

Scenario 37

PAKISTAN'S JUDICIARY IN 2002

On **14th January 2002**: Justice Irshad Hassan Khan was made Chief Election Commissioner of Pakistan.

On **10th February 2002**; in the case of Supreme Court Bar Association through its President Hamid Khan vs the Federation of Pakistan, a five-member bench examined the appointment of judges in the Supreme Court and the issue of seniority in the High Courts for such appointments. Explaining the spirit of the Judges' Case of 1996 and subsequent precedents, the apex Court held:

"The contention that the chief justice of a High Court is entitled to be elevated to the Supreme Court due to seniority is misconceived and travels beyond the parameters indicated in the Judges' Case. In our considered view, the scope of seniority and legitimate expectancy enunciated in those cases is restricted to the appointments of the Chief Justice of a High Court and the Chief Justice of Pakistan, and these issues neither apply nor can be extended to the appointment of Judges of the Supreme Court."

It was categorically stated that there was neither constitutional convention nor past practice to elevate the senior-most judges of a High Court to the Supreme Court. An interesting comparison was also drawn by the Supreme Court between Article 180 of the Constitution of Pakistan, which governs the appointments of acting chief justices of the Supreme Court and where the words "the most senior of the other Judges" are mentioned, and Article 177, which deals with the appointment of a Supreme Court judge and where such language is missing. In the Supreme Court's own words:

"The absence of the words 'most senior' in Article 177 for appointment of Judges of the Supreme Court would show that the seniority of a Judge in the High Court is not a sine qua non for his appointment as a Judge of the Supreme Court."

Gen Musharraf's Referendum:

2nd April 2002: Qazi Hussain Ahmed filed a Constitution Petition No. 15/2002 and a similar Constitution Petition No. 22/2002 was filed by Syed Zafar Ali Shah before the Supreme Court of Pakistan. It was prayed in both the petitions that:

'The Chief Executive (Gen Musharraf) has unlawfully occupied and taken over the position of the President of the Islamic Republic of Pakistan in violation of the judgment of this Court in Syed Zafar Ali Shah's case;

- *That Muhammad Rafiq Tarar still continues to be the President notwithstanding the Chief Executive's Order 3 of 2001;*
- *That writ in the nature of quo warranto be issued against the Chief Executive;*

- *That the holding of referendum for election to the office of the President be declared illegal, unconstitutional and violative of the judgment of this Court in Syed Zafar Ali Shah's case.*

On 9th April 2002, Gen Musharraf issued Chief Executive's Order No. 12 of 2002, commonly known as the 'Referendum Order' which provided that the Referendum would be held on 30th April 2002 and meant that:

'Notwithstanding anything contained in the Constitution or any law for the time being in force, if the majority of the votes cast in the referendum are in the affirmative, the people of Pakistan shall be deemed to have given the democratic mandate to General Pervez Musharraf to serve the nation as President of Pakistan for a period of five years.'

'The period of five years mentioned above would be computed from the first meeting of the Majlis-e-Shoora (Parliament) to be elected as a result of the forthcoming general election to be held in October 2002, in accordance with the Judgment of the apex Court.'

The referendum question was: 'For the survival of the local government system, establishment of democracy, continuity of reforms, end to sectarianism and extremism, and to fulfil the vision of Quaid e Azam [Great leader: Pakistan's late founder, Mohammed Ali Jinnah], would you like to elect President General Pervez Musharraf as president of Pakistan for five years?'

Gen Musharraf wanted to establish his legitimacy. He took power in a military coup on 12th October 1999 that ousted the then Prime Minister Nawaz Sharif, but promised to be only a caretaker leader until democracy could be restored. The referendum allowed him to be seen to be abiding by democratic ideals.

Pakistani politicians believed the army was denying them power thus termed the referendum as unconstitutional. Under the constitution, the president should be chosen not on a direct vote of the people, but by the elected members of the National Assembly, Provincial Assemblies and the Senate. Many had hoped that the general elections which were due in October that year could be followed by the picking of a new president.

Earlier in January 2002, Gen Musharraf had delivered a speech advocating reform and calling for Pakistan to return to the values upon which it was founded. He urged to stay in power to counter unnamed destabilising influences. The referendum was preceded by a month-long campaign by Gen Musharraf, while a ban on public rallies prevented political parties from campaigning against the referendum. The Governor Punjab, Gen Khalid Maqbool, during a pro-referendum rally, had warned that journalists could face revenge from the public if they did not cease their 'misreporting'.

The referendum, however, took place. The government said that with most of the votes counted [turnout was around 70%] around 98% backed Gen Musharraf continuing in office. It was hotly disputed by the opposition, which called for a boycott of the vote. It said little more than 5% of the electorate bothered to vote, illustrating that Gen Musharraf did not have popular support.

Pakistan's Human Rights Commission told there were flagrant abuses with instances of multiple voting and pressure on state employees to vote. They had also found evidence of widespread fraud and coerced voting. Electoral rolls and national identification cards were dispensed with, ballots were routinely stamped in the presence of, or even by, polling officials, and observers reported cases of repeat voting. Gen Musharraf pointed to the result as a popular endorsement of his rule, and also hoped that it reinforced him in the eyes of the rest of the world. He had largely escaped the diplomatic isolation and foreign condemnation followed by his armed, though bloodless, coup of 1999.

The **CNN dated 27th April 2002** had argued: the Pakistan's Supreme Court had ruled that Gen Musharraf's planned referendum to extend his term of office was legal. That the order

issued by the president on holding a referendum was valid as upheld by the nine-member bench of the apex court, in a unanimous decision, reached after days of deliberations and hearing arguments. CNN had observed that:

'Gen Musharraf's critics had gone to the Supreme Court to try to block the move ahead of the vote on Tuesday [30th April 2002; the Referendum Day]. A declaration issued by the so-called "All Parties Conference" in Lahore appealed to Pakistani people not to vote in referendum and to the international community to support them in its bid for a restoration of democracy.

Farooq Hassan, a prominent lawyer representing referendum opponents, called the decision "a sad day in the history of Pakistan." However, Sharifuddin Pirzada, a constitutional expert and legal adviser to Musharraf, hailed the ruling as one that "will help restore democracy."

The General argues the constitution allows him to hold a referendum on "important national issues." Musharraf, who toppled the previous elected government on charges of corruption and misrule, was given three years by the Supreme Court to curb corruption, introduce reforms and return the country to democracy. The Supreme Court deadline ends this October [2002], but Musharraf says his task is not yet finished.

So far none of Musharraf's opponents have been able to mobilise a popular movement against the plebiscite. On Saturday, his opponents were holding a counter rally in Lahore, where the police arrested 14 activists a day earlier for distributing anti-referendum leaflets.'

Evidently, the critics had held that the referendum was illegal under the constitution because the president should have been elected by the parliament and the four provincial assemblies. A declaration issued by the 'All Parties Conference' in Lahore had appealed to Pakistani people not to vote in the referendum but the response of the people was not so encouraging.

As Gen Musharraf's Referendum Order was challenged through the two Constitution Petitions Nos. 15/2002 filed by Qazi Hussain Ahmed of JI and 22/2002 from Zafar Ali Shah of the PML [mentioned earlier], it was thought that the people would like to take it as a revolt against the military regime and formal political activities were likely to initiate in the masses. Gen Musharraf took these petitions seriously and hired, of course on the expense of poor people of Pakistan, the top law experts to defend him and his intentions before the Supreme Court.

Syed Sharifuddin Pirzada, Mr Abdul Hafeez Pirzada and Syed Iftikhar Hussain Gillani, appeared on behalf of the Federation and Mr Makhdoom Ali Khan, Attorney General of Pakistan appeared on Court's notice and urged that the petitions be looked into while keeping in mind the ground realities prevailing in the country in the aftermath of the events of 12th October 1999. Moreover, the general elections fixed in October 2002 would also help the required transition process towards democracy. The highly paid counsels had also informed the Apex Court that:

'Gen Musharraf, ever since the assumption of power, has been performing his functions and duties in accordance with the mandate given to him by this Court in Syed Zafar Ali Shah's case and has been striving to transform the Army rule into a democratic set up as envisaged in the aforesaid case.'

They also guided the Court that Gen Musharraf's Referendum Order was not aimed at converting the parliamentary system envisaged under the Constitution into presidential form of government.

Some members of the intelligentsia kept the opinion that challenging the 2002 referendum in the Supreme Court was a conspiracy launched by Gen Musharraf's legal team. To legalize the referendum, the military's old buddies from Jama'at e Islami were brought forward and Qazi Hussain Ahmed was there to file the petition in the apex court. All of them knew that

historically the Supreme Court has always been in the military pocket. Filled with frustration and despair the people of Pakistan had no alternative except to put a light of hope and test the Supreme judiciary of Pakistan.

By the way; at the instance of making a mention of the Election Commission, one should not forget the brave and truthful judges, though very few in Pakistan's history, who had taken bold stand for their cause. A letter written on 17th April 2002, by Fauzia Wahab of the Pakistan Peoples Party (PPP), to Mrs Robinson of a UN body, speaks of the event itself:

'Justice Tariq Mahmood of the Balochistan High Court has finally resigned from his office. During the last five days, since he resigned from the membership of the Election Commission he was subjected to harassment and intimidation by the military regime. Ever since this news leaked out that a senior member of the Election Commission had resigned, this move was expected any time.'

*Justice Tariq Mahmood faced the wrath of the junta when he took a principle stand that holding referendum to extend the tenure of president-ship for five years was not a mandate of the Election Commission. In his resignation letter he wrote that "the issuance of ballot paper for the referendum and the Referendum Order were unconstitutional and it is not the mandate of the Election Commission to conduct such an exercise." The resignation was tendered on the **6th April**, a day after the announcement for referendum was made. The disclosure, however, was made five days later.*

Justice Tariq Mahmood was "pressurized by the [then military] government to repudiate the reasons that appeared in the press regarding his resignation, but he refused to change his stand after which he was told that if he did not deny his statement, the Election Commission would issue a statement on the subject."

*In his press statement the judge has said that '**There is no justification to hold the office of a judge while telling lies. The government left me no option, but to resign.**'*

For the democratic forces, the truthful stand taken by a member of the judiciary has illuminated a small ray of hope in a dark world where human rights are blatantly trampled and laws are encouraged for violation.

The Human Rights Cell of the Pakistan Peoples Party hails Justice Tariq Mahmood's courageous step for not bowing to the dictates of the government and upholding the principles of justice and fair-play before one's self. The resignation also vindicates our stand that referendum is unconstitutional and can carry grave implication for the country and the federal forces.'

(17th April 2002: Daily 'Dawn' & 'the News')

In nut shell, the independence of judiciary was put on trial in **April 2002** when Gen Musharraf sought to stay in office for five years through a referendum; was challenged as being a violation of the Constitution stipulating a definite procedure for the election of the President and which was being circumvented through the device of referendum. The '**Dawn**', a leading newspaper of Pakistan, quoted an extract that: '*the Supreme Court's validation of various actions of Gen Musharraf after seizing power in a military coup was aimed at enslaving the constitution and the people's will*'.

Simultaneously, despite all the exercises by the Bar Council in August 2002, the Legal Framework Order, issued by the military rulers, extended the age of retirement of the superior judiciary by three years.

On **27th April 2002**, these fragile hopes were dashed and once again the judiciary had taken stand by the General in power. The Judges went by their tradition again. It was too much to expect from the honourable judges to have shot themselves in their foot.

One Shehla Butt from '**Media Monitors**' had opined that:

'By legalizing a referendum, behind which was overtly malicious intents of a military usurper, Chief Justice of Pakistan Sheikh Riaz Ahmed and company has precipitously lowered their stature. Justice Irshad Hassan, a fresh retiree from the apex of judicial structure of Pakistan and currently heading the Election Commission, went a step further. He left us aghast by announcing that the most fraudulent electoral exercise in the history of Pakistan was free, fair and transparent. This was a monumental lie which not only blighted Justice Irshad's credibility but blackened the face of the institution that he belongs.'

There were many question marks over the integrity and truthfulness of these statements before the SC. Over the questions of occupancy of the President's Office, the apex Court was apprised that no relief should be made available to Rafiq Tarar because:

- The outgoing President continued in office under the PCO 1 of 1999 and was part of the present government for nearly less than two years;
- He had been performing the functions and duties of the office of President on and in accordance with the advice of the Chief Executive of Pakistan under the new dispensation and was a party to various legislative and executive actions of the present government;
- He did not launch any protest when he ceased to hold office;
- After he ceased to hold the office of President, he accepted the retirement benefits of that office and thus acquiesced in his ceasing to hold the office;
- The petition suffers from *laches* inasmuch as the former President left the office on 20th June 2001 whereas Qazi Hussain Ahmed filed Constitution Petition No. 15/2002 in this Court on 2nd April 2002, i.e. after a lapse of about 10 months;
- The issuance of writ of *quo warranto* is discretionary in nature and as held in *Sabir Ali Shah's case (PLD 1994 SC 738)*, such a writ cannot be issued in collateral proceedings.

On 27th April 2002, the Supreme Court's bench, under the chair of the then Chief Justice Sh Riaz Ahmed announced judgment in respect of the above mentioned two petitions and also giving consideration to a Civil Petition for Leave to Appeal No. 512/2002.

Sh Riaz Ahmed, CJP passed the order that on account of an extraordinary situation, which prevailed on 12th October 1999, Gen Musharraf, the then CAOS through an extra constitutional measure took over the government and the affairs of the country. On 14th October 1999, Proclamation of Emergency was issued, which had to take effect from 12th October 1999. The Court had considered it appropriate to go through these petitions in the light of their earlier decisions in that respect. The judgment held that:

'We have heard the learned counsel for the parties at great length. In view of the peculiar facts and circumstances of the present case, we are not persuaded to hold that a case for issuing the writ of quo warranto prayed for in Constitution Petitions No. 15 and 22 of 2002 has been made out.

We, therefore, hold that the Chief Executive's Orders No. 2 and 3 of 2001 have been validly issued by the Chief Executive of Pakistan in exercise of his powers under the Proclamation of Emergency of the 14th day of October 1999 and the Provisional Constitution Order No. 1 of 1999 as validated by this Court in Syed Zafar Ali Shah's case. Consequently, these petitions [praying for the issuance of writ of quo warranto] are dismissed.'

Deciding the legal status of the Referendum Order, the Court held that *'it has been issued by the Chief Executive and the President in a legal way duly authorized by this Court through an earlier decision on record'*.

It was further held by the apex Court that the Referendum Order was not intended to amend the Constitution of Pakistan and the questions regarding its consequences were declared as purely academic, hypothetical and presumptive in nature, therefore, being left to be determined at a proper forum at the appropriate time. No relief was given and the said Constitution Petitions were disposed of being premature. Further, the apex Court had not felt the necessity of passing any order in Civil Petition for Leave to Appeal No. 512/2002 in the light of above decision.

The subsequent days proved that, like Gen Ziaul Haq's notorious referendum of 1984, Gen Musharraf also behaved in the same manner. After the general elections of October 2002, he got passed 17th Amendment from his stooge Parliament practically distorting and negatively affecting the Constitution of Pakistan while defying all his promises before the Supreme Court and the people of Pakistan.

LEGISLATORS SHOULD BE GRADUATE:

11th July 2002, the Supreme Court, after hearing in detail, had dismissed all the five petitions in which it was prayed that the ***condition of being a graduate for the candidates*** of National and Provincial Assemblies be declared unconstitutional.

The background was that in the General Election Order of 2002, Gen Musharraf had prescribed a minimum qualification of being a degree holder for the candidates of National and Provincial Assemblies. The order was that:

'Notwithstanding anything contained in the Constitution of the Islamic Republic of Pakistan, 1973, the Senate (Election) Act, 1975 (LI of 1975), the Representation of People Act, 1976 (LXXXV of 1976), or any other law for the time being in force, a person shall not be qualified to be elected or chosen as a member of Majlis e Shoora (Parliament) or a Provincial Assembly unless he is at least a graduate possessing a bachelor degree in any discipline or any degree recognized as equivalent by the University Grants Commission.'

Pakistan Muslim League (Q), Jamhoori Watan Party, Awami National Party and some others had moved the Supreme Court to get remedy that this order should be declared null and void and against the fundamental rights given in the Constitution. The condition was upheld.

August 23, 2002: Gen Musharraf unilaterally redressed the country's constitution, imposing 29 amendments that expanded his control of the country he took over by coup in 1999 - changes that undermined coming parliamentary elections meant to return the nation to democracy. The new measures stated that *'he may make further constitutional amendments at will and allow him to dissolve the elected parliament and to appoint the country's military chiefs and Supreme Court judges'*.

24th August 2002: Chief Executive Gen Musharraf formally issued the Legal Framework Order 2002, announcing general elections for the National and Provincial Assemblies to be held in October 2002. Its details are given on separate pages in next chapters.