

Scenario 20

Pakistan's Judiciary in 1997- I

12th January 1997: In MAHMOOD KHAN ACHAKZAI VS FEDERATION OF PAKISTAN case, cited at *PLD 1997 SC 426* on a question about basic structure of the Constitution, the Chief Justice of Pakistan Sajjad Ali Shah had given the verdict that:

'The question cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution [of Pakistan] are amply reflected in the Objectives Resolution which is now substantive part of the Constitution as Article 2A inserted by the Eighth Amendment.'

The Objectives Resolution was preamble of the constitutions made and promulgated in Pakistan in 1956, 1962 and 1973. Its thorough perusal indicates that for scheme of governance the main features envisaged are federalism and Parliamentary form of government blended with Islamic provisions. The 8th Amendment was inserted in the Constitution in 1985, after which three elections were held on party-basis and the resultant parliaments did not touch this Amendment demonstrating its ratification in letter and spirit. The preamble categorically stated that:

'.....The State shall exercise its powers and authority through the chosen representatives of the people; and the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed. Wherein shall be guaranteed fundamental rights including equality of status, of opportunity before law, social, economic and political justice and freedom of thought, expression, belief, faith, worship and of the association, subject to law and public morality.'

Even this wording of the preamble remained un-changed in all the three previous constitutions of Pakistan and was maintained in 1973 Constitution also. While commenting upon the Parliament's procedure to amend the said Constitution under the provisions of Article 239, the judgment stated that:

'Article 239 cannot be interpreted so liberally to say that it is open-ended provision without any limits under which any amendment under the sun of whatever nature can be made to provide for any other system of governance, for example, the monarchy of secular, which is not contemplated by the Objectives Resolution. Clause (6) of Article 239 provides for removal of doubt that there is no limitation whatsoever on the power of the Parliament to amend any provision of the Constitution [of Pakistan].

It therefore, follows that the Parliament has full freedom to make any amendment in the Constitution as long as salient features and basic characteristics of the Constitution providing for the Federalism, Parliamentary Democracy and the Islamic provisions are untouched and are allowed to remain intact as they are.'

It has been debated much that Article 58(2)(b), inserted in the Constitution through Eighth Amendment had changed the shape of the Constitution from Parliamentary to Presidential. In fact this apprehension may not be based on factual analysis. It is stated that Eighth Amendment was brought in by Parliament which was not elected on party basis then after that three elections took place on party basis in 1988, 1990 and 1993 which did not touch the said Amendment showing that they had full faith in it which amounts to ratification by implication.

Therefore, six out of seven judges on the bench were of the unanimous and considered opinion that Eighth Amendment including Article 58(2)(b) had come to stay in the Constitution as permanent feature.

However, it would remain open to the Parliament to make amendment to the Constitution of any provision of the Eighth Amendment as contemplated under Article 239 as long as basic characteristics of federalism, parliamentary democracy and Islamic provisions as envisaged in the Objectives Resolution / Preamble to the Constitution are not touched. Just for academic consumption, one should not forget a note, embodied in this judgment by Justice Saleem Akhtar, who had opined that:

'There are some characteristic features in every Constitution which are embedded in the historical, religious and social background of the people for whom it is framed. It cannot be made rigid because such rigidity if confronted with the social and political needs of the time is likely to create cracks in it. (In nut shell) rigidity is one of the main features of a written Constitution. But this rigidity is often tuned to flexibility by the provisions of the Constitution itself and interpretations made by the Courts. Rigid Constitution may provoke violence.

..... The Courts enjoy power to strike down any law which is in conflict with the provisions of the Constitution; however, they do not have power to strike down any provision of the Constitution which may be in conflict with any of its provisions, even in the presence of Article 2A as a substantive part of the Constitution. In view of the legal dispensation resting on the judgments of this Court we agree and approve the observations of the CJP Ajmal Mian the impugned judgment that:

'it is not open to the Court to hold that a provision of the Constitution can be struck down on the ground of its being violative of the Objectives Resolution or of national aspirations or of higher ethical notions or of philosophical concepts of law or of the basic structure.'

The Achakzai's judgment had clearly stated that 'by employing the words "any law", the intention of the Constitution seems to be that Article 8 will apply to all laws made by the *Majlis-e-Shoora* (Parliament) be it general or any law to amend the Constitution.

[Likewise no enactments can be made in respect of the provisions of the Constitution relating to judiciary by which its independence and separation from executive is undermined or compromised. These are in-built limitations in the Constitution completely independent from political morality and force of public opinion.]

Most of the jurists agree with this viewpoint.

20th January 1997: Supreme Court of Pakistan was informed that false and fictitious documents were used by the then President of Pakistan Farooq Leghari to make out grounds for dissolution of government and the Parliament in November 1996. Resuming his arguments before a seven-member bench of the Supreme Court, Aitzaz Ahsan mentioned a particular letter submitted by President Leghari written on 13th November 1995 regarding an incident which actually occurred on 21st November. Another document had a date of 8th November on it but related to an incident which occurred on 15th November.

It was also pointed out that President Leghari had submitted another false document in which he had claimed that a company, in which Asif Zardari's brother-in-law held an interest, was illegally allotted land by the Capital Development Authority (CDA). The fact was that 'the person referred to by the supporting documentation, Mir Munawwar Ali, was not Zardari's brother-in-law (Mir Munawwar Ali Talpur) but some one else, that only the names were similar.

Referring to another document allegedly signed by PPP's Nahid Khan recommending employment for some one, the Court was informed that the letter on which the president had relied was a forged document and the criminals involved in forgery were being prosecuted.

Once Gen Raja Saroop Khan, the former Governor Punjab, in his interview published in daily '**Jang' dated 17th January 1999**, commented upon Farooq Leghari as:

'Farooq Leghari had developed a very bad habit of talking nice in presence of Benazir Bhutto and passing sarcastic remarks against her in her absence. We all knew it and Benazir Bhutto too. Most people started avoiding Mr Leghari. Mr Leghari had lacked courage to talk to Benazir Bhutto directly. For instance, to convey his point of difference on 'judges' case' Mr Leghari never talked to the PM [Benazir Bhutto] directly but always used to pass remarks before others. An objectionable person was he as the President of a Muslim country.'

29th January 1997: The Supreme Court upheld President Farooq Leghari's orders dissolving the National Assembly and dismissing Benazir Bhutto's government.

The Supreme Court by a majority decision upheld President Leghari's proclamation dissolving the National Assembly and dismissing Benazir's government. Justice Zia Mahmood Mirza was the only dissenting judge who had said that:

'The presidential order was illegal, can not be sustained and the prime minister along with her cabinet should stand restored.'

Six of the seven judges on the bench upheld all the charges leveled by the president excluding the murder of Mir Murtaza Bhutto saying this was subjudice before a tribunal. The allegation of extra-judicial killings in Karachi was the main charge in the presidential proclamation dismissing the Benazir Government. The court held that it was not necessary that all the material should be before the president to form his opinion before the dissolution of the assembly as was claimed by Aitzaz Ahsan; held that:

['Partial evidence was enough for forming the opinion and there was no harm if corroborative and supportive material was produced after the dissolution of the assembly'.]

The six judges of the bench disagreed with Benazir Bhutto's lawyer, Aitzaz Ahsan, that his client may also be given the same relief as provided to Nawaz Sharif, the restoration of the assembly and her government. Justice Zia Mehmood Mirza disagreed with the majority judgment and said loudly that requirements for using powers under Article 58(2)(b) had not been fulfilled.

Justice Mirza stated that law laid down in the previous dissolution cases (Haji Saifullah case, Khawaja Tariq Rahim case and Mian Nawaz Sharif case) of complete breaking down of the constitutional machinery was not fulfilled in this case. The Judge had further held that president, who had praised the government at numerous occasions for doing great job in Karachi, had no material before him at the time he made his mind to dissolve the National Assembly.

Justice S A Nusrat, in his interview of **25th July 1999**, published in the media, told that:

'I've seen Supreme Court's judgment written by CJP Nasim Hasan Shah in Nawaz Sharif's case of 1993. It was OK. In 1997, CJP Sajjad Ali Shah should have given a similar decision because the grounds of using Art 58(2)(b) were more or less the same. CJP Sajjad Ali Shah had dissented in 1993's judgment on the basis of Sindhi & Punjabi PMs which made him totally controversial in the judicial history of Pakistan] but he himself as the CJP behaved opposite when he wrote Benazir Bhutto's judgment.'

Basically, the CJP Sajjad Ali Shah had developed very intimate relations with President Farooq Leghari, quite contrary to the judicial norms, which made him controversial otherwise he was a perfect & nice judge altogether.'

It is interesting to note that four weeks before the Supreme Court judgment, the Caretaker Prime Minister, Malik Meraj Khalid, told a seminar in Karachi, that the IMF had agreed to

release the loan instalment only after his government dispelled the impression that the deposed government of Benazir was being restored. Meraj Khalid told that:

'When Pakistani team was negotiating with the IMF, a telephone call was made, asking them not to sign any accord because the Benazir government was being restored. The IMF officials were irked over the telephone call and the negotiations had run into snag because the international institutions were not inclined to dole out anything in this situation. With great difficulty the government convinced IMF that nothing of that sort was happening.'

The conspiracies amongst the stake holder institutions have been the major cause of obstructions faced by Pakistan in its way to development. **Nawaz Sharif's interview with Sohail Warroich** in the name of his book '**Gaddar Kaun**' very interestingly describes the personality traits of the then President Farooq Leghari saying that:

'Farooq Leghari was the personal choice of Benazir Bhutto as her most confident aide. The PPP had nurtured and then tolerated Mr Leghari for 30 years, a long way; otherwise he could simply be a chief of his little tribe not a politician. It was the PPP which had offered him the presidency in a plate, who in 1996, turned eyes from his PPP when developed relations, better to say friendship, with CJP Sajjad Ali Shah and the Army Chief Gen Jehangir Karamat. Ultimately he stabbed his own party, his own leadership and got blackened his own face.'

In nut shell, President Farooq Leghari had used his power of Art 58(2)(b) considering that Benazir Bhutto's government was involved in corrupt practices. He had not bothered to look into his own image in mirror that once he was also dragged into grave-sands of corruption.

A sale of 531 acre farm, situated in *Darkhawst Jamalkhan* (a village of District Dera Ghazi Khan) sold by Sardar Farooq Leghari, several times an MNA & Federal Minister in PPP governments and later President of Pakistan, was one of many episodes linked with Mehran Bank.

This land belonged to Mr Leghari and his family members. It was sold to six people from Karachi alleged to be fronting for banker Yunus Habib, which gave a new and dramatic twist to the Mehran gate scandal. The president's integrity and his image, as an honest politician, came under question when Nawaz Sharif alleged that Farooq Leghari was involved in the Mehran Bank scandal. Releasing photocopies of bank drafts worth 17 million rupees deposited in Mr Leghari's account in Mehran Bank, Nawaz Sharif charged that the money was a pay off by Yunus Habib in return for Leghari's bailing out Mehran bank.

On 4th June 1994, President Farooq Leghari conceded that the documents produced by Nawaz Sharif, the then sitting on opposition benches, were related to the sale of a farm that had been owned by him and several of his family members. However, he defended the deal, saying that there was nothing illegal about it.

President Farooq Leghari had told the **Newsline**, a monthly magazine of Karachi:

"I did ask Mr. Yunus Habib to see if he could arrange for any buyers for the land ... But I didn't know those six people (who eventually bought the land). I am not aware of whether they were fronting for Mr Yunus Habib or if the land was actually bought by Mr Yunus Habib and his family.... As a seller, my only interest was to make sure that I got the price of the land."

President Farooq Leghari, however, admitted, that he was approached by Yunus Habib in April 1993, when he was Finance Minister in the interim government (April / May 1993) to save Mehran Bank from collapsing. Mr Leghari referred Yunus Habib's request to the State Bank, but before getting any reply, the interim government was dissolved and Mr Sartaj Aziz, who became the Federal Finance Minister in the revived government of Nawaz Sharif in April 1993, had ordered the demanded relief given to the Mehran Bank.

President Farooq Leghari had categorically stated that:

"The allegation of my having helped Yunus Habib and saved Mehran Bank is false. It was done by Sartaj Aziz and Nawaz Sharif. But I have the moral courage to say that yes, I also wanted to do the same and if I had a longer stay as Finance Minister I would have done the same."

In July 1994 a commission, comprising five judges, was formed to launch investigation into the Mehran Bank scandal. It took eight months to complete its inquiry in February 1995 but its report was never published. However, some parts of the reports were released on 8th December 1996, according to which the commission had exonerated President Leghari from any wrong doing in his *benami* deal. But the commission did not mention to whom the land was sold by the President for Rs. 15 million and from which account the money was debited for the payment.

Earlier, on 14th December 1995 Younus Habib had been awarded 10 years rigorous imprisonment and fined Rs 36.7 million in a fraud case by the Special Banking Court of Sindh.

Coming back; had Farooq Leghari not done so, the history of Pakistan would have been different. He would have continued with his portfolio as president for long. In the first week of April 1997, just about forty days after the SC's decision, when he was having rest in his village home, Prime Minister Nawaz Sharif got a constitutional amendment okayed by both houses of the Parliament during the same night at 11 PM and at 3 AM a helicopter was landing in Mr Leghari's village with that amendment to be signed finally depriving him off his powers of Article 58(2)(b). After a few months he was lastly asked to pack off from the Presidency too.

24th February 1997: COAS Gen Mirza Aslam Beg told the Supreme Court that he was not answerable to it regarding the alleged funding of the *Islami Jamhoori Ittehad* (IJI) election campaign in 1990.

[It was proved through record that ISI had distributed 140 million Rupees of army secret fund to various people of IJI to make sure defeat of PPP's candidates in general national elections in 1990. Full details are given in a separate chapter.]

2nd March 1997: Prime Minister Nawaz Sharif got Justice (Rtd) Rafiq Tarar and Justice (Rtd) Afzal Loan elected as senators.

One can re-collect that this was the reward from Nawaz Sharif for having their favours for restoration of his government in April 1993 when they were the sitting judges of the Supreme Court of Pakistan. This nexus went a long way.

Prime Minister Nawaz Sharif once paid a courtesy visit to the Chief Justice Sajjad Ali Shah in mid 1997. Majid Nizami of daily '*Nation & Nawa i Waqt*' was also accompanying him. The PM asked the CJP to refrain from accepting petitions or cases involving Sharif family in corruption and also to shun the routine judicial process against them. In those days there were numerous petitions under regular hearing with ample documentation on alleged corruptions done by the Sharifs and the prime minister was feeling embarrassed due to numerous stories appearing in row at print and electronic media.

Nawaz Sharif had then asked the CJP that what he intended to do after retirement which was due after three months. If he (CJP) extended favours to Sharifs in petitions lying before the SC, he would be able to get 'big favour' from the PML in return.

The CJP Mr Shah told Nawaz Sharif that he intended to go to *Madina Munawwara* after retirement. The PM asked him to stay here and '*he would be nominated as the president if he considers*'. The CJP thought for a while and then refused to accept that 'bargain' because he intended to deal with those petitions of corruption against Sharifs on pure merits.

In November 1997, when the relationship deteriorated between the PM and the CJP, Justice (Rtd) Rafiq Tarar played a vital role in winning the judges of Balochistan High Court which helped Nawaz Sharif's move of sending CJP home. In reward Rafiq Tarar was offered that presidential slot through Mian Sharif, PM's father, which he gladly accepted.

10th March 1997: An ordinance titled '**Registration of Printing Press and Publication Ordinance, 1997**' was got issued by PM Nawaz Sharif to curb the press and freedom of expression. Article 29 authorized magistrates and low-ranking police sub-inspectors to get in the way of the Press, hold them and to initiate executive actions including the forfeiture of newspaper copies without the process of judicial review and restraint.

Among other negative points, the ordinance obstructed the newspapers from publishing any account of the proceedings of the National Assembly or the Senate or a provincial assembly if such account contains any matter which is not part of the proceedings of such an assembly and which is prejudicial to the maintenance of public order or is opposed to morality, or amounts to contempt of the court, defamation or incitement for the commission of an offence.

The police and respective magistrates were authorized to forfeit the copies of a newspaper containing any material inciting an offence or violence or amounts to false rumours or causing hatred or contempt of the government with intent of causing defiance of the government authority.

This suppression of press freedom was taken as the first negative point for the Nawaz Sharif government which ultimately harmed him in October 1999 when all the press and media welcomed Gen Musharraf along with his army team because they were living in a frightening atmosphere for the last two years.

13th Amendment Bill:

2nd April 1997: At midnight, rules and procedures of the parliament were suspended all of a sudden and the 13th Amendment Bill was rushed through both houses, signed by the president the next day, and notified on 4th April. By this amendment, the president was disempowered and the Prime Minister further empowered. The President was left with no power to dissolve the National Assembly under the provisions of Art 58(2)(b) , he could not appoint governors at his discretion but on the advice of the prime minister, the provincial governors could dissolve their assemblies.

Further, the president, though he was the supreme commander of the Armed Forces, but was not able to appoint or sack the services of the chiefs without consultation and recommendations of the prime minister.

On the issue of appointment of judges, Benazir Bhutto as prime minister and Farooq Leghari as president had filed separate references before the Supreme Court. The PPP had then levelled an allegation that the Supreme Court had accepted the reference of the president on Sunday by opening the court doors especially for him.

Justice Sajjad Ali Shah had himself refuted this allegation later by saying that the reference of Farooq Leghari was in the hearing process since much before Benazir Bhutto's dismissal. Mr Farooq Leghari's presidential reference was basically concerned with certain explanations of 'Judges Case' *vis a vis* Article 2A of the Constitution.

In the same reference Mr Leghari had particularly asked the SC to guide 'if the PM's consultation is mandatory before the president's orders for appointing judges are released.' All law officers including Attorney General had tried to convince the court that PM's consultation should not be there because PM's office was 'political' and thus the judges would also be carrying certain political influences. Justice Sajjad Ali Shah CJP gave a categorical verdict that:

'As our constitution gives approval for parliamentary system of government, therefore, Prime Minister's consultation should be incorporated in the decision making process while appointing judges in the superior courts of Pakistan.'

The then President Farooq Leghari had gone home in Dera Ghazi Khan for a week in the last week of March 1997 and in his absence the special sessions of Senate and the National Assembly were made to sit midnight. The PML(N) had two third majority in both the houses

thus it took only seconds to pass this amendment. During the same night time a special helicopter was sent to President Leghari's home 300 miles away, he was awakened and asked to sign the bill passed, a much humiliating way to tell somebody that your powers have been snatched.

4th April 1997: 13th amendment in Pakistan's Constitution got enforced by the then PM Nawaz Sharif. Under the provision of this amendment, the powers to dissolve the Assemblies or sending home the Prime Minister were taken back from the President.

Ehtesab Cell Modified:

29th May 1997: The National Assembly amended the Ehtesab Ordinance to introduce major changes in the accountability process to suit Nawaz Sharif. In that era of political victimization and tyranny all the higher courts remained mum rather shown a visible bias and partisanship. Mostly the goals were achieved through judges like Justice A Qayyum Malik whose face was blackened by his fellow judges in 2001 while his audio tapes were caught having 'glorious' instances of miscarriage of justice.

The most significant amendment was the shifting of the starting date for accountability from the original 31st December 1985 (when General Zia lifted the martial law) to 6th August 1990 (when the first government of Benazir Bhutto was dismissed). It was done so because Nawaz Sharif himself remained in saddles of the Punjab Government.

The amendment also transferred the power of investigating the corruption charges from the Chief Ehtesab Commissioner to the Ehtesab Cell set up by PM Nawaz Sharif. This amendment in Ehtesab Bill steam-rolled through the National Assembly made a mockery of accountability because Nawaz Sharif had taken out himself and his family members from accountability process for the period he remained as Finance Minister, Interim Chief Minister and Chief Minister of Punjab.

During the same abolished period of 1985-1990, he had got written off bank loans of Rs: 212 billion taken on their family projects from various banks and Financial Institutions. (Ref telecast program of ***Kashif Abbasi dated 8th April 2011 on ARY News***)

During this period Nawaz Sharif, in his capacity of Chief Minister of the Punjab, was strengthening and consolidating his industrial and political base. Reports were on record that:

'There were 167 cases of major loan defaults which included 107 cases involving top leaders of the PML(N) who got the benefit of huge write-offs during 1985-1990 during his rule on Punjab.'

The transfer of power of appointment of the Chief Ehtesab Commissioner from the President to the federal government reduced the office of the CEC to a mere post office. The real powers were soon transferred to the Accountability Cell in Prime Minister's secretariat. The head of the Cell, Senator Saifur Rehman Khan, was accountable only to the PM. The amendment also extended ex post facto legal sanction to the Prime Minister's Accountability Cell, which was under attack in a number of petitions and challenges in the Lahore High Court.

The original ordinance had empowered the Ehtesab Commissioner to initiate a case on a reference received from the appropriate government, on receipt of a complaint or on his own accord. Under the new amended law, if the CEC deems a reference necessary, he must refer it to the A Cell for investigation. With all the accountability functions and powers concentrated in Saif ur Rehman's Cell functioning in PM secretariat, PM Nawaz Sharif was able to keep strict check not only on the opposition and the bureaucracy but on his own party-men also.

On **4th February 1998**, Nawaz Sharif got amended the Ehtesab Act, replacing the name 'Ehtesab Cell', with 'Ehtesab Bureau', and provided powers of an SHO, (like an officer in-charge of a police station) to the Bureau Chief or any other official designated by him for the purpose of investigation. The amendments were introduced into the Ehtesab Act through a

presidential ordinance, promulgated by the then President Rafiq Tarar on advice of Nawaz Sharif.

By amending Section 3 of the Ehtesab Act, the government had restored the original definition of 'corruption' meaning thereby that any favour by a government official to any person other than his / her spouse or dependents would also fall in the definition of corruption, and he would be held responsible for that. A reference made to the Ehtesab Bureau was treated as a report under Section 154 of the code with powers to examine all the material, evidence and proof. No other agency will have a power to look into the matter.

After the amendment, the Ehtesab Bureau was also empowered to ask the Chief Ehtesab Commissioner (CEC) to make a request to any court for the withdrawal of any case pending in a court. If the court grants permission, the said case will be transferred to the Ehtesab Bureau. The Chief Ehtesab Commissioner was given powers to arrest an accused at any stage of proceedings against him.

The amendment had provided a right of appeal to the CEC if the court or Ehtesab Bench acquitted any accused. Earlier this right was given only to the accused. It was also provided that on the grant of pardon from the CEC, a magistrate appointed by the CEC himself will examine an accused [what a judicious joke it was].

When the Ehtesab Bureau became an independent investigating agency with teeth of its own and therefore not dependent, as it formerly was, upon the powers of the FIA, a cold war had taken start between Saifur Rehman and Ch. Shujaat Hussain whose FIA and interior ministry were made paralyzed. The first and most striking change was to strip the original law of its neutrality and place all the powers in the Prime Minister Secretariat Islamabad.

In Pakistan, the word 'accountability' has only one meaning: to malign and persecute political opponents. Glimpses of the full story can be culled from the report of Mehran Bank Commission along with the evidence provided by Gen Asad Durrani and Hameed Asghar Qidwai, as well as the jailed chief executive of the failed bank, Yunus Habib.

Several references were filed against the former PM Ms Bhutto and her husband and 87 senior bureaucrats were suspended hastily amidst a blaze of publicity. Meanwhile, the list of bank defaulters remained as long and potent as ever with hardly anything returned to the banks or the financial institutions or state.

The annual 1997 Human Rights Report of US State Department said:

'The Accountability Commission, which was established by the caretaker government and headed by a retired judge, had been overshadowed by an Accountability Cell, headed by a close associate of the PM Nawaz Sharif. This cell had been accused of conducting politically motivated investigations of politicians, senior civil servants, and business figures, designed to extract evidence and, in some cases, televised confessions of alleged wrongdoers. There are numerous examples of televised confessions extracted from Salman Farooqi, Secretary of Commerce under Benazir Bhutto; Ahmed Sadiq, Benazir Bhutto's Principal Secretary; and Zafar Iqbal, Chairman of the Capital Development Authority Islamabad and many more like them.'

16th June 1997: A writ petition was moved in the Supreme Court to close down political cell of the Inter Services Intelligence (ISI), Pakistan Army's spy directorate. The PML had backed it in fact.

14th Amendment Bill:

1st July 1997: the National Assembly had unanimously adopted the Constitution Bill, the Fourteenth Amendment. This **Anti-Defection (Floor Crossing) Bill** earlier passed by the Senate and later by the National Assembly with a large majority, was a structural reform to end the practice of switching party loyalties and blackmailing party leadership for ministerial slots, bank loans and other concessions.

After being rushed through Parliament, the 14th Constitutional Amendment was hailed as the remedy against the scourge of floor-crossing, which had de-stabilized the democratic political system in the post-Ziaul Haq era. On the other hand, by vesting party leaders with sweeping powers to unseat legislators and denying judicial redress to the latter, it was seen as having imposed party dictatorships and political regimentation making it the 'family dynasty' in politics.

All these issues went before the Supreme Court and its 6 to 1 verdict has only partially validated the controversial Amendment. The six judges in favour had struck down the portions curbing the legislators' right to express dissent inside and outside Parliament. However, almost certainly with an eye to the bitter realities of our political culture, they maintained the compulsion for legislators to vote according to party dictates so as to "bring stability to the polity" by eliminating floor-crossing.

Even in allowing this right of verbal dissent, there was a 4-2 split among the honourable judges. Justices Saiduzzaman Siddiqui and Irshad Hassan held that even dissent outside the legislature was ultimately damaging to party discipline inside the House and, thus, for political stability generally. They believed that principled dissent required the legislator to resign the seat won under a party flag. Hence, they favoured upholding the 14th Amendment in its entirety.

However, the six judges were unanimous in diluting the vast powers given to party bosses by upholding the right of an unseated legislator to seek remedy from the superior courts. A very interesting situation had cropped up in Pakistan on that 14th Amendment issue, which ultimately 'inspired' the then ruling party of Pakistan Muslim League (PML) to launch an attack on the Supreme Court of Pakistan.

A Supreme Court judgment of 11th July 2002 describes it as under:

'..... A tug of war started between the Prime Minister (Nawaz Sharif) and the Chief Justice of Pakistan (Justice Sajjad Ali Shah). The Prime Minister introduced the 14th Amendment to the Constitution as a result of which the persons elected on the ticket of a particular party were debarred from speaking against the policies of the party concerned at the floor of the house or outside.

A petition was moved challenging this amendment on the ground that it infringed the fundamental right of freedom of speech and the then Chief Justice suspended the operation of the 14th Amendment which was resented by the party in power. The justification advanced by the party in power to introduce 14th Amendment was that they were trying to bring an end to the floor crossing.

The suspension of the operation of the 14th Amendment made the Prime Minister and others to ridicule the Chief Justice and certain derogatory remarks were made against this Court, which led to initiation of Contempt of Court proceedings against the sitting Prime Minister Nawaz Sharif and his cronies.

Although the Prime Minister appeared in Court but as expected this Court desired to proceed further in the matter which again infuriated the party in power and thus through a concerted effort this Court was attacked by an unruly mob to deter the Court from hearing the contempt case as a result of which the Chief Justice of Pakistan and other Judges had to leave the Courtroom. Crocodile tears were shed by the party in power over the incident. The mob which attacked this Court included elected members.'

Before passing that 14th Amendment, probably during 2nd week of May 1997, the CJP J Shah had once called Barrister Akram Sheikh and handed over a draft of that proposed amendment carrying imposing of restrictions over freedom of parliamentarians, which was going to be taken through the Parliament. Next day, Akram Sheikh tried to see PM Nawaz Sharif to speak on that proposal but could not see him. Akram Sheikh, however, made out a text suggesting the PM to refrain from calling such an amendment on the floor and faxed it to the PM with

copies of that text to all PML's MsNA. On 15th May when PML's parliamentary meeting was held, all the members placed that Akram Sheikh's fax before the PM and urged him to cool down.

Two days later, that fax was published in all print media. Nawaz Sharif went sentimental, had conveyed his displeasure to Barrister Akram Sheikh and announced to go with the draft proposal at all costs which ultimately became the basis of 14th Amendment.

Throughout the history of Pakistan, the 'party changing process' had contributed to a sense of immunity on the part of members of the ruling party, and to rampant corruption among leading politicians. The 14th Amendment, had however, helped some dictators and particularly contributed to the overwhelming popular support for Gen Musharraf's coup in 1999. The same Supreme Court had subsequently validated the coup on the grounds that the 13th & 14th Amendments had created a situation for which there was no constitutional remedy.

Anti Terrorist Courts 1997:

On 18th January 1997 Mehram Ali, a Shia militant member of an organization called *Tehrik Nifaz Fiqh-i-Jafaria* (TNFJ), planted a remote controlled bomb in the grounds of the district court complex in Lahore. He detonated the bomb. When the debris settled the bodies of twenty-three victims were found, including those of Maulana Zia-ur-Rehman Farooqi and Maulana Azam Tariq, Chairman of the *Sipah-i-Sahaba Pakistan* (SSP), a militant Sunni organization. The victims were brought to the Additional Sessions judge's Court from the Kot Lakhpat jail where they were serving sentences related to their earlier anti-Shia crimes. 55 others were injured in the blast.

One Mehram Ali was caught at the scene but his trial before the Sessions court dragged on. The case generated considerable press coverage and provided the context, perhaps pretext, for the introduction of the Anti Terrorism Act of 1997 which came into effect on 20th August.

The Anti-Terrorism Act of 1997 was the brainchild of the Nawaz Sharif administration, which had been returned to power in February 1997 following a landslide victory that left PML(N), with an overwhelming majority in the national assembly. During his first premiership, Nawaz Sharif had earlier introduced an anti-terrorism strategy, through 12th Amendment in the Constitution, which added Article 212-B to the document.

The said amendment allowed for the "establishment of Special Courts for the trial of heinous offences" on 28th July 1991. This device was designed as a temporary measure that would stand repealed, if not confirmed by the parliament, three years after its enactment. Thus, the 12th Amendment & Article 212-B expired on 28th July 1994, died its own death and stood nullified at its own.

On 13th August 1997, an ***Anti-Terrorism Act (ATA)*** was bulldozed through the parliament and was severely criticized by all including many members of PML and its coalition allies. Yet on the day of its presentation it was endorsed within three hours. It was widely felt that the ATA would turn the country into a police state violating the constitution. The law was to equip the law enforcing agencies and army with a license to kill any person on mere suspicion. It also empowered the police to search a house and arrest a person without warrant.

The ATA provided an appeal against the special court judgment before a tribunal of two High Court judges. A person accused under the ATA was not able to move any court for bail even the High Court. Thus the judiciary also opposed the ATA and many feared that the law would be grossly abused. In a mutual meeting on 20th August CM Punjab, Shahbaz Sharif, had failed to convince the then CJP Justice Sajjad Ali Shah of the need to establish special courts under the ATA. The bar associations had also condemned the law.

The then Federal Law Minister Khalid Anwer first surprised his colleagues by allowing the government to push through this piece of dubious legislation but afterwards proceeded to distance himself when it was enacted. He even went so far as to declare that he would have

opposed the law, had he been in the opposition. The situation went so tense that PM Nawaz Sharif had to announce that the law would be phased out once the situation was under control.

Six special courts started working in the Punjab province on 25th August but with smooth profile. When the special courts were established in the Sindh province the fears came true because the police had started sending cases to special speedy trial courts at rocketing speed.

The Punjab Forensic Science Laboratory used to be kept under pressure from the government to issue 'positive results' about weapons used in cases being tried by the special courts set up under the ATA. For instance, the same four weapons were repeatedly sent to the Punjab Forensic Science Laboratory at Lahore to ascertain whether or not they were used in about 1000 cases by an accused during a sectarian attack for which he was being tried.

Interestingly, all the weapons tested were declared positive by forensic experts, providing sufficient evidence for the prosecution to obtain maximum punishment for the accused. On the basis of those bogus reports as many as 55 people were sentenced to death, 32 people sentenced to life imprisonment or so.

Reportedly in some cases the bullet shells collected from a crime scene years ago matched with the weapons recovered from the accused on arrest. It was ironic that some officials had insisted on matching the shells recovered from a scene of crime in 1990 with that of a weapon recovered from the accused in 1997.

It was CJP Justice Sajjad Ali Shah who had tried to block the mode of this tyrannical way of governance for which he had to pay ultimately in November same year when he was shown way to home in an un-ceremonial way. In February 1999, the Supreme Court had declared these Military Courts unconstitutional and ordered their dissolution. There was no way out except to obey the Apex Court's orders. Nawaz Sharif, taking it as a note of humiliation for his person and premiership, got formulated and issued an ATA Ordinance in April 1999 to continue his dictatorial, despotic and oppressive governance.

Under this Ordinance, those ATA Courts, previously run by the military officers and commonly called as special military courts, were later replaced with Anti-terrorist Courts. Through amendments to the ATA, the jurisdiction of Anti-terrorist Courts was extended to cover the same types of offences as had been tried before by Military Courts, and the executive completed the transition by transferring Military Court cases to the Anti-terrorist Courts. These courts again lacked essential due process and fundamental rights guarantees, including the right of appeal. As was the case with Military Courts, Anti-terrorist Courts were also established to dispense with the summary justice, conducting and concluding trials mostly within seven working days.

Coming back to the earlier cited case, after promulgation of ATA 1997, the Mehram Ali case was transferred to the newly constituted special Anti-Terrorism Court (ATC) in late August, where Ali was awarded a death sentence, convicted for twenty three counts of murder, and various other sentences related to the bombing. He filed an appeal before the newly constituted Anti-Terrorism Appellate (ATA) Tribunal, also having a seat at Lahore.

The ATA upheld his conviction. The petitioner then filed a writ petition before the Lahore High Court claiming, among other things, that the formation of the special courts violated provisions of the constitution. The Lahore High Court claimed jurisdiction to hear the appeal, but held that the conviction should still stand. Mehram Ali then filed an appeal to the Supreme Court of Pakistan.

The motives for the introduction of the Anti-Terrorism Act were, in a way, justified. Clearly, Pakistan had suffered from very significant communal and sectarian violence for the past several years, and the regular criminal justice system had not been able to curb such violence. In this context, the ATCs, with their "promise" of speedy justice, unencumbered by the procedural niceties of the regular court system, would serve as a deterrent to would-be

terrorists. The Chief Justice Sajjad Ali Shah CJP had opposed this development in mid 1997 but the PM Nawaz Sharif sent him home later.

His successor Justice Ajmal Mian, the then Chief Justice of the Supreme Court, also held the opinion that the supervision and control over the subordinate judiciary (including the special courts) should go with the High Courts. Moreover, no parallel legal system could be constructed that bypassed the operation of regular court system. Despite this finding the Supreme Court had shown sympathy for the government's affirmed intent to speedy justice.

In a concurring opinion Justice Irshad Hassan Khan had stated:

'[The] speedy resolution of civil and criminal cases is an important constitutional goal, as envisaged by principles of policy enshrined in the constitution. It is therefore, not undesirable to create Special Courts for operation with speed but expeditious disposition of cases of terrorist activities / heinous offences have to be subject to constitution & law [then in vogue in Pakistan].'

In the light of this finding, the Nawaz Sharif government had no recourse but to amend the Anti-Terrorism Act and incorporate the changes ordered by the Supreme Court. Accordingly, on 24 October 1998 the ***Anti-Terrorism (Amendment) Ordinance, 1998*** was issued. The new act met all of the objections raised in the *Mehram Ali* case.

Thereafter, Special Anti-Terrorism courts remained in place but the judges of such courts were granted tenure of office (two years, later extended to two and half years); the special Appellate Tribunals were disbanded, appeals against the decisions of the Anti-Terrorism courts would henceforth allowed in the respective High Courts; and restrictions were placed on the earlier act's provisions regarding trial in absentia to accord with regular legal procedures.