

## Scenario 254

### **JUDICIARY's HI-VERDICTS (2018-22)**

#### **Glancing A Little Back ...**

**On 17<sup>th</sup> March 2009;** on the conclusion of Barrister Aitzaz Ahsan's LAWYER MOVEMENT in early 2009, Justices Javaid Iqbal, Ijaz Ahmed, Ramday, and Fayaz Ahmad were restored to their position as of 2 November 2007 with Justice Iftikhar Chaudhry assuming the post of Chief Justice of Pakistan (CJP) on 22<sup>nd</sup> March 2009.

*[The Fact remained that it was Gen Ashfaq Parvez Kayani, the then-army chief, who had played a vague role in intervening and encouraging a rapprochement between the government and the opposition. Neither side acknowledged it until lawyers' movement leader Aitzaz Ahsan publicly admitted later (in a rally at Gujranwala) about Gen Kayani's role. There were mass speculations that protestors and law enforcement agencies would have violently collided - had the Generals not intervened.]*

Immediately thereafter, the SC rendered its judgement declaring the appointments based upon PCO on 3<sup>rd</sup> November 2007 as null and void as well as declaring the NRO as null and void, that ultimately opened the investigations and cases against then-President Asif Ali Zardari and Prime Minister Gillani. But the media also flared up with hard facts that of the 14 justices that rendered a verdict related to taking an oath under the PCO, 12 had once taken the oath themselves under an earlier PCO including the CJP Iftikhar Chaudhry and his die-heart buddy Justice Ramday - they controversially did not apply the judgement to themselves.

**On 31<sup>st</sup> July 2009;** decision was handed down in the case of Constitutional Petitions 8 and 9 of 2009; two judges named Faqir M Khokhar and M Javed Buttar immediately resigned before their cases were referred to Supreme Judicial Council. In addition, about twelve more justices were removed from the SC on the ground that their appointments to the court was made without consultation with the *de jure* Chief Justice of Pakistan.

It was a controversial decision by all means as the SC summarily removed all justices of the higher judiciary who were not part of it as on 2<sup>nd</sup> November 2007. Their removal was ordered on the grounds that the *de jure* Chief Justice was not consulted or allowed to advise in those cases – and the *de jure* Chief Justice was J Iftikhar Chaudhry himself.

The SC bench that rendered the said decision consisted entirely of justices who had taken oath under the PCO of 1999 themselves - though had taken a constitutional oath later. The 1999 PCO and decisions made under it were given constitutional protection by 17<sup>th</sup> Constitutional Amendment. Thus, newly appointed judges who had never taken any sort of oath under any PCO were also removed while sitting judges who took an oath under the 2007 PCO were still acting as justices. Some sitting judges who were re-appointed and took oath under CJP Dogar were spared to act as justices with no action. More so, the judges who took oath under the PCO of 1999 were still functioning as justices of higher judiciary

The removed ad hoc judges of the Lahore High Court filed several petitions in the SC for review of its judgment, which sent 76 judges of Supreme Courts and High Courts immediately home. These judges argued that they were qualified to be appointed as judges of the High Court in accordance

with the requirements of Article 193(2) of the 1973 Constitution and were offered to serve as ad hoc judges following the consultation required under the Constitution. They accepted the offer and took oath when the state of emergency was lifted. They never took oath under a PCO and continued performing the functions of judges of the High Court until the judgement of 31<sup>st</sup> July 2009 appeared against them.

These judges were appointed by Lahore High Court CJ Zahid Hussain, who was [strangely] still a justice of the SC and was not being tried before the Supreme Judicial Council. The petition also noted that none of the sacked judges were made parties to the decision against them, nor were they heard in person or collectively. Even the copy of the decision was not sent to the High Court or to the judges concerned – they got it through the media news.

Referring to the daily '**Times**' dated 9<sup>th</sup> November 2009:

*"..... the Supreme Court has applied its judgement retroactively, having effect from 3 November 2007. The 14-member Supreme Court bench has not, however, applied the sanction to judges who took oath under the 1999 PCO. Some of these are current justices, and some have not yet taken a constitutional oath.*

*It is inconsistent with the principles laid down in Malik Asad Ali's case where it was held that the Chief Justice was bound by the Court's judgement. Chief Justice Sajjad Ali Shah was removed from office based on this case.*

*Inconsistently with the decision, the present CJP Chaudhry has accepted the stance of the government that Justice Dogar was the Chief Justice until his retirement."*

#### **J SHAUKAT SIDDIQUI – A JUDGE ON TRIAL:**

**On 21<sup>st</sup> July 2018:** Islamabad High Court [IHC] judge Shaukat Aziz Siddiqui made serious allegations against Pak-Army's security agency in a speech delivered before the Rawalpindi District Bar Association. He said:

***"In today's era, the ISI is fully involved in manipulating judicial proceedings; their personnel get benches formed at their will."***

The remarks made by Justice Siddiqui were strong and unusual coming from a senior judge; he did not mention particular cases for ISI's interference in the judiciary except that:

*"....the agency approached the IHC CJ M Anwar Khan Kasi urging that ....We [ISI] do not want to let Nawaz Sharif and his daughter come out [of the prison] until elections, [also that] do not include Shaukat Aziz Siddiqui on the bench [hearing Sharifs' appeals].*

***I know who takes whose messages to the Supreme Court. Why was the administrative control of the accountability court taken away from the Islamabad High Court? The judiciary's freedom has been divested and that it is now in control of 'those with guns'. I was told that 'if you assure us of decisions in our favour, we will end references against you'; and [I shall] be made chief justice of the high court by September (2018)."***

At that time, two references against Justice Siddiqui were pending at the SJC. The first reference was of a corruption case filed against him by an employee of the Capital Development Authority [CDA]. In the second reference, the SJC questioned his critical comments regarding the role of the Army during last year's Faizabad sit-in.

Likewise, a similar Show Cause Notice was issued to Justice Siddiqui under Article 209 (5)(6) of the Constitution by the SJC on a reference moved by Advocate Kulsum Khalil on behalf of former member of the National Assembly Jamshed Dasti alleging that the high court judge J Siddiqui had, during one of the hearings on a case relating to the 20-day Faizabad sit-in, objected to a compromise between the federal government and the protesting TLP. The compromise was facilitated by the armed forces.

The SJC held an inquiry against Justice Siddiqui with regard to the above-mentioned references. After scrutinising the reference, a meeting of the SJC held on 6<sup>th</sup> Feb had observed that the judge was guilty of misconduct and should be issued a show-cause notice in this regard.

However, Justice Siddiqui re-affirmed his earlier words that the Big Spy-Agency people were (and had been) manipulating judicial proceedings in the country; adding that he would resign if the bar found that he had been involved in corruption; making remarks that: '**50 per cent of responsibility of the country's current situation lies with the judiciary while other institutions are responsible for the rest**'.

**On 11<sup>th</sup> October 2018:** President Arif Alvi **removed Justice Shaukat Aziz Siddiqui**, a judge of the Islamabad High Court [IHC] after the Supreme Judicial Council [SJC] recommended his removal. The council, comprising five Supreme Court judges, said it found Justice Siddiqui guilty of misconduct over a speech he delivered in July earlier that year before the Rawalpindi District Bar Association. The SJC was unanimously of the opinion that 'in the matter of making his speech before the District Bar Association, Rawalpindi on [21<sup>st</sup> July] Mr. Justice Shaukat Aziz Siddiqui had displayed conduct unbecoming of a judge of a high court and was, thus, guilty of misconduct and he is, therefore, liable to be removed from his office under Article 209(6) of the Constitution.'

Later, in a statement issued in response to the SJC's recommendation of his removal, Justice Siddiqui said:

*"The decision was **not unexpected** for him. When nothing came out of a baseless reference started in the name of alleged refurbishment of [my] official residence about three years ago. Despite full effort, my address to a bar association, every word of which was based on truth, was used as the justification [to dismiss me].*

*This reference was not heard in open court despite my demand and clear verdict of the Supreme Court, and neither was a commission formed to examine the facts described in my speech.*

*I am completely satisfied with the requisites of my conscience, my nation and my rank; he will present his detailed stance before the public very soon. I will also reveal the facts which I had presented before the Supreme Judicial Council in my written statement and state the actual reasons behind the dismissal of a high court judge."*

**Much later....**

In daily the **DAWN** dated 28<sup>th</sup> September 2023, **Usama Khawar** wrote:

*Unlike previous cases where judgements against military generals came after they were removed from power, this verdict [penned down by Justice Faez Esa] targeted the current dispensation of the military establishment.*

*Previous cases, such as the declaration against Gen Yahya Khan in the Asma Jilani case, the judgment for Gen Aslam Baig in the Air Marshal Asghar Khan case, and the direction for initiating a treason trial against Gen Musharraf in the PCO Judges Case, had all been heard after the military officials' respective tenures.*

*In contrast, this decision was delivered while the military had become an even more dominant force in Pakistan's political landscape, and the Generals had been promoted, marking a significant departure from established norms of holding generals accountable only after their removal from office."*

The most striking aspects of the judgement was its unflinching examination of the roles played by the armed forces and intelligence agencies, including the ISI and Military Intelligence (MI). ***Justice Isa questioned the role of state agencies, particularly the ISI, in failing to counter the threat of violent extremism posed by groups like the TLP and others.*** He expressed disappointment in the alleged interference of ISI in matters of political significance, highlighting that military agency should never be seen as supporting any particular political party.

Additionally, the judgement provided specific directions for initiating action against members of the armed forces who had violated their oaths and ventured into political activities. It also called for bringing intelligence agencies under legal frameworks. It also aimed to shield other state institutions and the media from undue influence by intelligence agencies.

The judgement took a stance against religious extremism and bigotry propagated by groups like the TLP. It did not mince words and issued strong directives to counter religious extremism. This resolute approach highlighted the judiciary's commitment to curbing radicalism and preserving social harmony in the country.

The Faizabad Dharna Case and its subsequent developments had far-reaching consequences for Pakistan's judicial, political, and broader landscape. However, Justice Isa and his family went through a tough time on that count. Even the then Prime Minister Imran Khan had eventually admitted that the reference regarding his family-properties against Justice Isa was a mistake pushed by the establishment's agenda. The subsequent erosion of the court's authority and the impact on civil liberties painted a vivid picture of how the Faizabad Dharna Case left its mark on Pakistan's legal and political scene.

**On 22<sup>nd</sup> March 2024:** The Supreme Court of Pakistan (SCP) set aside the dismissal of former Islamabad High Court (IHC) senior judge Shaukat Aziz Siddiqui, declaring he should be entitled to all the perks and benefits as a retired judge of the high court. The 23-page verdict compiled by CJP Justice Qazi Faez Isa stated that Siddiqui should be declared as a retired high court judge and would also get the perks and benefits of retirement.

A five-member bench led by Chief Justice of Pakistan (CJP) Qazi Faez Isa, including Justice Aminuddin Khan, Justice Jamal Khan Mandokhail, Justice Hasan Azhar Rizvi, and Justice Irfan Saadat, on 23<sup>rd</sup> January 2024, had reserved its verdict on Siddiqui's plea against his removal. The proceedings of the case were broadcast live on the apex court's website. In his petition, the former judge had challenged a decision of the Supreme Judicial Council (SJC) about his dismissal from service.

The former judge had challenged the Supreme Judicial Council (SJC) about his removal from service after a speech he had delivered at Rawalpindi Bar Association. Lawyer Hamid Khan represented the former IHC judge in the case, while Kh Haris appeared before the apex court to represent former DG ISI Lt Gen (retd) Faiz Hameed and Brig (retd) Irfan Ramay. The proceedings were broadcast live on the apex court's website and as on YouTube channel.

At the start of the hearing, J Siddiqui's lawyer urged the court to conduct a fair inquiry of the matter, arguing that under Article 209(6) of the Constitution, the SJC could not present a report to the country's president without conducting an inquiry. Chief Justice of Pakistan Qazi Faez Isa said the problem was not the speech but its text; if a judge was removed for giving a speech, then half of the judiciary would go home.

It is pertinent to mention here that the then President of Pakistan Dr Arif Alvi had removed Islamabad High Court (IHC) judge Shaukat Aziz Siddiqui from his post in the light of a recommendation by the Supreme Judicial Council (SJC); the SJC's opinion about Siddiqui's dismissal and the subsequent notification issued in October 2018 were SET ASIDE. Also, that:

*"A 'delay that occurred in hearing and deciding these petitions meant that in the interregnum, Justice Siddiqui attained the age of 62 years, at which age a judge of the high court retires. Therefore, Justice Siddiqui cannot be restored to the position of judge. Consequently, Justice Siddiqui shall be deemed to have retired as a judge of the IHC and he will be entitled to receive all the benefits and privileges due to a retired judge, by allowing these petitions in the above term.*

*.....that a failure to abide by the fundamental right of due process resulted in Justice Siddiqui being treated unfairly and it was conjecturally assumed that he was making false allegations. The action, as it was taken, against Justice Siddiqui constituted mala fide and the SJC had acted coram non judice."*

The judgment also said the SJC had determined J Siddiqui as guilty of misconduct 'without ascertaining the veracity of allegations and without conducting an inquiry and merely because he had taken the matter public. If all that Justice Siddiqui alleged was true then it would be unjust and unfair to punish him for highlighting wrongdoing at the highest level. But, if on the other hand what he had alleged was found to be false then he would be guilty of misconduct.'

It stressed the need to ascertain the veracity of the allegations against the former judge, noting that '**the then-army chief and the government had explicitly requested the same.**'

The bench determined that the SJC did not state what particular misconduct Justice Siddiqui was guilty of. The SJC felt shocked because J Siddiqui had made serious allegations and had done so publicly; without appreciating that these were not generalised allegations with regard to the ISI as a whole but against certain officers within its ranks, and specific allegations against his own Chief Justice – not so serious deliberation it was.

#### **GEN MUSHARRAF SENTENCED:**

**On 17th December 2019;** a special court in Islamabad declared Gen Musharraf guilty of high treason and handed him a death sentence under Article 6 of the Constitution. It was short order while the detailed judgement was to be released later.

*[Article 6 of Pakistan's Constitution: Any person who abrogates or subverts or suspends or hold in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.]*

**On 19<sup>th</sup> December 2019;** the Special Court released the written judgment in Gen Musharraf's hi-treason case for which a 4-liner short order was read out two days earlier. It comprised of 169 pages. The special court in its detailed verdict of death penalty given to former Pakistan Army Chief and ex-president - ***ordered to hang the convict [Gen Musharraf] by neck till his actual death.*** The detailed verdict issued in the said treason case shocked the people especially the armed forces of Pakistan. The orders penned down in the verdict were traumatizing; it contained:

*"As a necessary corollary to what has been observed we find the accused guilty as per charge. The convict be hanged by his neck till he dies on each count as per charge."*

*"We direct the law enforcement agencies to strive their level best to apprehend the fugitive / convict [Gen Musharraf] and to ensure that the punishment is inflicted as per law **and if found dead, his corpse be dragged to the D-Chowk, Islamabad, Pakistan and be hanged for 03 days.**"*

[D-Chowk was named to as Democracy Chowk (crossing); a large square located at the junction of Jinnah Avenue and Constitution Avenue in Islamabad and is notoriously famous place for rallies and protests.]

*"It would be in the interest of justice that all those involved (if any) in facilitation of the escape of the fugitive accused may also be brought in the net of due course of law and their criminal acts (if any) may be investigated and tried in accordance with law."*

Dismissing criticism of a trial conducted 'in haste', the Special Court said:

*"....that Gen Musharraf had been afforded more than his due share of fair trial and given every opportunity to defend himself."*

*"....that the facts of the case are well documented and clearly demonstrate guilt on part of the accused".*

*"The trial of high treason is the requirement of the Constitution against those individuals who undermine or attempt to undermine the Constitution by any means."*

*"This Court after the presentation of undeniable, irrefutable and unimpeachable evidence by the prosecution against the accused reaches to the conclusion that indeed accused [Gen Musharraf] is guilty and deserves exemplary punishment."*

The court sentenced Gen Musharraf to death for imposing a state of emergency on 3<sup>rd</sup> November 2007, adding that it had found him guilty of high treason in accordance with Article 6 of the Constitution of Pakistan. The case was heard by a bench comprising Justice Waqar Ahmad Seth of the Peshawar High Court, Justice Shahid Karim of the Lahore High Court and Justice Nazar Akbar of the Sindh High Court. The unprecedented judgment read:

*"We, with the majority of 2 as to 1, allow the complaint and hold the accused guilty of high treason as defined at Article 6 of the Constitution and pass punishment under section 2 High Treason (Punishment) Act, 1973 - the convict be hanged by his neck till he is dead."*

*"The then Corps Commanders Committee, in addition to all uniformed officers who were guarding him [Gen Musharraf] each and every time, with boots on, are equally and fully involved in the act and deeds of the accused person."*

*"Each and every member of the Armed Forces, as per their oath under the 3rd schedule to the Constitution in pursuance to Article 244 is bound to bear true faith and allegiance to Pakistan and uphold the constitution which embodies the will of the people. They have also sworn not to engage themselves in any political activities....."*

The judge noted that Gen Musharraf's aiders and abettors were not made part of the complaint when it was filed by the federal government. However, the verdict said: ***"...that does not absolve the government from investigating these officers and filing a complaint against them".***

The 167-page verdict was written by **Justice Seth**, who along with Justice Shahid Karim said that the evidence presented had proved that Gen Musharraf committed a crime. However, the third judge, J Nazar Akbar wrote a dissenting note saying:

*"I have respectfully gone through the proposed judgement wrote by my brother Waqar Ahmad Seth J [...] with my humble comprehension of law and justice, I happened to dissent with majority view of my learnt brothers."*

After release of the detailed verdict against Gen Musharraf, members of the legal fraternity began weighing it on the severity of paragraph 66 of the judgment which called for **'the former president's body to be dragged to D-Chowk in Islamabad and hanged for three days'**. It was authored by Peshawar High Court Chief Justice Waqar Ahmad Seth; however, J Shahid Karim of the Lahore High Court [LHC] and J Nazar Akbar of the Sindh High Court [SHC] disagreed with such a method of execution prescribed by their fellow judge.

Invariably all the senior lawyers, though belonging to different schools of politics in Pakistan, termed Justice Seth's judgment as **"condemnable and unlawful"** and found Justice Karim's opinion balanced overall. All were of the view that there were multiple grounds for appeal available there. One senior Barrister reminded everyone that the country had fought against the menace that had derived pleasure from exactly this kind of corpse-dragging. ***"No sentence in law provides for a three-day lynching and no crime in this country attracts it. Justice is never for the mob."***

The high treason trial of Gen Musharraf was raised purely on ill-will, pay-back retaliation and revenge by two persons who were at the helm of the affairs in the country then; the CJP Iftikhar Chaudhry and the Prime Minister Nawaz Sharif. The charge was of clamping the state of emergency on 3rd November 2007 as a result of which Gen Musharraf had put certain judges including the CJP under house arrests.

Gen Musharraf was forced to resign from the Presidential assignment in Pakistan in August 2008. He left the country but kept on visiting his former republic regularly till ending 2013 when the two narrow minded and vindictive souls determined to take revenge from Gen Musharraf for their rough dealings – so this case of hi-treason was developed.

It was the first time in Pakistan's history that a former army chief and ruler of the country was sentenced to death. Gen Musharraf, who was sentenced in absentia, was out of the country since 2016, when by the same courts he was allowed to leave on bail to seek medical treatment abroad. The former military chief was then lying in Dubai's hospital following deterioration of his health since earlier that year. In a video statement from his hospital bed, he called the treason case 'absolutely baseless' while adding that:

*"I have served my country for 10 years. I have fought for my country. This [treason] is the case in which I have not been heard and I have been victimized."*

Gen Musharraf was booked in the treason case in December 2013 and indicted on 31st March 2014. The prosecution had tabled its evidence before the special court in September the same year however, due to various legal lacunas, his trial lingered on and he left Pakistan in March 2016 to seek medical treatment. The military as an institution remained silent over the courts' proceedings – but the members of the Pak-Army had taken it at their hearts.

Gen Musharraf graduated from Pakistan Military Academy [PMA] Kakul in 1964 and was then commissioned in the Pakistan Army. His first battlefield experience came during the 1965 Indo-Pak war and he served in the elite Special Services Group [SSG] from 1966-1972. During the 1971 war with India, Gen Musharraf was a company commander of an SSG commando battalion. After 1971, he continued to excel in several military assignments and gained regular promotions within the army.

In October 1998, he was appointed as chief of army staff by the then Prime Minister Nawaz Sharif. On 12th October 1999, troops had to take over the Prime Minister House after Nawaz prevented Gen Musharraf from landing at Karachi airport upon his journey back from Sri Lanka. He was in a normal plane in which other 200 civilian passengers were flying. In fact, the hijacking had catalysed the take-over then when Gen Musharraf and other 200 passengers' lives were endangered.

***It was a hairline escape from a major disaster.*** Pak Army's Lt Gen Usmani, the then Corps Commander Karachi, immediately took over the control of the airport and when the plane landed it had exhausted all its fuel while waiting in air. Gen Musharraf had to undertake power and he declared a state of emergency, suspended the Constitution and assumed the role of Chief Executive. There were no protests against the coup within Pakistan whatsoever. In June 2001, Gen Musharraf declared himself as the President of Pakistan – as had been the tradition in the country's history.

**Coming back to the TRIAL:** A 3-member special court comprising Chief Justice of the Peshawar High Court [PHC] Waqar Seth, Justice Nazar Akbar of the Sindh High Court [SHC] and Justice Shahid Karim of the Lahore High Court [LHC] was made to hear the case. On behalf of the PTI government, the prosecution team, led by Advocate Ali Zia Bajwa, argued before the court to amend the indictment against the former military ruler. He contended to frame charges against former PM Shaukat Aziz, former CJP Abdul Hamid Dogar, and the then Federal Minister Zahid Hamid arguing that "... ***it is imperative for all accused to be tried simultaneously. The aiders and abettors should be tried as well***" – but the court didn't respond.

It was a majority verdict, with three of the two judges giving the decision against Gen Musharraf. It is pertinent to mention here the special court on 19th November 2019 had said the verdict in the case would be announced on 28th November but the Islamabad High Court [IHC] barred it from doing so due to numerous legal lacunas. However, in utter disregard of the IHC's orders, the Special Court announced the short verdict that day flouting two basic legal requirements:

- Firstly; the defense statement of the accused was never recorded by the court.

- Secondly: it was the first case in the legal history of Pakistan when the accused was given death penalty when he was not present in the court.

The intelligentsia held that the special Court victimised Gen Musharraf in haste, allegedly, to please the out-going CJP Asif Saeed Khosa who was retiring on 21st December 2019. The prejudice and bias had no parallels in Pakistani judiciary. Just a week earlier, CJP Asif Khosa had declared his intent when he mockingly raised his hands sarcastically and cynically copying '**Gen Musharraf - the beloved leader**'. The judiciary was, perhaps, desperately trying to recover its lost prestige but that highly controversial Judgment affixed another black mark on the so-called sane judges of the country.

***This was absolute injustice.***

Even the members of the high legal fraternity, former attorney general Irfan Qadir and Barrister Ali Zafar were the first to come out and speak that the higher judiciary had purposefully attacked the solidarity of Pakistan because the decision had no merits at all. The General was victimized by the former CJP Iftikhar Chaudhry, who had been in cahoots with the former PM Nawaz Sharif; cases were on record to prove it. Nearly whole of Pakistan mourned the injustice and tyranny of the judiciary that day.

The verdict in the treason case against Gen Musharraf marked an unprecedented shift in Pakistan's history. It was far inconceivable that any military ruler of this country could be convicted of high treason. The trial lasted nearly six years, four times the judges of the special court were changed on one pretext or the other till this last bench declared the former army chief guilty of the offence; Gen Musharraf had suspended the Constitution on 3<sup>rd</sup> November 2007, when he imposed emergency in the country in consultation with the then Prime Minister Shaukat Aziz and his cabinet members.

Some might see this as the wheel having come full circle. Judicial independence cuts both ways, depending on where one is standing. There were legal remedies available to him as part of his constitutionally protected right to due process. His lawyers, and the PTI government, daring announced they would appeal the special court's decision.

Fighting for one's country does not preclude the commission of treachery. Two senior uniformed officials, as high as of Lt Gen rank while the other was Brigadier, were court-martialed and convicted on charges of espionage earlier that year of 2019.

The moment news about Gen Musharraf's conviction appeared in media, Maj Gen Asif Ghafoor, DG ISPR, in an official statement said 'the decision given by special court has been received with lot of pain and anguish by rank and file of Pakistan Armed Forces'. The statement by the Director General of Inter-Services Public Relations [ISPR] came after a meeting of the top military leadership was held at the Army General Headquarters [GHQ] in Rawalpindi where the said judgement was discussed. The statement said:

*"An ex-Army Chief, Chairman Joint Chief of Staff Committee and President of Pakistan, who has served the country for over 40 years, fought wars for the defense of the country can surely never be a traitor. **The due legal process seems to have been ignored including the constitution of special court, denial of fundamental right of self-defense, undertaking individual specific proceedings and concluding the case in haste.***

*Armed Forces of Pakistan expect that justice will be dispensed in line with Constitution of Islamic Republic of Pakistan. (For him) it was a dark day, when an Ex-Commando General*

*who had fought valiantly three wars for Pakistan, who defended his country silencing the most formidable and aggressive journalists with his eloquence when his country was fighting the worst war on international media, who in his heart and mind was the one of the biggest patriots his country had produced was given death penalty on charges of treason. (Gen Asif dared to question the so called honourable Chief Justice) ....it was shame for all the members of judiciary – and he [the CJP] was retiring with utter disgrace just four days after.*

*Nawaz Sharif has been allowed to go abroad with his entire family. Shahid Khaqan Abbasi was the Chairman PIA and one of the accomplices. There are many more.”*

See the media posts on the count:

*“This verdict against Gen Musharraf is as per the ‘sweet will of CJ’----he had already barred his teeth and announced in Public that Gen Musharraf will be punished. Although IHC has stopped any further action on this case and LHC has also approved to form a new Bench, but someone at the helm of affairs was in hurry - passing the judgment just TWO DAYS before his retirement.”*

.... Another media comments in that regard:

*“What a farce our judicial system is. Those who have been convicted for embezzling tons of public money have been given relief. If this is not treason what else can be. An army chief, when he takes over the reins of government by abrogating the constitution, does not act on his own. It is an institutional intervention and is necessitated by compelling circumstances and absolute intellectually corrupt practices allowed by some family-ridden politicians in power. Today’s judicial decision has created further fissures.....*

*These Judges might be lured like Judge Arshad Malik for delivering the verdict in a hurry. The Hon CJ of IHC has (already) raised objections about the constitution of the charge-sheet itself. There is also a second application pending about the validity and powers of this Hon court to decide this case. **The verdict which has been delivered in such a hurry is worth throwing in dust bin.** The matter is NOT repeat NOT going to end here. A long way to go.”*

#### **BBC’s NOTE ON JUSTICE SETH:**

**On 13<sup>th</sup> November 2020:** The judge, who wrote the judgment awarding the said derogatory sentence in Gen Musharraf’s trial, named J Waqar Seth, died after contracting coronavirus. He was an outspoken judge of a kind rarely seen in Pakistan and an unlikely source of opposition to the powerful hi-officials of the country. Tributes described him as bold, fearless and independent; he was 59.

As chief justice (CJ) of Peshawar High Court (PHC), J Seth passed judgments that angered both the military and the government - including the above paragraphed death sentence on exiled former ruler Gen Musharraf that had made headlines around the world. He had been critical on human rights abuses in striking down a law under which the military ran secret internment centres and acquitting dozens of people convicted under anti-terrorism laws for lack of evidence.

Justice Seth's death was seen as a major loss in country's judiciary where the unknown forces had been expanding its influence again in years after the rogue 9/11 episode. Waqar Seth became chief justice of the Peshawar High Court in 2018 but was not promoted to the Supreme Court; his goal remained to struggle for judiciary's independence in Pakistan's quasi democracy. Justice Seth represented the tradition of conscientious and fearless judges... who unfortunately always remained in minority in the country's judicial canvas. A tweet said that Justice Seth's stature was raised not just by the list of his remarkable judgments, '**but also the oppressive conditions that required courage for writing such judgments.**'

Supreme Court Bar Association president Abdul Latif Afridi described him as "a courageous and uncompromising" person who didn't shy away from a fight with the high-ups whether from executive or military; and he paid a personal price for it - that the CJ Peshawar had been denied elevation to the Supreme Court three times despite his seniority.

Justice Seth made history when the three-member special court he headed sentenced Gen Musharraf to death a year earlier in absentia. The General had been found guilty of treason for suspending the constitution and imposing emergency rule in 2007. News of Gen Musharraf's sentence in December 2019 had sparked widespread protests in Pakistan. However, it was the first time the treason clause in the constitution been applied to anyone by a civil court in a country where the military had controlled political decision-making during the said General's tenure from 1999 till 2007. ***The penalty was unlikely to be carried out*** because Gen Musharraf had been allowed to leave Pakistan for Dubai in 2016 on medical grounds where he died later.

Due to his unprecedeted and blatantly odd judgment in Gen Musharraf's Case, there was outrage, with the government seeking to disbar Justice Seth for being unfit for office, and legal experts calling the instructions unconstitutional. The Pak-military had to issue a rare statement saying the verdict was '***received with a lot of pain and anguish by the rank and file of the armed forces and that Gen Musharraf can surely never be a traitor.***'

Justice Seth was never liked rather immensely hated by the general populace of the country when soon after taking charge as chief justice PHC in June 2018, he acquitted key-butchers convicted in trial by the military court that had been constituted following the 16<sup>th</sup> December 2014 massacre by the Pakistan Taliban at Peshawar's Army Public School in which 143 children and 11 lady teachers were axed and butchered mercilessly. The whole world media had narrated that mourning episode for days and weeks; the Pak-Army had done great efforts for locating them in Afghanistan and their repatriation to Pakistan and had done a military trial. Justice Seth applied his rogue mind and cited ***a lack of evidence and malice in facts and law as grounds for those acquittals.***

Waqar Ahmad Seth was born on 16 March 1961 into a middle class family in the city of Dera Ismail Khan, Khyber PK. He received most of his education in Peshawar, graduating in law and political science in 1985. The same year he enrolled as a practicing attorney. Lawyers who knew him said he was a socialist at heart; was active in the student wing of the left-leaning Pakistan People's Party (PPP) and later hung portraits of Karl Marx, Vladimir Lenin and Leon Trotsky in his private law office. Given his habit of shunning the grand security protocols other senior officials crave, the lawyers' fraternity often feared he was putting his life in danger. ***He always used his personal car to drive to work and back, and could often be seen in the market doing shopping with his family, or sipping tea at a cafe with an old friend, just like a common man.***

The International Court of Justice (ICJ) in its briefing paper on Pakistan's military courts, released in January 2019, admitted this much when it mentioned that while petitions of people convicted by military courts had been rejected by the Pakistani Supreme Court in 2016 for lack of jurisdiction, the outcome was different when the same petitioners approached Justice Seth's high court in 2018. Many thought he

might further rock the Pakistan's national cause by acquitting on appeal the '**Bin Laden doctor', Shakil Afridi**, who had helped the US find Bin Laden in Abbottabad. Dr Afridi was accused of treason as per Pakistani law in vogue and there was sufficient evidence available on record.

### **IHC RELEASED CONVICTED PRISONERS:**

**On 20<sup>th</sup> March 2020;** the Islamabad High Court [IHC] ordered the issuance of bail for prisoners who were facing trial for minor crimes in order to prevent the spread of the covid-19. IHC Chief Justice Athar Minullah made the decision after hearing a case regarding 1,362 prisoners being incarcerated in overcrowded jails.

Deputy Commissioner Islamabad Hamza Shafqaat assured the court that no prisoner held at Adiala Jail had been infected with the virus. However, Justice Minallah worried that the corona virus outbreak had worsened in China after it spread among prisoners. The court was seen inclined that relief would also apply to prisoners facing NAB trial considering the phenomenon as **unnecessary arrests**. The court also ordered the release of suspects then in police custody.

Within a week, a writ petition against the IHC judgment for release of 400 under-trial prisoners from Adiala jail was filed before the Supreme Court. A five-member larger bench of the apex court headed by Chief Justice of Pakistan Justice Gulzar Ahmed heard the appeal against the said order. The petition contained that release of 400 criminals was unprecedented and unconstitutional. The Superintendent, Central Prison, Rawalpindi, had submitted a report in the IHC that the authorized occupancy of the Central Prison Rawalpindi was 2,174 while the number of its present inmates was 5,001 that day. The number of under-trial prisoners whose cases were pending before the courts was 1,362. Majority of the prisoners were alleged to have committed offences falling within the ambit of the non-prohibitory clause; and several convicted prisoners were above the age of 55 years while some suffering from serious illnesses. The fact remained that the IHC CJ while in chamber exercised his sole jurisdiction and converted the report into a petition under Section 561 A of the Criminal Procedure Code [CrPC] on the ground that a national calamity had been declared by the federal government in the wake of corona-virus threat and that the situation in the over-crowded Adiala Jail was alarming.

The IHC was not vested with jurisdiction to exercise such *suo moto* powers, thus the impugned judgment dated 20<sup>th</sup> March 2020 was illegal, without any jurisdiction and was liable to be set aside. The remedy under Section 561-A CrPC was not an alternate and substitute for an express remedy as provided under the law. The petitioner urged that in the instant case 'the provincial government is empowered under the Pakistan Prison Rules, 1978 read with Section 401 of CrPC to suspend the sentence'. The Islamabad Capital Territory [ICT] administration didn't find it expedient to come forward and invoke the said provisions. The petition was admitted for hearing.

**On 30<sup>th</sup> March 2020;** a five-judge bench, comprising CJP Gulzar Ahmed, Justice Umar Ata Bandial, Justice MAK Miankhel, Justice Sajjad Ali Shah and Justice Qazi M Amin, heard the said petition. The CJP remarked:

*".....how the high courts could have ordered the release of under-trial prisoners. Corona-virus is a grave matter and a serious issue but we cannot allow the release of the prisoners involved in heinous crimes. We're well aware about the country's situation but we'll have to see under what authority the IHC had ordered the release of the said prisoners."*

The SC's larger bench thus ***threw away the judgment of the IHC*** and also suspended all the directives of the other courts regarding release of prisoners. The provincial home secretaries, IG Prisons, Prosecutor General NAB and ANF were also notified not to release any prisoner until the apex court makes a ruling on it.

### **ATIF ZAREEF CASE OF 2021:**

**On 4<sup>th</sup> January 2021;** a Supreme Court bench headed by Justice Mansoor Ali Shah gave remarkable verdict in two cases titled as Crl Appeal No.251/2020 & Crl Petition No.667/2020. The two cases were against the judgment of Lahore High Court, Rawalpindi Bench, dated 09.06.2016, passed in Crl. A. No.393/2013, and Capital Sentence Reference No.14-T/2013 and against the Order dated 09.06.2020 of that Court declining suspension of sentence in Crl. Misc 822/M of 2020. **Barrister Rida Tahir, a distinguished human rights activist,** analysed the judgement of the Supreme Court of Pakistan in the said case and the re-victimisation faced by female survivors of sexual violence in the criminal justice system of Pakistan. She wrote:

*"Across Pakistan, the conviction rate in sexual violence (SV) cases stands at less than 3 per cent (a Research Paper of 2021 at [www.las.org.pk/wp-content...](http://www.las.org.pk/wp-content...) is referred), despite their high level of prevalence. Rape is a severely under-reported crime in Pakistan and there are no reliable statistics due to under-reporting and no centralised data collection. An analysis reveals that the causes of the under-reporting of SV crimes and a large number of acquittals by the courts is due to, among other things, **the re-victimisation of female survivors of SV by the criminal justice system.***

*This includes the use of the two-finger test (TFT) and the impeachment of the chastity and morality of female survivors by questioning their prior sexual activity and maligning their character in their cross- examination by the defence."*

**[Two Finger Test (TFT);** also known as the virginity and hymen test is an old practice and has long been a routine part of criminal proceedings in Pakistan. It is conducted on female survivors / victims of rape and SV in Pakistan. It is a practice whereby two fingers are inserted inside the female genitalia by a medico-legal officer to check its size and elasticity. The TFT is based on the unscientific and misogynist assumption that a woman who engages in sexual intercourse is less likely to have been raped hence she lacks the moral authority to make an accusation of rape or SV.]

The Supreme Court of Pakistan (SCP)'s landmark judgement in the said cited case, which held that ***recording the sexual history of the survivor by carrying out the TFT and questioning the survivor on her sexual history or character in order to discredit her credibility is unconstitutional and illegal.***

Art. 14 of the Constitution of Pakistan (Constitution) grants the right to dignity. In *Atif Zareef v. The State*, the SC held that reporting and recording the sexual history of a survivor by conducting the TFT was contrary to Art. 14 as it amounted to degrading her human worth by discrediting her independence, identity, autonomy and free choice. It was also held that the TFT had no scientific value. The TFT was previously held unconstitutional and illegal by the Lahore High Court (LHC) in *Sadaf Aziz v. Federation of Pakistan*; however, the LHC's judgement only (practically) applied to the province of Punjab whereas the SC's judgement, through that verdict of 2021, made it a binding precedent across the whole country.

Moreover, Art. 4(2) (a) of the Constitution stipulates that, "...no action detrimental to the life, liberty, body, reputation...of any person shall be taken..." The SC held that mentioning the sexual history of a survivor by making observations about her body, such as, '**the vagina admits two fingers easily**' was contrary to the reputation and honour of the survivor and (thus) violated Art. 4(2) (a) of the Constitution. Whereas, the TFT was based on the unscientific and misogynist assumption that 'a woman who engages in sexual intercourse is less likely to have been raped hence she lacks the moral authority to make an accusation of rape or SV'.

During SV trials, the accused was often defended on the basis that the survivor / victim had a unrestrained background and that she was a woman of immoral character and on that basis, she might have consented to the alleged act of rape or her testimony was less worthy of belief. Art.151 (4) of the **Qanun-e-Shahadat Order** 1984 (QSO) stipulated that, when a man is prosecuted for rape... it may be shown that the victim was of generally immoral character to impeach her credibility.' It was omitted by the Criminal Law (Amendment) (Offences Relating to Rape) Act 2016. However, the practice of questioning survivors on their sexual history and chastity continued. The SC referred to *Mukhtar Ahmad v. Govt. of Pakistan*, wherein a full bench of the Federal Shariat Court (FSC) had earlier declared that the provisions of Art. 151(4) of the QSO was repugnant to the Injunctions of Islam.

The SC stated at paragraph 14 of the judgement that: 'evidence relating to sexual history should not be admitted in order to draw inferences supporting the 'twin myths', namely, that by reason of that sexual history, it is more likely that the complainant may have consented or become less worthy of belief.' It was also held that the omission of Art. 151(4) of the QSO left no doubt in discovering and ascertaining the intention of the Legislature that in a rape case, the survivor was not to be questioned about her alleged general immoral character. Further, the SC held that the declaration of the FSC of Pakistan as to the provisions of Article 151(4) of the QSO, since omitted, also barred such questions.

Often, expression such as, habituated to sex, woman of easy virtue, woman of loose moral character, and non-virgin are used to describe survivors of SV in Pakistan. The SC held that '**... such expressions are unconstitutional and illegal. The courts should discontinue the use of inappropriate expressions even if the charge of rape is not proved.**'

The judgment in *Atif Zareef v. The State* was widely celebrated across Pakistan. However, in order to cease the re-victimisation of SV survivors in courts, meaningful transformations in the CJS's response to SV was needed to be made; gender sensitisation trainings could have been provided to judges, lawyers, prosecutors, medico-legal officers, police officers and all responders to SV crimes in the system. Secondly, lawyers and prosecutors could be provided with ethical training on advocacy and education on the existing laws on SV along with specialised sexual and gender-based violence mechanisms.

Lastly, the government could provide Standard Operating Procedures (SOPs) for prevention and response to SV based on international good practices, such as, the framework issued by the World Health Organization (WHO) and UN Women on preventing violence against women and girls. The government and civil society organizations could have acted in harmony and devise appropriate strategies in order to bring reforms to the CJS and female's dignity in the society.

#### **SC BANS EXECUTIONS OF MENTALLY-DISABLED PRISONERS:**

**On 10<sup>th</sup> February 2021;** the Supreme Court of Pakistan (SC), while commuting the death sentences of Imdad Ali and Kanizan Bibi, placed a ban on the death penalty being applied to those with mental disabilities. Amnesty International said:

*"This landmark judgment from Pakistan's Supreme Court marks an important development not only for the death penalty, but also for mental health. Imdad Ali and Kanizan Bibi should have been taken off death row the moment their history of severe mental disabilities was brought to the fore. This historic precedent puts a stop to the execution of other prisoners with similar conditions, many of whom have yet to be diagnosed."*

Imdad Ali and Kanizan Bibi, who were on death row since 1991 and 2002 respectively, had been repeatedly diagnosed with schizophrenia. Both had multiple execution warrants issued for them before securing stays on the basis of their mental disabilities. Both Imdad and Kanizan were convicted of murder. On 10<sup>th</sup> February 2021, the Supreme Court passed a historic order commuting their death sentences, stating: **'After considering the material discussed herein above, we hold that if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his / her punishment, then carrying out the death sentence will not meet the ends of justice.'**

#### **NCM - DETAILED JUDGMENT OF 7<sup>th</sup> APRIL 2022:**

**On 13<sup>th</sup> July 2022;** the Supreme Court of Pakistan (SCP) published a judgment detailing the reasons for issuing its landmark unanimous short order dated 7<sup>th</sup> April 2022 which order had declared the ruling of the deputy speaker of the National Assembly (NA) dismissing the resolution of no confidence (RNC) motion against the country's PM Imran Khan **'to be contrary to the Constitution and the law and of no legal effect.'**

The judgment held that the ruling and the subsequent acts of the PM and the President dissolving the NA were a nullity in the eye of the law.

**Background to the Judgment** was that on 3<sup>rd</sup> April 2022, PM Imran Khan was set to face a no-confidence resolution vote under Article 95 (*Vote of No-Confidence Against Prime Minister*) of the Pakistan's Constitution, after the opposition said it had the simple majority numbers needed to remove him. However, NA Deputy Speaker Qasim Khan Suri dismissed the motion, ruling that it was in breach of Article 5 of the Constitution (*Loyalty to State and Obedience to Constitution and Law*) because the opposition was alleged to be complicit in a **'collusion with a foreign state'** purportedly evidenced by a diplomatic cypher. The foreign state and a few members of the National Assembly were said to be using the RNC process to oust the PM. Although it was not mentioned in the ruling, short order, or judgment, the alleged foreign state was widely identified in media reports as the United States.

On the same day, PM Khan advised the country's president Arif Alvi to dissolve the NA under Article 58 (*Dissolution of National Assembly*) of the Constitution and prepare for new national elections.

On its own motion, the apex court (SC) took notice of the matter. On 7<sup>th</sup> April 2022, it issued a short order unanimously setting aside the deputy speaker's ruling on the no-trust motion. The court said: **'... the ruling was contrary to the Constitution and the law and of no legal effect.'** It restored the NA by declaring that the advice given by the PM and the order of the president were unconstitutional and null. The court declared that the NA was in existence at all times and would continue

to remain so. (Short Order 5). The order also stated that detailed reasons for the order would be recorded later.

The detailed judgment was authored by Chief Justice Umar Ata Bandial, with concurring judgments by Justice Mazhar Alam Miankhel and Justice Jamal Khan Mandokhel. Preliminarily, the court said it had original constitutional jurisdiction under article 184(3) of Pakistan's Constitution, as 'it relates to the enforcement of a fundamental right or the concerns of the public at large.' The court found that the ruling and subsequent actions of PM Imran Khan and president Arif Alvi *prima facie* infringed the fundamental rights of the Opposition Parties and the public at large. Namely, 'the Deputy Speaker's ruling and the actions of the PM and the President defeated the right of the Opposition Parties to test their voting strength in support of the RNC and if successful, to form the next Government in exercise of their fundamental right under Article 17(2) of the Constitution.'

Regarding the invocation of **Article 5 and national security** in the deputy speaker's ruling, the court said that:

*".... although courts should exercise caution and restraint in matters of national security, judicial review is permissible on narrow grounds. When national security is taken as a defence to sustain a decision by the Government that is *prima facie* unconstitutional then the Government is under an obligation to substantiate the bona fides of its defence. To do so the Government must produce evidence to demonstrate the defence in order to escape legal scrutiny of its impugned action.*

*(Because the contents of the cipher were not produced and other evidence detailing those members of the national assembly were involved in the conspiracy was not provided) ... The Court cannot accept the Respondents defence that the alleged contravention of Article 95 of the Constitution by the Deputy Speaker is protected from judicial scrutiny on the claim of national security."*

The court also found that the deputy speaker's ruling was not protected by the immunity provided by Article 69(1), which could bar the courts from inquiring into proceedings in Parliament **to the extent that the same suffer from an irregularity of procedure**. Further, the apex court held:

*"The ruling fails to qualify for protection as part of the internal proceedings of Parliament, (as the ruling was not) the outcome of a vote in the NA but instead, it was a unilateral decision taken by the Deputy Speaker at the behest of the Law Minister....*

*The current Constitution empowers the superior courts to examine and adjudicate the validity of proceedings in Parliament if these contravene the substantive or procedural provisions of the Constitution. Although courts will ordinarily exercise restraint and not enter into the domains of the Legislature and the Executive, they will intervene when either of these branches overstep their constitutionally prescribed limits.*

*(Because the deputy speaker's ruling is unconstitutional).... **the RNC against the PM stands revived.** Furthermore, in light of the Explanation to Article 58(1) of the Constitution, a PM against whom notice of an RNC has been given cannot advise the president to dissolve the NA, and thus, the president's order also loses constitutional legitimacy. These findings accord with a settled principle of law that when the basic order is without lawful authority and void ab initio, then the entire super-structure raised thereon falls to the ground automatically. **Therefore, the NA stands restored with immediate effect, and in fact, it is deemed to have been in existence at all times.**"*