

Scenario 275

UMAR ATA BANDIAL:

During **March 2023** a new constitutional crisis emerged in Pakistan, which for months has been engulfed in another political crisis that shows no signs of dwindling. In ending days of that month the PDM government presented a bill in the National Assembly, the lower house of parliament, seeking to limit the powers of the Supreme Court, which, Prime Minister Shehbaz Sharif alleged, was creating 'political instability in the country'.

The legislation, called the ***Supreme Court (Practice and Procedure) Act, 2023***, came after the top court took a *suo motu* notice of the Election Commission of Pakistan (ECP) delaying provincial elections in Punjab, the country's most populous province.

[A suo motu is when a court itself takes cognizance of a matter which it deems is in the public interest and commences proceedings on it.]

BACKGROUND OF CJP BANDIAL:

Born on 17th September 1958, in Lahore, Umar Ata Bandial secured his Higher Senior Cambridge certificate from Aitchison College in 1975. He went on to complete his BA in Economics from Columbia University in the USA in 1979, followed by a Law degree from Cambridge University, UK, in 1981. During his career, Bandial also handled international commercial disputes. He appeared in arbitration matters before the Supreme Court of Pakistan and foreign arbitral tribunals in London and Paris until 2004.

In December 2004, he was appointed as judge of the Lahore High Court (LHC). He had declined to take oath under the Provisional Constitutional Order (PCO) in November 2007. Umar Ata Bandial was elevated as the chief justice of LHC in June 2012 and to the Supreme Court as a judge on 17th June 2014. During his tenure as judge and chief justice in LHC, he issued judgments on a number of important cases, such as the sanctity of the office of the president. Bandial ruled that as the symbol of unity of the federation, the position required the president to stay detached from political involvement.

Mr Bandial once ruled on a case granting autonomy to the Chief Election Commissioner [ECP]. However, the political and judicial landscape changed after Bandial became the chief justice of Pakistan. The entire politics of the country started revolving around one institution, the Supreme Court. The court was involved in high-profile political cases after the ouster of Imran Khan from the office of prime minister in April 2022.

The SC's rate of disposal of cases showed a positive trend till February 2023, when some 52,590 cases were pending, down by 2,116 cases from the year before. But things took a turn when Bandial took the sole *suo moto* notice of the year, on the delay of elections in Punjab and Khyber PK. Thereafter, many judgments on political issues led to anomalies and aberrations. By 31st August 2023, a Supreme Court report showed that the pendency of cases had increased to 56,544.

CJP's WING-CLIPPING PLANNED:

On 28th March 2023: The National Assembly passed a resolution accusing the Supreme Court of *judicial activism* and demanding its *'non-interference in matters related to the ECP'*. The resolution said: *'This house believes that an unnecessary intrusion of the judiciary in the political matters is the main cause of political instability'*. The draft bill presented in parliament pursued to amend laws regarding the conduct of the top court and suggested setting up a three-member panel headed by the chief justice to take up *suo motu* cases.

The beginning of the clash was the removal of former PM Imran Khan from power through a parliamentary vote of confidence in April 2022. Khan's party, the PTI, launched a countrywide campaign to demand immediate national elections, otherwise scheduled in late-2023. As the government rejected his demand, the 72-year-old cricketing icon-turned-politician decided to dissolve the provincial assemblies in Punjab and Khyber PK provinces in January 2023. The move was part of Khan's bid to force the elections, since Pakistan *'historically holds the provincial and national elections together'*.

However, according to Pakistan's constitution, elections must be held within 90 days of the dissolution of a legislative assembly. But a deadlock emerged when the ECP did not announce an election schedule, forcing President Arif Alvi, a member of Khan's PTI, to unilaterally declare 9th April (2023) as the poll date in the two provinces. Three days later, as observers questioned the legality of President Alvi's announcement, Chief Justice of Pakistan [CJP] Umar Ata Bandial on 23rd February 2023 decided to take a *suo motu* notice of the issue and initiated a hearing on his own.

After four judges recused from the original nine-judge bench constituted to hear the issue, the Supreme Court on 1st March 2023, in a 3-2 verdict, ordered the ECP to fulfil its constitutional obligation and announce an election schedule for Punjab and Khyber PK provinces. Two days later, on 3rd March, the ECP said the vote in Punjab province would be held on 30th April 2023 but the poll body last week withdrew its schedule, saying it was impossible to hold the vote in April (2023) due to security and financial concerns. It announced 8th October 2023 as the new poll date in Punjab. The furious PTI approached the Supreme Court, which was then debating whether the ECP's move was legal. That forced the government to move ***the said resolution*** against the apex court itself.

However, legal experts were found with mixed opinions; while the proposed amendments by the PDM government aimed to cut the Supreme Court's powers were welcome, *the way the parliament was doing it was ugly and questionable*. The government was doing something that should have been done a long time ago. *Most of the changes proposed by the government were constitutional amendments, which required a two-thirds majority in parliament*. Some also questioned the timing of the bill; it appears they were solely doing this to pressurize the sitting chief justice of Pakistan, CJP Bandial. One lawyer opined:

"A simple act of parliament to regulate judiciary with respect to procedural and substantive law might be in conflict with the independence of judiciary which is a basic structure of our constitution. The courts may strike it down if reviewed or challenged by court."

This bill is just about restructuring of power. It is currently the sole prerogative of the chief justice of the court to take suo motu notices. One could argue that the proposal is about expanding the role for other judges as well since the Supreme Court is not defined as just the chief justice, but other judges too."

The government was trying to put pressure on the court to make the changes it wanted. The government was proposing to amend the rules of the Supreme Court which was the job of the apex court itself. What if the court takes up a matter of parliamentary rules and procedure tomorrow and starts dictating how the

parliament should conduct its affairs? It was better to let the Supreme Court amend its own rules and procedures.

On 12th May 2023; While chairing a cabinet meeting Prime Minister Shehbaz Sharif said:

*"...while other politicians faced trials and tough handling by the courts, Khan was given a privileged treatment, calling it a **death of justice**. When he was presented in court yesterday [11th May], the chief justice said 'it is good to see you'; he said this in a case of corruption. If you want to keep favouring this **laadla** [pampered in Urdu], then you should also release all the dacoits behind bars in the country. Let this be a free for all. **These are the double standards of justice.**"*

Next day, Federal Information Minister Marriyum Aurangzeb told the media that:

*"Khan was **invited** to the court for a hearing and not summoned. [When] we were jailed on false cases, our hearing was never heard in the court for a year, for eight months, for six months but Mr Khan did not go to the court, Mr Khan was invited to the court in a Mercedes Benz. When Mr Khan went there ... the Supreme Court gave him bail and said it was really happy to see him and then wished him good luck."*

PDM government also doubted that the Islamabad High Court, which granted the two-week bail to Khan two days earlier, was under the influence of the Supreme Court. Adding that: 'He [Khan] can't be arrested in any other case in any new investigation, the existing cases are all shut down or given bails. Where does this happen?'. On another count, Maryam Nawaz Sharif, later the Chief Minister of Punjab and niece of Prime Minister Shehbaz Sharif, said and tweeted:

- 'Chief Justice Bandial was the **most responsible** for the deadly riots that broke out after Khan's arrest. You should leave the post of the chief justice and join [Khan's party]'.

In many rallies that Khan had held to demand early elections since his removal from power more than a year ago, he had, no doubt, lauded the Supreme Court and called Bandial **his only hope** for saving the country's constitution. Bandial's tenure as chief justice was to end in September 2023. However, an odd sense was then prevailing in legal fraternity '...it was not clear what the ruling alliance was trying to achieve by attacking the top court'.

'If they think it will force the chief justice to take a step back, I don't think it will happen. Instead, it will have an opposite impact. This might end up uniting the court and all the polarisation that we hear about in the ranks [of the judiciary], it may entirely end.'

On 15th May 2023: Hundreds of PDM supporters of Pakistan's ruling alliance were holding a sit-in protest outside Pakistan's Supreme Court to protest against alleged *undue favours* shown by the judiciary towards former Prime Minister Imran Khan in those days. That day's protest was mainly led by the Jamiat Ulema-e-Islam-Fazal (JUI-F) party – one of the 13 members of Pakistan's ruling coalition, the Pakistan Democratic Movement. Government supporters also broke through the main entrance of the capital's high-security Red Zone which housed prominent state offices, including the parliament.

Inside the parliament, the ruling alliance, on the same day passed a resolution against the CJP Umar Ata Bandial 'on charges of misconduct'. The rare passage of a resolution against the top judge in parliament and protests by pro-government supporters outside followed accusations by Pakistan's ruling parties that the country's judiciary was **biased** towards Khan, their (PDM's) main political opponent.

While tensions between the government and the judiciary began earlier this year, as mentioned in earlier paragraphs above, over holding provincial elections' The reaction got further intensified since 9th May events when the Supreme Court declared Khan's dramatic arrest in a corruption case **illegal**, clearing the way for his two-week bail and eventual release on 12th May.

- *The 70-year-old chief of the Pakistan Tehreek-e-Insaf (PTI) party was also granted protection from further arrest until later that month.*

On the same day, another court in Lahore granted bail to Khan's wife until 23rd May 2023 in the same case in which the PTI chief was arrested. Bushra Bibi was co-accused along with her husband in the Al-Qadir Trust case. The couple was accused of receiving financial help from a land developer to establish a university in which they are trustees; for more details see Scenario 268 elsewhere in this book.

DIVISIONS IN SC JUDGES: **DOUBLE STANDARDS OF JUSTICE (?)**

Referring to AL-JAZEERA dated 16th September 2023:

*"Yasser Kureshi, a lecturer in South Asian Studies at Oxford University and author of **Seeking Supremacy: The Pursuit of Judicial Power in Pakistan**, said Bandial took over the reins when the Supreme Court was already deeply fragmented, but his actions only helped to exacerbate those divisions. He did not seem inclined towards mitigating these divisions, using his powers to form benches that included judges that appeared to align with him, and marginalising judges with whom he was known to have differences, and refusing to bring together full benches for major political cases."*

- In fact, all the 15 top court judges responsible for fracture within the judiciary. [Those] differences among the judges only harmed the judiciary, and for that, all the judges were responsible. They were unable to sit together and ignore their differences, and that led to the Supreme Court losing its independent space and as a watchdog of the executive. CJP Bandial would be remembered for his gentle manner, as a judge who was civilised and courteous, yet his tenure as the top judge left much to be desired.

A point to remember is that during his tenure, there was a massive state crackdown on political workers and human rights abuses, as well as the state's failure to implement on court's orders. Yet he continued to show restraint. Those were extraordinary times, of course.

A legal analyst said: 'Bandial is leaving behind a court which is more fractured than ever before'. But also adding that:

*"The chief justice's propensity to appease all sides may not have appeased anyone. While the gains from such appeasement may not be clear, what we have lost is the people's confidence in the Supreme Court. BUT, let us praise Bandial's determination despite being dealt an impossible hand. [Because] **Over the course of his tenure, he was obstructed or opposed by both the PDM and the PTI, the deep state, the bureaucracy, and a divided bench.** In keeping with so many of his predecessors, he could have easily capitulated. Instead, he did his duty to Pakistan and the constitution."*

The two PTI-controlled assemblies were dissolved in January 2023 as part of Khan's bid to force the federal government into announcing early elections. (Pakistan traditionally holds provincial and national elections together) However, despite clear guidelines to hold the polls within 90 days of the dissolution, ***the Bandial-led bench's orders were never fulfilled by the PDM government***; the divisions within the judiciary were exploited by the political executive.

The judiciary depends on the executive for the enforcement of its orders. But the former coalition government diminished the authority of the judiciary. CJP Bandial ordering the count of each legislator's vote in case they went against party lines in a legislative assembly was perhaps his most touchy judgment. The verdict of 2022, in a case about voting by dissenting legislators, resulted in the collapse of the PMLN led government in Punjab, the country's most influential province, and allowed the PTI to take over. Perhaps, the Supreme Court had rewritten the constitution in that decision which was not their job. They were meant to interpret constitution, not fill in legislative gaps.

- Known media analyst **Cyril Almeida**, however, held that *Bandial would be remembered for his efforts to reshape the country's politics and to interpret the law without any regard for its immediate political consequences*. Also adding that:

"In truth, at a time when all civilian parties themselves have contributed to the unravelling of democracy in Pakistan and the military has asserted itself more forcefully in the political domain, Bandial's tarnished legacy is symbolic of the current political era. No party has its hands clean and everyone has some legitimate reason to be upset."

WAS THE CJP REALLY BIASED:

One political party or other criticized him every so often; **the FRIDAY TIMES** dated 15th September 2023 is referred.

"CJP Bandial first came under fire from the Pakistan Tehreek-e-Insaf (PTI), who targeted him when the top court opened its doors at night and took suo moto notice on the ruling of the then-Deputy Speaker Qasim Suri. CJ Bandial headed the bench that ordered the ouster of Imran Khan from the office of prime minister. [BUT] Otherwise, and arguably so, his decisions favoured the PTI."

"When Imran Khan led a protest to the D-Chowk in Islamabad after his ouster from the PM office, despite the top court's orders that barred him from entering the D-Chowk, Justice Yahya Afridi recommended initiating contempt of court proceedings against Imran. But the CJP, showing restraint, sought reports from intelligence agencies on whether Imran was informed about the top court's order. The case went on the pending-list in court."

Then there was the *infamous judgment on Article 63-A*, wherein Ch Pervez Elahi was declared the chief minister of Punjab under provisions of Article 63-A. For one school of thought, the said judgment had shattered the foundations of parliamentary politics in Pakistan. Beyond the public concerns, especially politicians, eyebrows were raised when dissenting voices started coming from within CJP Bandial's own fellow judges. Once Justice Qazi Faez Isa wrote to CJ Bandial and questioned the composition of a larger bench to hear the presidential reference and the SCBA petition.

Even on his last working day, CJP Bandial appeared to promote PTI's narrative by issuing a judgment in the NAB amendments case, which was to impact almost 60 percent of the top leadership of PTI's political rivals. ***The judgment also strengthened the military establishment against politicians.***

Like-minded fellow judges (?): The country faced a number of constitutional crises during CJ Bandial's one-year-and-six-month-long tenure. The SC benches, headed by the CJP, passed controversial judgments. He also introduced the '**concept of like-minded judges**' in the corridors of the apex judiciary. He gave priority to junior judges over seniors. Differences surfaced within the judges of the top court when the former military establishment used former PM Imran Khan to remove Justice Qazi Faez Isa. In fact, for the first six months of Bandial's tenure, justices Qazi Faez Isa and Sardar Tariq Masood were not included on benches headed by CJP Bandial.

The divisions within the SC judges became even more apparent in a case on the delay of elections in Punjab and KP. The SC bench, which started with nine members, ended up with only three judges. CJ Bandial ignored the legal concerns raised by Justice Athar Minallah and Justice Mansoor Ali Shah, who were all initially part of the nine-judge bench, ***questioning if assemblies were first dissolved illegally.***

- *Even officials of the Inter-Services Intelligence (ISI) and Military Intelligence briefed the chief justice and two other judges on the bench hearing the case about security issues confronting the country. But, heading the bench, CJ Bandial was determined to order elections for the provincial assembly in Punjab on 14th May instant. The ruling, which the government never complied with, ended up undermining the writ of the Supreme Court as an institution.*

The tenure of the outgoing chief justice, Mr Bandial, not only weakened the top court but also damaged the authority of the parliament. The Supreme Court Practice and Procedure Act, which was to regulate the unconstrained powers of the chief justice regarding *suo moto* notices and fixation of cases, was suspended. *The interim order was issued pre-emptively by the Bandial-headed bench because the legislation had not become law by that time; the court has functioned under the cover of the stay since April 2023.*

Audio Leaks Case etc: Some of the important cases that the apex court had dealt with during Bandial's tenure were trying civilians in military courts, the National Accountability Bureau (NAB) NAB amendment case, the audio leaks case and the Supreme Court Review of Judgments and Orders case. All of those cases were affixed before benches which were presided over by CJ Bandial or his like-minded judges. *He was often accused of toeing the PTI line, especially in the case of the NAB amendment case.* CJ Bandial declined requests from the Attorney General for Pakistan and the Pakistan Bar Council for the formation of a full court to hear high-profile cases and not to invite criticism, especially since the Practice and Procedure Act was stayed.

Justice Syed Mansoor Ali Shah and Justice Jamal Khan Mandokhail of the Supreme Court, in their dissenting notes on the poll dates case said that the *suo motu* '*proceedings initiated by the CJP were wholly unjustified*', besides being initiated with undue haste. They recommended to revisit the '***powers of one-man show***' enjoyed by the office of the CJP. Chief Justice Bandial, however, ignored their recommendations.

- *CJ Bandial stayed the proceedings of the Commission probing the audio leaks and suspended the operation of the federal government's notification in this regard. He observed that the formation of the government-appointed Judicial Commission, to be headed by Justice Qazi Faez Isa and comprising two chief justices of high courts, "**interfered in the judiciary's internal matters**" and noted that there were errors in the notification issued by the government for the formation of the Commission.*

Legal and political experts thought this was a matter of direct conflict of interest – as his mother-in-law's alleged audio recording, in favour of the PTI, was to be scrutinized by the said Commission. However, the Supreme Court Bar Association's President Abid Zuberi challenged the notification of the Commission in the top court. Interestingly, Zuberi's alleged phone tape, where he could be heard talking about the fixation of cases before Justice Mazahar Naqvi, was also leaked and made subject to the Commission's probe. Attorney General for Pakistan Mansoor Usman Awan requested the CJ to '***not be a part of this bench***' and leave

the matter to the next senior-most judge, based on the conflict of interest issue. However, the CJP responded by saying: 'You should not interfere with our administrative authority'. The CJP issued a written order where he expressed anger over the PDM government and the challenges it had posed for him during his tenure.

CJP BANDIAL's LEGACY:

Senior journalist Hasnaat Malik told **the FRIDAY TIMES** [dated 15th September 2023 is referred] that the outgoing Chief Justice Umar Ata Bandial would leave behind a deeply divided judiciary; saying:

*"Throughout his tenure, Bandial never summoned a full court meeting (on the administrative side) and formed benches for hearing high-profile cases that included like-minded judges. This not only damaged the image of the CJ but also of the judiciary. The outgoing chief justice elevated '**like-minded**' judges from the high courts to the Supreme Court. Five judges were supposed to be elevated in CJ Bandial's tenure, but only four judges could be elevated – because he had no majority vote in the Judicial Commission of Pakistan (JCP) for elevation of the fifth judge.*

Former Chief of Army Staff Gen Bajwa had asked the PDM government to support CJP Bandial's nomination in the JCP for the elevation of junior judges – Justice Shahid Waheed and Justice Hassan Rizvi."

However, most media gurus believed that the controversial decisions of former justices Iftikhar Chaudhry and Saqib Nisar were far more damaging to the country than those made by CJ Bandial. The later can only be accused of escalating tensions between the establishment and the Supreme Court. His court ordered the government to hold snap polls in Punjab after a petition was filed by the PTI that challenged the ECP's order to postpone the elections in Punjab and KP. Further, when Imran Khan decided to dissolve the assemblies in Punjab and KP, Bandial and his camp of judges supported the PTI stance that elections should be held in the provinces within 90 days.

Though CJP Bandial talked about the accountability of judges, he included Justice Naqvi in the nine-member bench to hear petitions filed by former CJP Jawad S Khawaja and others against the trial of alleged 9th May rioters in military courts. Justice Naqvi was accused of abusing his powers to gain financial benefits, and complaints against him remained pending in the Supreme Judicial Council (SJC), a forum under Article 209 of the Constitution for the accountability of judges.

Saga of dissenting notes: Legal experts believed that CJ Bandial's tenure would be remembered as the tenure of dissenting notes and reservations by judges of the opposing camp. Rasheed A. Rizvi, senior lawyer and former chairman of the Executive Committee of the Pakistan Bar Council (PBC), once told media that 'Umar Ata Bandial's tenure as the chief justice of the Supreme Court is a bag of mixed impressions'. Political parties were against his decisions, and a section of the legal fraternity didn't support his judgments. CJ Bandial proved himself weak in managing cases. It was a well-established practice that fresh cases were to be fixed later; 'a lot of judgments are yet to be written'.

- Justice (retired) Mabool Baqar, who was then the caretaker chief minister of Sindh, told the media, that CJ Bandial 'weakened the institution as well as his credibility'. Justice (retired) Shaukat Siddiqui (who served in the Islamabad High Court until his unceremonious removal) said CJ Bandial's tenure was controversial, lackluster and full of disputes – '...he failed to maintain unity within the institution and develop jurisprudence'. Hassan Raza Pasha, incumbent chairman of the PBC Executive Committee, said: 'CJ Bandial belongs to a respectable and educated family. He meets people and lawyers in his chambers with respect. But, he could not control the institution. Tensions escalated

amongst judges because he never summoned the full court meeting. Pasha was of the view that the way CJ Bandial and his bench decided the case on Article 63-A, gave obvious benefit to a political party.

GOOD BYE CJP BANDIAL:

A DESPARATE BUT ESTEEMED CJP: CJP Umar Ata Bandial, was set to retire on 16th September 2023 – a day before his birthday – amid controversies and criticism over leaving behind a much-weakened judiciary. Contrary to what many think, history will ultimately remember Umar Ata Bandial as a tolerant chief justice. Unlike his predecessors (Saqib Nisar, Asif Saeed Khosa and Gulzar Ahmed), he showed restraint towards the politicians, media and citizens. He honoured lawyers in the courtrooms, even if they disagreed with him ideologically.

CJP Bandial got into the robes of the chief justice in a changing Supreme Court. There was an air of women empowerment after his predecessor, Chief Justice Gulzar Ahmed, had appointed Pakistan's first female Supreme Court judge. Bandial carried that tradition forward and appointed the second female judge to the Supreme Court, Justice Mussarat Hilali. Hina Firdous Khan, an officer of the Information Ministry who served as the Public Relations Officer (PRO) in the Supreme Court on deputation during CJ Bandial's tenure, remembered her time in the top court warm-heartedly; telling the media that:

"It was a privilege to be a part of the CJP's team. Chief Justice Bandial was always approachable and courteous. He paid attention to diverse perspectives and created an inclusive work environment. He respected his subordinate staff."

A few actions by CJ Bandial reflected how he discouraged the prejudice and hostile mindset in the top court's administration by appointing a woman as the secretary of the Law and Justice Commission. Moreover, in his extempore speech at an event to welcome the New Judicial Year 2023-2024 that week, CJP Bandial specifically appreciated women working with the top court and the Law and Justice Commission of Pakistan.

On 16th September 2023; Umar Ata Bandial, Pakistan's 28th chief justice, retired from the prestigious echelon; his detractors and supporters said he would be remembered as one of the most '**polarised top judges**' in the country's history - leaving behind a '**tarnished legacy**'. The Lahore-born jurist's tenure as the chief justice lasted for about 20 months after he took over in February 2022 as the South Asian country was facing a serious political crisis; **AL-JAZEERA** dated even date is referred.

[When the CJP was elevated as CJP of the top court, the then-opposition coalition, the Pakistan Democratic Movement (PDM), was striving to topple the government, headed by former Prime Minister Imran Khan and his Pakistan Tahreek-e-Insaf (PTI) party, through a parliamentary vote of no confidence.]

Within two months of taking charge, Bandial faced his first major legal challenge when he declared that the then-deputy speaker [Mr Qasim Suri] of parliament's decision to dissolve the house was **unconstitutional**. With the top court's five-member bench headed by Bandial ordering the restoration of the National Assembly, the stage was set for Khan's removal as the PDM alliance moved a no-confidence motion against the government.

The removal of Khan in April last year set in motion a chain of events with after-effects that could be felt in Pakistani politics even today. For the next 18 months, Bandial found himself arbitrating on a flood of

petitions, often political, making him a deeply polarising figure in the country. CJP Bandial, who became Supreme Court judge in 2014 before his elevation as the top judge last year, had been often accused of showing leniency towards Khan and his party.

On numerous occasions since his elevation, former Prime Minister Shehbaz Sharif's Pakistan Muslim League-Nawaz party, the PTI's biggest rival, demanded Bandial's resignation, with some of its leaders going as far as to suggest him to join Khan's party. The tussle was so strong that Sharif's government refused to implement some of the top court's decisions and even passed a resolution in parliament to curb the powers of the chief justice. On the contrast, legal fraternity held that:

"PTI has been facing a massive state crackdown and Bandial only tried to uphold law and constitution. If he was biased towards the party and its chief, Imran Khan would not have been in jail right now."

Khan had been suffering in Attock city Prison since 5th August 2023, when he was handed a three-year sentence on corruption charges. While the conviction was suspended by a high court a month later, the 70-year-old opposition leader remained in custody in the so-called CYPHOR CASE, an investigation over a leaked diplomatic cable proved his allegations that the United States conspired with Pakistani authorities to remove him.