

Scenario 38

LEGAL FRAMEWORK ORDER (2002)-I:

24th August 2002: Chief Executive [& 'PCOed' President of Pakistan] General Musharraf issued the Legal Framework Order (LFO) 2002, announcing general elections for the National and Provincial Assemblies to be held in October 2002. Constitutional Provisions were amended for smooth and orderly transition of power from the Chief Executive to the newly elected Prime Minister after the elections.

The **main text** of the L. F. O. 2002 stated as follows:

..... It will come into force henceforth and in the first meetings of National Assembly, Senate and Provincial Assemblies and that if any necessity arises for any further amendment of the Constitution or there is any difficulty in giving effect to any of the provisions of this Order, the Chief Executive will have the discretionary power to make provisions and pass orders for amending the Constitution or for removing any difficulty. It has been further asserted that *the validity of any provision made, or orders passed, under clauses (1) and (2) shall not be called in question in any court on any ground whatsoever*. The main points of LFO 2002 may be summed up as below:

- i) Every political party shall, subject to law, hold intra-party elections to elect its office-bearers and party leaders.
- ii) Having received the democratic mandate to serve the nation as President of Pakistan for a period of five years, the Chief Executive on relinquishing the office of the CE, shall assume the office of President of Pakistan forthwith and hold office for a term of five years under the Constitution, and Article 44 and other provisions of the Constitution shall apply accordingly.
- iii) There shall be 342 seats of the members in the National Assembly, including seats reserved for women and non-Muslims.
- iv) The seats in the National Assembly are allocated to each Province, the Federally Administered Tribal Areas and the Federal Capital as under:

- Balochistan:	General 14, Women 3, Total 17
- N. W. F. P:	General 35, Women 8, Total 43
- Punjab:	General 148, Women 35, Total 183
- Sindh:	General 61, Women 14, Total 75
- F. A. T. A:	General 12, Women 0, Total 12
- Federal Capital:	General 2, Women 0, Total 2
- Total:	General 272, Women 60, Total 332
- v) In addition to the number of seats referred to in clause (iv), there shall be, in the National Assembly, ten seats reserved for non-Muslims.
- vi) Members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats won by each political party in the National Assembly. A political party securing less than five per centum of the total number of seats in the National Assembly shall not be entitled to any seat reserved for women or non-Muslims.

vii) If any question arises whether a member of the Parliament is disqualified from being a member, the Speaker or, as the case may be, the Chairman Senate shall, within 30 days, refer the question to the Chief Election Commissioner who shall give his decision thereon not later than three months from its receipt by the Chief Election Commissioner.

viii) If a member of a Parliamentary Party resigns from membership of his political party or joins another; or votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs concerning election of the Prime Minister or the Chief Minister; a vote of confidence or no-confidence; or a Money Bill, he may be declared in writing by the Head of the Parliamentary Party to have defected from the political party. The Head of the Parliamentary Party shall forward a copy of the declaration to the Presiding Officer, and a copy thereof to the member concerned.

ix) A member of a House shall be deemed to be a member of a Parliamentary Party if he having been elected as a candidate or nominee of a political party constituting the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

x) With an addition of "a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary", the clause 58 is revived.

xi) Where a Bill is referred to the Mediation Committee, it shall, within 90 days, formulate an agreed Bill likely to be passed by both Houses of the Parliament and place the agreed Bill separately before each House. If both the Houses pass the Bill, it shall be presented to the President for assent.

xii) All decisions of the Mediation Committee shall be made by a majority of the total number of members of each House in the Committee.

xiii) The President may, in consultation with the Speaker of the National Assembly and Chairman of the Senate, make rules for conduct of business of the Mediation Committee.

xiv) With an insertion of a new article 152A, there shall be a National Security Council (NSC) whose chairman shall be the President in order to serve as a forum for consultation on strategic matters pertaining to the sovereignty, integrity and security of the State, and the matters relating to democracy, governance and inter-provincial harmony. Other members of NSC shall be the Prime Minister, the Chairman of the Senate, the Speaker of the National Assembly, the Leader of the Opposition in the National Assembly, the Chief Ministers of the Provinces, the Chairman Joint Chiefs of Staff Committee, and the Chiefs of Staff of the Pakistan Army, Pakistan Navy and Pakistan Air Force. Meetings of the NSC may be convened by the President either in his discretion, or on the advice of the Prime Minister, or when requested by any other of its members, within the time frame indicated by him.

xv) On dissolution of an Assembly under article 58(2)(b) or, on completion of its term, the President, in his discretion, or, as the case may be, the Governor, in his discretion but with the previous approval of the President, shall appoint a caretaker Cabinet. When a caretaker Cabinet is appointed, on dissolution of the National Assembly under Article 58 or a Provincial Assembly under Article 112, or on dissolution of any such Assembly on completion of its term, the Prime Minister or, as the case may be, the Chief Minister of the caretaker Cabinet shall not be eligible to contest the immediately following election of such Assembly.

xvi) The Proclamation of Emergency of the 14th October 1999, all President's Orders, Ordinances, Chief Executive's Orders, including the PCO No: 1 of 1999, the Oath of

Office (Judges) Order 2000, the Referendum Order 2002 (Chief Executive's Order No: 12 of 2002), and all other laws made between the October 12, 1999 and the date on which this Article comes into force, are hereby affirmed, adopted and declared notwithstanding any judgment of any court, to have been validly made by competent authority and notwithstanding anything contained in the Constitution shall not be called in question in any court on any ground whatsoever.

xvii) All Proclamations, President's Orders, Ordinances, Chief Executive's Orders, laws, regulations, enactments, notifications, rules, orders or bye-laws in force immediately before the date on which this Article comes into force shall continue in force until altered, repealed or amended by competent authority.

Through LFO 2002, the President and Chief Executive revived the Constitution of Pakistan, except a few articles pertaining to the Provincial Governments and the Senate of Pakistan etc, with effect from 16th November 2002. Those parts of the Constitution which were restored immediately included 'Preamble, Article 1 to 58 (both inclusive), Article 64 to 100 (both inclusive), Annex, insertion of Article 152A and the schedule to the Constitution'.

Some of the immediate implications of the L. F. O. 2002 were:

A) LFO 2002 was sanctified by postulating that no body could challenge it in any court of law 'on any ground whatsoever.'

b) It was then assumed to be an integral part of the Constitution and there was no imperative left for the newly and duly elected National Assembly but to accept it willingly or unwillingly. The Parliament was quite unable to reverse or do away with any of the Amendments, especially the one relating to the National Security Council. The Prime Minister and the whole Parliament were at the will of the President for their survival.

c) Many believed that the LFO 2002 was enforced without any regard for the Constitutional and democratic norms and proprieties. By terminating the 13th Amendment that was not passed by two-third majority but a unanimous vote of the Parliament, the President was again authorized to enjoy the powers of dismissing the Prime Minister along with his Cabinet and the Parliament.

d) With the adoption of the Legal Framework Order 2002, Pakistan was virtually advanced from the parliamentary form of government to the presidential system. The Article 58(2)(b) clause was revived and an insertion of the new clause 152A was introduced which created the National Security Council (NSC).

e) Though the function of NSC and the clause 58(2)(b) was to provide a system of checks & balances, there were some more issues to be considered. In case of a confrontation between the President and the Prime Minister, the majority of votes in the NSC would automatically go in favour of the President who could thus easily remove the Prime Minister, putting the Parliamentary form of government once again in jeopardy as has been happening in 1990s.

f) With a radically altered Constitutional Framework, in whose making the people of Pakistan had no say, the sovereignty of the Parliament was severely crippled.

g) Although the Article 58(2)(b) did not specifically mention the President as having the power to sack the Prime Minister, the dissolution of the Assembly would automatically make the Prime Minister go. During 1988-96, this clause was misused by three Presidents to remove Prime Ministers for purely political reasons, even though the Constitution authorized the President to take such a drastic step only after it had become clear that:

'A situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Constitution.'

There is no doubt that every future Prime Minister would prefer to work under the constraints of 58(2)(b) at all times.

The only way to constitutionally amend the Constitution was through the Article 239, which lays down the following procedure:

"A bill to amend the Constitution may originate in either House (National Assembly or the Senate) and, when the bill is passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House."

In the given circumstances, it was considered by the Constitutional experts that Gen Musharraf would require two-thirds majority to have his Constitutional Amendments or LFO 2002 validated. In addition, the legal position of Gen Musharraf was also not in accordance with the Constitution of Pakistan for it does not recognize a uniformed Army Chief as the Head of State. Under the Constitution of 1973, only a majority vote in National Assembly, Senate, and four Provincial Assemblies could elect a President.

One *Naeem Shakir Advocate* had rightly pointed out that the LFO remained under fire inside and outside Pakistan for the changes it brought in 2002 to our original Constitution, although it was just the latest in a seemingly endless series of challenges and changes to the constitution. In fact Gen Musharraf took powers in 1999 from an elected government that alone had affected 29 constitutional amendments.

17th CONSTITUTIONAL AMENDMENT:

The Legal Framework Order 2002 was promulgated and was passed into the constitution, by way of the **17th Amendment 2003**, which went through parliament on 31st December 2003. This constitutional amendment had validated all the regulations established, appointments made and other steps taken by Gen Musharraf and his government under the LFO, and protected it from legal action against persons who would have it otherwise.

The history would remember that the legal authority that the military commander had exercised to effect those constitutional amendments had taken birth from a Supreme Court order in the case of *Zafar Ali Shah v. Pervez Musharraf (PLD 2000 SC 869)*. As the Supreme Court had conferred vast powers on the military government, it became extremely difficult to challenge its legal legitimacy. However, some jurists held that the Supreme Court was not authorised to confer such powers on an individual, as only the chosen representatives of the people could exercise them. Some powerful voices were also raised that the superior courts should have exercised their powers to judicially review the actions of the armed forces, including the proclamation of emergency, as deemed necessary.

How the outer world had seen that 17th Amendment, one can see 'Reforming the Judiciary in Pakistan' **Asia Report N°160 released on 16th October 2008** which says:

'Like Zia's Eighth Amendment, Musharraf's 17th Amendment, passed by a rubber-stamp parliament in December 2003, enshrined all executive orders and changes made under military rule. The 17th Amendment gave the president, the titular head of state, the power to dismiss elected governments and parliament and also transferred from the prime minister, the head of government, key appointment powers to the president including appointments of governors, the three service chiefs and the chief justice of the Supreme Court. Gen Musharraf's constitutional distortions weakened civilian institutions. By sidelining secular democratic forces, the military government also enabled right-wing religious parties to fill the vacuum. In dismissing legal challenges to 17th Amendment, the Supreme Court shirked its responsibility to protect constitutional rule.

Some courageous judges, such as Justices Dorab Patel and Fakhruddin G. Ibrahim, had refused to sanctify authoritarian interventions, and preferred to resign rather than undermine constitutionalism and the rule of law. By legitimising military rule and intervention, most have, however, abdicated their duty to uphold the law.

After the PCO of year 2000, the reconstituted Supreme Court was composed of judges who willingly accepted the military's directions. They included Iftikhar

Chaudhry, who was on the bench which had upheld the legality of Musharraf's coup under the doctrine of state necessity. The Supreme Court also authorised the army chief to amend the constitution. It was Gen Musharraf who had elevated Justice Iftikhar M Chaudhry to the slot of the Chief Justice of Pakistan in 2005.'

Thus the Supreme Court had allowed the same person to hold the office of the President and Commander of the armed forces, despite the fact that this had contravened the spirit of 1973's Constitution. It was undemocratic for the same person to hold these two offices, as one was a position of public service whereas the other was a public office to represent the people.

Inevitably, this subject also came before the Supreme Court in the case of *Qazi Hussain Ahmed v. Gen Pervez Musharraf (PLD 2002 SC 853)*. In this instance, lawyers asserted that the 1973 Constitution was the supreme law of the land and Gen Musharraf's powers were strictly circumscribed as per Supreme Court's judgement in Zafar Ali Shah's Case. However, the court again refused to take on the military ruler, by deciding that the relevant provisions of the constitution were still being held in abeyance.

It may not be out of context to recall some background to explain the real intent of the LFO with regards to the judiciary, as judges were retained or dismissed by the military ruler on the basis of their political allegiance. Superior court judges have from the beginning been obliged to take an oath of the office to uphold the constitution. However, the relevant provisions of the Provisional Constitution Order 1 of 1999, introduced by Gen Musharraf, remained in vogue till then. Recall that PCO:

'No Court, tribunal or other authority shall call in question the Proclamation of Emergency of 14th day of October 1999 or any other Order made in pursuance thereof. No judgement, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any other authority designated by the Chief Executive.'

All persons who, immediately before the commencement of this Order, were in service of Pakistan as defined in Article 260 of the Constitution and those who immediately before such commencement were in office as Judge of the Supreme Court, the Federal Shariat Court or a High Court or Auditor General or Ombudsman and Chief Ehtesab Commissioner, shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any.'

10th October 2002: Article 179 of the Constitution was amended through the Legal Framework Order (LFO) under which the retirement age of SC Judges was enhanced from 65 to 68 years. Due to reasons best known to Gen Musharraf or his military or legal advisors, the amendment was not enforced on the same date. The new seniority list of the 37 Lahore High Court judges was issued on 2nd January 2003, confirming enforcement of amendment to Article 195 of the Constitution governing the retirement age of High Court judges.

Following enforcement of the amendment, Chief Justice Sheikh Riaz Ahmad, who was to attain the age of retirement on 8th March 2003, under the previous law was to retire in 2006. Two other SC judges - Justice Munir A Sheikh and Justice Qazi Mohammad Farooq – were scheduled to retire on 1st July and 5th January 2006 respectively.

Urging the legislature to abrogate this amendment, the Supreme Court Bar Association President, Hamid Khan, had raised his voice that the government had enforced it to prolong the tenure of judges whose oath was administered under the PCO. The Bar Association had held that enforcement of the amendment was a clear violation of the Constitution since the Supreme Court, while deciding the Zafar Ali Shah case in May 2000, had observed that the then chief executive could not make any amendment regarding affairs of judiciary.

31st October 2002: Taking serious exception to Supreme Court Bar Association's charge that it had "ceased to be independent", the Supreme Court reminded the body that it was

due to its judgement that Gen Musharraf had held the general elections [of October 2002] to hand over power to an elected government. It was reacting to the SCBA statement that arguing a case before the present judiciary was a futile exercise "as it had ceased to be independent", due to the oath taken by the judges under the Provisional Constitutional Order (PCO), promulgated by the Gen Musharraf regime.

23rd November 2002: Gen Musharraf administered oath of office to Faisal Saleh Hayat, Aftab Ahmed Sherpao and Nilofar Bakhtiar. All the three were allegedly involved in corruption cases prepared by the 'Accountability Bureau' while the later two politicians were formally convicted by Accountability Courts.

EX ISI CHIEF AGITATES LHC:

27th December 2002: The former chief of the ISI, Lt Gen Javed Nasir (Retd), filed a petition before Lahore Anti-Terrorist Court seeking the death sentence for four top journalists responsible for a report accusing him of embezzling Rs:3 billion. Gen Nasir, perhaps for the first time before the Pakistani courts, had confirmed the ISI's 'worldly criticized role' in Afghanistan and Bosnia, true or false.

The petition, published in ***the South Asia Tribune***, claimed that the ISI under him [Lt Gen Javed Nasir] had decided to curb the 'free hand' acquired by RAW since 1948 in the "manipulation and control of Sikh *yatris*" travelling to Pakistan to attend religious functions. He had set up the Pakistan Sikh *Gurdwara Prabandhak* Committee to snatch control from the Indian intelligence agency and had succeeded in gaining control over the management of the festivals within a year. This matter had incensed the Indian government so much that Prime Minister Atal Behari Vajpayee preferred to raise the issue with the then Prime Minister Nawaz Sharif during their one-on-one meeting during the famous Lahore *yatra* in February 1999.

Lt Gen Javed Nasir further said that the Punjab chief minister had accompanied Mr Vajpayee and that eventually the Pakistan government ensured that the Indian plan to regain control was "aborted." Gen Nasir had cited this to substantiate a claim that RAW, along with the CIA, was behind the effort to discredit him through the newsmedia.

Lt Gen Javed Nasir had also disclosed in the petition that:

'Despite the UN ban on supply of arms to the besieged Bosnians, he successfully airlifted sophisticated anti-tank guided missiles which turned the tide in favour of Bosnian Muslims and forced the Serbs to lift the siege, much to the annoyance of the US government. He thus became the target of US, Indian and secular minded lobbies both inside and outside Pakistan.'

'Having failed to buy him, the US government started a fabricated and mendaciously false propaganda against him and demanded his removal as ISI chief, failing which Pakistan would be declared a terrorist state.'

Lt Gen Javed Nasir had also claimed that:

'In April 1993 the US threatened to declare Pakistan a terrorist state unless he [Javed Nasir] was removed. It was therefore at the behest of the US government's official demand that he was prematurely compulsorily retired from service by the caretaker government of Mir Balkh Sher Mazari on 13th May 1993.'

Lt Gen Javed Nasir was the ISI Chief from March 1992 till May 1993.

The court did not take any action on the petition. Contrarily, the honourable court should have initiated proceedings against him on the charge of 'divulging state secrets'.