's concern is that the amendment slashed away the powers of the judiciary by creating a parallel prosecution system, and that it violates standards of justice such as judicial oversight of arrests, right to appeal in a court of law in matters as grave as criminal proceedings, detention and treatment of prisoners.

The 21st Amendment is at odds with established principles of criminal justice like presumption of innocence. Articles 10 and 10-A of the constitution – about safeguards to arrest and detention and right to a fair trial – are surely at stake. The said amendment holds these articles in abeyance for two years and no one is sure for how many cases.

Article 184 (3) of the constitution states “... the Supreme Court shall,

if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights ...is involved have the power to make an order of the nature mentioned in the said Article.”

The verdict alone will tell whether the court satisfies the questions about the balance of powers between the judiciary and parliament besides its conclusion on the 21st Amendment. Given that democracy is restored in the country, the Supreme Court may not absolve the bench permanently from its responsibility to intervene if complaints of regression of constitutional norms surface. Setting aside the precedent of allowing parliament to amend the operational part of the constitution that affects or interferes with fundamental rights has become more probable.

The holding of the court will further strengthen or weaken the interdependent, inalienable and indivisible character of the fundamental rights in the constitution, thus the petition is enormously consequential.

The decision will possibly settle the question of whether fundamental rights can be dispensed with during extraordinary circumstances such

as fighting terrorism. International customary laws have motivations and precedents on both sides. Importantly, suspension of human rights to respond to emergencies did not help build sustainable peace and development in Pakistan.

An unnerving scale of terrorist activity can understandably provoke gut reactions seeking extraordinary measures. Military courts might even help suppress terrorism temporarily. A permanent resolve, however, would mean dealing with the causes of violent extremism.

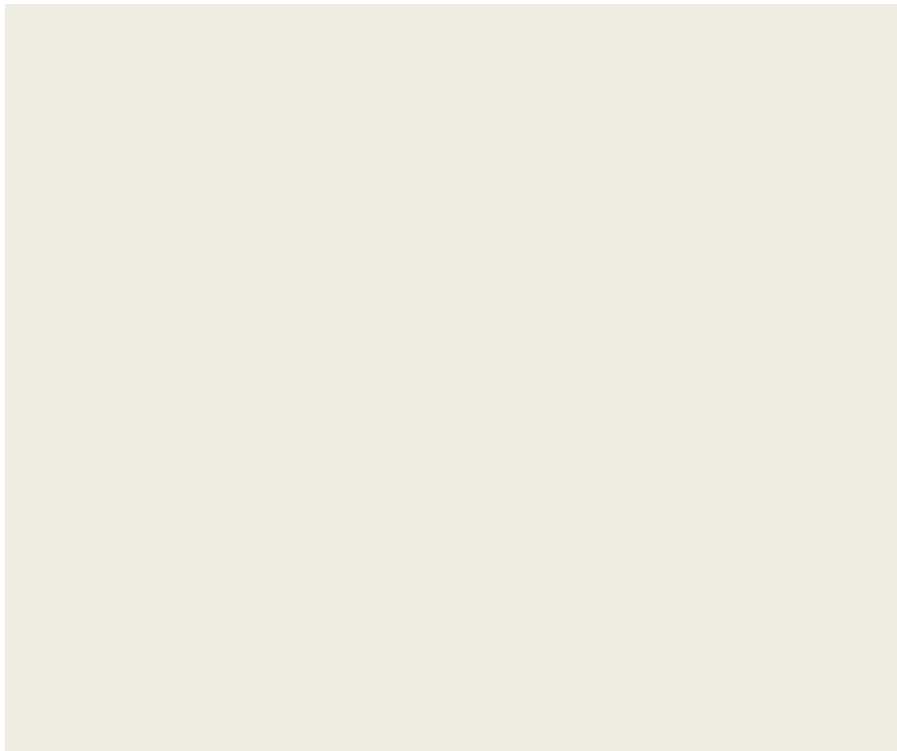
Knowing that some political parties voted for the 21st Amendment with reservations, the government may well benefit from a political rather than judicial review of its January 2015 decisions. A five-month progress report on NAP should be used to review its decision about establishing military courts.

Out of this dilemma, the government can concentrate on reforms in the justice system such as the progress on formation of a National Human Rights Commission and a Commission for Children's Welfare and Development, and Juvenile Justice System. These enabling human rights institutions can reduce the burden on the courts and strengthen the fragile societal resolve on human rights norms.

Sacrificing fundamental rights in order to curb terrorism is utterly unnecessary. First, it is possible to strike a balance between the two objectives. Second, the cause and manifestations of terror can be amicably defeated using a human rights-based approach. Backtracking on constitutional safeguards and freedoms is not a wise option.

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