

## Scenario 16

### **Judiciary: Nawaz Sharif Restored (1993)**

From the first day of Pakistan, the judges have been trying to match their constitutional ideas and legal language to the exigencies of on going politics. This has been the most favourite line of action. Judiciary has largely remained a tool in the hands of the rulers. As a matter of fact, various judgments of the higher judiciary pertaining specially to the validity of martial laws have made us a laughing stock in the world. The imposition of martial laws, abrogation and suspension of constitutions were acts of treason but who bothers in poor countries.

Roedad Khan, a former bureaucrat in his book '**Pakistan-A Dream Gone Sour**' has highlighted this important issue which has been hunting the nation for the last fifty years. He questioned:

*'Where does the sovereignty reside in Pakistan? The higher judiciary in Pakistan created history' by validating the imposition of martial law by Ziaul Haq and granted him the right to amend the constitution. All the nine judges were a party to this. (Then giving more details of various feats performed by the higher judiciary, he continues to say worriedly) ..... where revolution is successful, it satisfies the test of efficacy and becomes a basic law creating fact was the observation on Gen Ayub's martial law.*

*This ruling legitimized not only Ayub's usurpation of power but opened the flood gates for others. Yahya's usurpation of power was declared illegal when he was no longer there. The Provisional Constitutional Order of 1982 was the climax to humiliate the higher judiciary which largely accepted it. Again in Junejo's case, the judgment came after the usurper was gone. Nawaz Sharif's restoration is another example. 'Gen. Waheed distanced himself from the president, his benefactor, and joined the crowd in running him down'.*

Roedad Khan described it 'improper' that the military brass summoning Ghulam Ishaq Khan, the then Chairman Senate, to the Army GHQ after the crash of Gen Ziaul Haq on 17<sup>th</sup> August 1988. The proper course was that the top military hierarchy should have gone to him.

One excuse that judges speak for their weakness is that in Pakistan, the executive exercises control over the courts by using the system of judicial appointments, promotions and removals to ensure its allies fill key posts. But it is true for most of the third world countries.

As per *Robertson and Nicol*: (Ref: **Robertson & Nicol, Media Law, 3rd Edition, [1992] p 298**).

*".....in certain commonwealth countries there does exist an unhealthy relationship between the judges and the Government that appoints them..."*

Pakistan is also among the list of same third world countries and considers itself as member of commonwealth, so there should be no surprise if the above statements are applicable here too.

In the immediate aftermath of the October 1999 coup, the judiciary was purged of judges who might have opposed the military's unconstitutional assumption of power. The purge was accomplished by requiring judges to take an oath to Gen Musharraf's Provisional Constitutional Order -- an oath that required judges to violate oaths they had all previously taken to uphold the 1973 Constitution. An element of fear that another oath would be used to remove more judges, had limited the bench's freedom. In addition, new judges were

mostly found scared because the executive could follow a generally prevailing practice of removing them after a year or two by declining to 'confirm' their appointments.

An episode from the recent judicial history of Pakistan: During the hearing of Haji Saifullah's writ petition against the then president of Pakistan on the issue of dissolution of National Assembly in August 1990, Gen Mirza Aslam Beg, on 4<sup>th</sup> February 1993, briefed the national press and electronic media that:

*'I did try to convey to the Honorable Supreme Court that, we had given a solemn undertaking to the nation that elections to the National Assembly would be held according to the schedule already announced and that, therefore, it would be in the best interest of the nation and the country that we stick to our promise and the said general elections were allowed to be held accordingly.'*

Tragedy is that it lies on record of the Supreme Court of Pakistan in the form of a statement given by Gen Mirza Aslam Beg himself in person that (when the former COAS was asked whether his above narrated action did not constitute contempt of court):

*'I definitely did not think so as the information sought to be conveyed in good faith and in national interest.'*

**On 20<sup>th</sup> February 1993**, during preliminary proceedings, the Supreme Court censured Gen Beg for giving an 'irresponsible and careless' answer to the question asked by the press on 4<sup>th</sup> February, and remarked: 'we are very sorry to hand over the defence of the country to a person if he was so careless.' On 21<sup>st</sup> February 1993, the Supreme Court formally charged Gen Aslam Beg with contempt of court. When the trial started, Gen Beg met with the then COAS, General Waheed Kakar and through him assured President and the army leadership that he would not damage their image. **(Ref; 'The Govt of Agencies' [in Urdu] by Azhar Sohail Page 106)**

The CJ Nasim H Shah, in later moments, had also observed that:

*"I do not change my opinion, even if Allah the Almighty directed me to do so."*

Yet again, on 22<sup>nd</sup> February 1993, the Chief Justice addressed the reporters and respondent in anger that:

*"If you fail to produce the tapes, I shall blacken many faces; I shall ensure that I send some of you to your graves and hell."* (Quoted verbatim from the '**daily Dawn**' of 2<sup>nd</sup> March 1993)

Referring to A S Ghazali's book on internet: On 1<sup>st</sup> March, Gen Beg stated before the Court that the then Chairman Senate Waseem Sajjad had carried his message to the Supreme Court to block restoration of Junejo's assembly. Mr Waseem Sajjad had denied Gen Beg's statement.

Despite all the lengthy hearing in detail, stunning remarks of the Chief Justice and making the former army chief face bullshits, what happened in the end, Gen Mirza Aslam Beg was let off by 'a weary but thoroughly indignant' Supreme Court with a conviction without a sentence. On appeal, even that conviction was overturned by the same Supreme Court.

In another judgment the Court decided on 9<sup>th</sup> January 1994, to drop even that punishment against Gen Mirza Aslam Beg.

Commenting on the judgment, **The Friday Times Lahore of 11<sup>th</sup> April 1996** had thrown its candid opinion that:

*'..... the (Supreme) Court was humiliated during the contempt of court hearing against Gen Mirza Aslam Beg because it knew that it couldn't punish an army general. People made fun of Chief Justice Zullah's eccentric obiter dicta, and a witness called him corrupt inside the court.'* [What a tribute to the judiciary it was]

Referring to 'Building Judicial Independence in **Pakistan: Asia Report No: 86**' published by US State Department (on Human Rights practices in Pakistan) on 9<sup>th</sup> November 2004, it is on record that:

*' ..... The superior judiciary (in Pakistan) is unable to address creeping financial corruption within its own ranks. Dysfunction in the superior judiciary also impedes reform in Pakistan's subordinate judiciary, which comprises the trial courts in which the mass of ordinary judicial business is transacted. Appalling under-resourcing and endemic corruption in the subordinate judiciary lead to agonizing delays in the simplest cases and diminish public confidence in the judiciary and the rule of law.'*

In some subject-areas and in some territories, the government simply bypasses the ordinary courts by establishing parallel judiciaries. Since as early as August 1947, the Federally Administered Tribal Areas (FATA) and the Northern Areas have had *sui generis* legal systems, more or less independent of Pakistan's ordinary judiciary. Little justification exists, as even the government seems to recognize, for the essentially colonial regimes preserved in these enclaves.

In 1997 and 1999 respectively, the respective governments established separate anti-terrorism and accountability courts and tribunals. Those tribunals contained procedural shortcuts that made them too attractive to zealous police and prosecutors. It had never been realized that in the absence of state commitment to reform constitutional ground rules and statutory laws, judges would continue to lack security of tenure and necessarily would do and announce decisions with an eye to the government's agenda.

The same sentiments can be felt in an article captioned as 'Pakistan Corruption's Trap' written by A Masroor, published in The **Pakistan Observer of 4<sup>th</sup> March 2005**. It says that:

*'President Musharraf, in order to keep the genuine politicians out of the 2002 Parliament, had manipulated the electoral laws in such a way that it was not difficult for the unscrupulous to find the electoral loopholes. And during his rule President Musharraf has inducted so many retired and serving armed forces personnel into the civilian set-up that the performance of the elected governments of the 1990s in doling out Government jobs to their party workers pales into insignificance.*

*The judiciary is completely at the mercy of the executive. The Pakistan Bar Council has already expressed its no confidence in the superior judiciary refusing to seek its help against the high-handedness of the executives or attempts by the military ruler to redraft the constitution to suit his agenda. Parliament is so weak that it has gone to the extent of passing facilitating a non-elected, in-service Army General to become the President of the country.'*

There was a time when Judges in the Judiciary were very fond of taking *Suo-Moto* Notices particularly on those matters which indirectly or directly related with the Power. Now there are subjects like Extra Judicial Killings, Custodial Deaths, Fake Encounters, Mysterious Death or Assassinations, Illegal Confinement of Prisoners and Women and Child Abuse Reports by Human Right Watch but courts are not moved. There is no *suo-moto* notice. Above all there was no hearing on Mehran Bank Scandal of ISI which can [if these hearings are held impartially] end political bribery by ISI in body politics once and for all.

Some people opine that Judges in Pakistan were worse than Dacoits and Terrorists. How?

Famous Columnist of Daily Dawn **Mr. Ardeshir Cowasjee**, known for his judicious views, had once said on PTV:

*"Today Judiciary has no respect. The judiciary has killed itself. The Judiciary is corrupt. The Government made it corrupt. The Government has got a book on all the Judges. The people looked down on the Judges. The higher the Judge, the lower he is looked down upon.....Judiciary can never demand respect. I mean these guys can threaten us that we will take you to court and charge you with contempt case.*

*But it's all nonsense. They should command respect and that will take a long time to come, every thing is corrupt. These remarks, the Court urges," scandalized the Superior Courts of this country and the judges comprising such courts and tended to bring them into hatred, ridicule and contempt".*

The American State Department's report on Human Rights and Democracy around the world, released on **28<sup>th</sup> March 2005** titled 'Supporting Human Rights and Democracy' notes that:

*'...constitutional amendments passed by Musharraf government have strengthened the powers of the president at the expense of the National Assembly. Parts of the report are blunt'. It stated that the military remains heavily engaged in politics, the Government's human rights record remained poor, political parties are generally weak, undemocratic institutions centred on personalities instead of policies. But it commented on Pakistani judiciary in a stinking tone that the **'judiciary is corrupt, inefficient, and malleable to political pressure.'***

On **18th April 1993** the same President Ghulam Ishaq Khan dissolved the National Assembly again and dismissed the government of Nawaz Sharif under Article 58(2)(b) of the Constitution. The Prime Minister Nawaz Sharif immediately approached the Supreme Court and challenged his un-called for dismissal.

A brief background: Chief Justice Nasim H. Shah's favourable tilt towards Nawaz Sharif's Muslim League and his hostility towards PPP were well known. He had exchanged harsh words with the then Chief Justice M Afzal Zullah when the later had received Benazir at a function being an opposition leader.

He had been humiliated earlier during PPP's government when Benazir Bhutto as prime Minister had refused to sit on the same table with him. The reason was that Nasim H. Shah was one of the justices who had upheld the death sentence of Benazir's father Mr Bhutto in 1979 (Justice Shah was one of the four judges out of seven to sign a verdict for rejecting Bhutto's appeal of death sentence).

In early 1993, relations between PM Nawaz Sharif and President Ghulam Ishaque Khan (GIK) deteriorated quite rapidly and GIK was planning to ouster PML's chief and the PM. Statements attributed to the Chief justice M Afzal Zullah indicated that judiciary might act to counter president's move. President waited till 18th April 1993; the day of retirement of Chief Justice of Pakistan Afzal Zullah. In a very curious development, Chief Justice on the very day of his retirement was on a plane heading out of country.

Justice Nasim Hasan Shah was sworn in as Acting Chief Justice; another inquisitive move as he should have been appointed permanent Chief Justice of Pakistan. President dropped his guillotine on the same day sending Nawaz Sharif, his cabinet and the Assembly packing home.

PML moved their petition in the Supreme Court against allegedly undue use of presidential powers by GIK and Acting CJ Nasim H Shah was there to handle it. After short arguments, the bench resorted to restore Nawaz Sharif's government but justice Sajjad A Shah gave the lone dissenting opinion when Supreme Court announced the decision by majority. Two judges; M Rafiq Tarar and Saeeduzzaman Siddiqi had asked Chief Justice Nasim H Shah to take disciplinary action against Justice Sajjad Ali Shah for the language he had used in his dissenting note. The Chief justice did not take any action against the said Mr Justice but it caused a lasting rift amongst the two.

**26<sup>th</sup> May 1993:** A full bench of the Supreme Court including Justice Rafiq Tarar, Justice Afzal Lone and others, under the chair of CJP Nasim Hasan Shah, in an almost unanimous verdict, declared that President Ghulam Ishaq Khan had acted unlawfully in dissolving the National Assembly and dismissing the Nawaz Sharif's government. The Supreme Court of Pakistan had announced:

*'On merits by majority (of 10 to 1) we hold that the order of the 18th April, 1993, passed by the President of Pakistan is not within the ambit of the powers conferred*

*on the President under Article 58(2)(b) of the constitution and other enabling powers available to him in that behalf and has, therefore, been passed without lawful authority and is of no legal effect.'*

Chief Justice Nasim Hasan Shah took the view that the president and not the prime minister had been instrumental in subverting the spirit of the constitutional provisions because:

*'The president had ceased to be a neutral figure and started to align himself with his opponents and was encouraging them in their efforts to destabilize his government.'*

An interesting fact about this judgment was that each of the eleven judges on bench had written his own, individual and separate decision and each judge had written different grounds to reinstate Sharif's government but reaching the same one conclusion except one Justice Sajjad Ali Shah who later paid a big price for that.

However, Justice Sajjad Ali Shah, the only judge of the Supreme Court from rural Sindh, in his dissident verdict pointed out that:

*'Seemingly it so appears that two Prime Ministers from Sindh were sacrificed at the altar of Article 58(2)(b) of the constitution but when turn of Prime Minister from Punjab came the tables were turned. Indisputably right at the very outset of the proceedings indications were given that the decision of the court would be such which would please the nation...In my humble opinion decision of the Court should be strictly in accordance with law and not to please the nation.'*

It was a wrong set of reasons on the part of Justice Sajjad Ali Shah. The PM was from Punjab but the bench did not comprise of all Punjabi judges as five of them were from Urdu speaking community of Karachi, one from rural Sindh. It was against the judicial norms & prevailing traditions and a reference should have been filed before the Supreme Judicial Council for his written remarks.

Throughout the proceedings, the Chief Justice gave such remarks that led to the belief that the judges had already made up their minds. Even before start of proceedings, CJP Nasim H Shah once said loudly that *'I would not be Justice Munir'* and all the ten judges on bench had launched a strong protest in that regard. After retirement, once he made a statement before media that:

*'The President (GIK) was right; we should not have given that judgment in favour of the Prime Minister (Nawaz Sharif).'*

It has been pity that our Chief Justices were so careless, sentimental, irresponsible and sloppy.

The case stands reported as *Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473)* in which the apex court had held that the order of dissolution did not fall within the ambit of the powers conferred on the President under Article 58(2)(b) of the Constitution and other enabling powers available to him in that behalf and in consequence the National Assembly, Prime Minister and the Cabinet were restored.

However, Nawaz Sharif later advised the then President to liquefy the assemblies on 18th July 1993. Nawaz Sharif could not survive more than two months as Prime Minister after getting decision in his favour from the Chief Justice Nasim Hasan Shah.

The Supreme Court apparently gave its verdict against President Ghulam Ishaq Khan because it knew that the president has lost support of the power arbiter, the Army. The subsequent developments confirmed this belief as ***the Chief of Army Staff, Gen Abdul Waheed Kakar forced Ghulam Ishaq Khan and Nawaz Sharif both to resign simultaneously.***