

Scenario 3

Judiciary in 1977

Nusrat Bhutto Case:

It may be recalled that in 1976 Z A Bhutto announced general elections in the country and after the polls were held in early 1977 an agitation started alleging that the election had been rigged. There were large-scale demonstrations, law & order became worse and there was arson, loot and plunder. The parleys and negotiations between the ruling party and opposition failed although an understanding had been reached. At that juncture, Mr Bhutto introduced as Article 96-A in the Constitution to provide for a referendum for a vote of confidence for him. Under this provision it was said that:

'If at any time the Prime Minister considers it necessary to obtain a vote of confidence of the people of Pakistan through a referendum, he may advise the President to cause the matter to be referred to a referendum in accordance with law made by the Parliament of Pakistan in vogue whatsoever.'

The only disturbing element in this new article was that:

'Any dispute arising in connection with the counting of votes at a referendum shall be finally determined by the Referendum Commission or a member thereof authorized by it and no dispute arising in connection with referendum or the result thereof shall be raised or permitted to be raised before any Court or other authority whatsoever.'

In nut shell, the courts and their existence were negated altogether. No objection, no cry and no petition for its revision came up.

However, no referendum could take place because of the volatile situation in the country and this provision being time-specific ceased to be part of the Constitution in September 1977. Nevertheless, on presumption that there was no concluded agreement between the government and opposition parties, Gen Ziaul Haq, the then Chief of Army Staff, on 5th July 1977 imposed Martial Law and held the 1973 Constitution in abeyance.

[On 5th July 1977, Gen Ziaul Haq pronounced martial law. Sajjad Ali Shah (afterwards elevated as Chief Justice of Pakistan) was the Registrar Supreme Court. He immediately rang up the Chief Justice, Yaqoob Ali Khan and told him that after martial law, Mr Bhutto and his cabinet members had been arrested. The CJP replied that the Law Ministry and the Establishment Division had already told him and that Gen Ziaul Haq was coming to see him as the Chief Martial Law Administrator at 11 AM. The CJP had also briefed him about the arrangements to be done. Gen Ziaul Haq came at 11 AM; the Registrar received and escorted him to the CJP's chambers. The Registrar Mr Sajjad Ali Shah left the two heads there and doors closed.

Soon after the then Federal Secretary Law, Abdul Haye Qureshi was called there. All the accompanying Generals were oozing outside after a hectic night. Two main things were decided between the two;

- Firstly: that in the communiqué for the nation, in respect of the Constitution neither the word 'abrogated' would be used nor 'suspended', it would be said as '**held in abeyance**'.

- Secondly: All the Chief Justices of the High Courts were made governors of the respective provinces. (After two years they were given confirmations if needed and promotions too.)

All it was a very calculated move to win the higher judiciary in favour of military rule that was why the decision of Nusrat Bhutto case was as Gen Ziaul Haq wanted.

19th September 1977: Chief Justice of Pakistan Yaquab Ali Khan admitted Begum Nusrat Bhutto's petition challenging the constitutionality of Zulfikar A Bhutto's detention. Bhutto was removed from the government and was arrested on 5th July 1977 as sitting Prime Minister. That day after promulgation of the Martial Law, Gen Ziaul Haq had suspended all democratic institutions.

22nd September 1977: Yaquab Ali Khan, the Chief Justice of Pakistan, was forced to retire because he had dared to accept Begum Nusrat Bhutto's petition for hearing.

The interesting fact was that the CJP Yaqoob Ali Khan, while accepting Nusrat Bhutto's petition, wrote an order on that *'the political prisoner Mr Bhutto should also be produced before the court'*. When Gen Ziaul Haq was told of such instructions of the Supreme Court, he immediately ordered to suspend whole of the superior judiciary and to bring Generals and Brigadiers instead to act as 'senior military courts'. Governor Punjab Justice Aslam Riaz Hussain immediately approached Gen Ziaul Haq and asked audience for few minutes. When Justice Aslam met the CMLA, the schemers of the said proposal; A K Brohi, Sharifuddin Pirzada and Gen K M Arif were also present. Justice Aslam dared to advise the CMLA to refrain from that act in the wake of possible revolt by the lawyer's community countrywide.

Gen Ziaul Haq thought for a while but how to deal with CJ Yaqoob Ali Khan's orders. A mid-way was worked out that the government should file a review petition on the grounds that *'by causing Mr Bhutto's presence in the Supreme Court, there is an apprehension of law & order situation associated with security risk.'* It was agreed. Review petition was got prepared and placed before the apex court next day.

The review petition was admitted, the apparent problem solved but the same evening it was, however, decided to replace the Chief justice of Pakistan Yaqoob Ali Khan also.

23rd September 1977: Sheikh Anwar-ul-Haq, an officer of Administrative Cadre, a person who lacked adequate judicial training, was appointed the Chief Justice of Pakistan.

[Quoting '**Judicial Murder of a Prime Minister**' written by Tariq Aqil and appearing on 7th December 2004 at www.Chowk.com, it is a historical fact that the new Chief Justice took his oath of office along with other Supreme Court judges, Omitting the paragraph in the oath laid down in 1973 constitution whereby the supreme court judges swear to "*preserve, protect and defend the constitution*". By this contrived deliberate manner the judges ceased to function as constitutional judges and were absolved from faith with the oath they had sworn earlier.]

10th November 1977: The imposition of the third Martial Law was challenged in *Nusrat Bhutto's case (PLD 1977 SC 657)* wherein, using fulcrum of 'ground realities and the objective conditions', the Supreme Court had declared the imposition of Martial Law as valid on the ***doctrine of State necessity***, but the Court observed that the power of judicial review was available to it to examine the legality or otherwise of the actions of the government and particularly the Court would also see whether the necessity continued to exist or not.

Notwithstanding the above quoted judgment, a Provisional Constitution Order of 1981 was promulgated by Gen Ziaul Haq ousting the power and jurisdiction of the Superior Courts to judicially review actions of the Martial Law regime. In nut shell, the Supreme Court of Pakistan in Begum Nusrat Bhutto case, unanimously validated imposition of martial law under the 'doctrine of necessity'.

In its judgment dismissing Begum Nusrat Bhutto's petition challenging detention of former Prime Minister Z A Bhutto and 10 others, the nine-member court headed by Chief Justice Anwar ul Haq remarked that:

'..... after massive rigging of elections followed by complete breakdown of law and order situation, bringing the country on the brink of disaster, the imposition of martial law had become inevitable..... the court [Supreme Court of Pakistan] would like to state in clear terms that it had found it possible to validate the extra constitutional action of the Chief Martial Law Administrator (CMLA) not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional breakdown, but also because of the solemn pledge given by him that the period of constitutional deviation shall be as short as possible.'

'It is true that owing to the necessity of completing the process of accountability of holders of public offices, the holding of elections had to be postponed for the time being but the declared intention of the Chief Martial Law Administrator still remains the same namely, that he has stepped in for a temporary period and for the limited purpose of arranging free and fair elections so as to enable the country to return to a democratic way of life.'

In the presence of these unambiguous declarations, it would be highly unfair and uncharitable to attribute any other intention to the Chief Martial Law Administrator, and to insinuate that he has not assumed power for the purposes stated by him, or that he does not intend to restore democratic situations in terms of the 1973 constitution'. **(Ref: PLD 1977 SC 673-674)**

It may not be out of place to mention that before making formal announcement of the decision, the CJP Anwarul Haq had sent his draft to Gen Zia ul Haq Chief Martial Law Administrator for prior approval. On seeing the said draft, Gen Ziaul Haq immediately got furious and returned it with remarks that:

*'.....In the decision why the Chief Justice had not given him the authority to make changes in the Constitution. The said Chief Justice got his office of the Supreme Court opened in the same evening, made the desired changes in the draft and had immediately sent to Gen Ziaul Haq again for approval. That decision was read over next day and Mr Z A Bhutto was hanged on the basis of the same decision. (Column by Dr Safdar Mahmood: **Daily Jang London dated 5th July 2007**)'*

In an article captioned as '**Tale of a vitiated trial**' written by Fakhar Zaman, sent to all media websites on **4th April 2000**, it was opined that:

'The real culprit responsible for impairing the image of the judiciary was General Ziaul Haq, Chief Martial Law Administrator, assisted by the two Chief Justices, Molvi Mushtaq Hussain and Anwar-ul-Haq, who lent him their noble judicial positions in bringing the conspiracy against the Prime Minister to fruition.'

'These were the two judges who also lent legality to the imposition of martial law and prepared the ground for amendment of the Constitution itself to help achieve the evil designs to the dictator. It was with the blessings of these two that Zulfikar Ali Bhutto was removed from the scene and a usurper was able to rule the country for eleven long years and, in process, destroyed many of its valuable institutions.'

The Supreme Court had also held that the facts in Begum Nusrat Bhutto's case were distinguishable as the Constitution had not been dismissed but only suspended and the intention was to restore it. What an assessment and what was the foresightedness.

Going into more details, the said decision from the Supreme Court of Pakistan titled **Begum Nusrat Bhutto V. The Chief of the Army Staff** and Another (PLD 1977 SC 657 & 1977 (3) PSCR 1) was announced on a petition by Begum Nusrat Bhutto, under Article 184 (3) of the 1973 Constitution of Pakistan, sought to challenge the detention of Mr. Zulfikar Ali Bhutto, former Prime Minister of Pakistan, and the other leaders of the Pakistan People's Party under

Martial Law Order no. 12 of 1977 contending that the Chief of the Army Staff had no authority under the 1973 Constitution to impose martial law in the country. It was also contended that his intervention amounted to an act of treason in terms of Article 6 of the Constitution; that as a consequence the proclamation of martial law dated 5th July 1977 and other actions of arrest and detention were all without lawful authority.

This petition was heard by a bench of nine judges of the Supreme Court consisting of S. Anwar-ul-Haq, Chief Justice, Wahiduddin Ahmad, Muhammad Afzal Cheema, Malik Muhammad Akram, Dorab Patel, Qaisar Khan, Muhammad Haleem, G. Safdar Shah and Nasim Hasan Shah.

The leading judgment was written by S. Anwar-ul-Haq, Chief Justice. His opinion was also agreed with by Justice Nasim Hasan Shah, who had stressed in a separate note that '...when the political leaders failed to steer the country out of a crisis, it is an inexcusable sin for the armed forces to sit as silent spectators. It is primarily, for this reason that the army, perforce had to intervene to save the country.'

On the issue of validity of Proclamation of Martial Law on 5th July 1977, it was held that:

'In these circumstances neither the ratio decidendi of Dosso v. State nor that of Asma Jilani v. the Punjab Government is strictly applicable to the present case. The question next arises whether the above intervention was a step which could lawfully be taken? So far as this point is concerned, it is an admitted position that there is no provision in the constitution authorizing the army commander, even in the event of the break-down of the constitutional machinery, to intervene in the manner that he did.

But Mr. Sharif-ud-Din Pirzada, the Attorney-General of Pakistan, submitted before us that since the country cannot be allowed to perish for the sake of the constitution, the intervention was justified on the doctrine of state necessity, while Mr Brohi contended that as the old legal order had been effectively replaced by a new legal order [leaving no vacuum], henceforth all questions of legality were answerable with reference to it.'

The speech of Gen Ziaul Haq was repeatedly read in the apex Court that:

'.... I was obliged to step in to fill in the vacuum created by the political leaders. I have accepted this challenge as a true soldier of Islam. My sole aim is to organize free and fair elections which would be held in October (1977) this year. Soon after the polls, power will be transferred to the elected representatives of the people....;

These words were included in the decision and the whole judgment was based on the sincerity and sacredness of this phrase.

[That was why Justice Nasim H Shah had to opine that in view of the break-down of the normal constitutional machinery and to fill the vacuum, the armed forces were obliged to take an extra-constitutional step. Martial law was imposed, in the picturesque words used in the written statement filed by Mr. Brohi, not "in order to disable the constitutional authority, but in order to provide a bridge to enable the country to return to the path of constitutional rule".]

The Judgment said that 'the question whether the conditions prevailing in Pakistan necessitated the above step (of imposing Martial Law) has to be answered by reference to the happenings from 7th March 1977 up to 5th July 1977 which reveal that the constitutional and moral authority of the National Assembly which had come into being as a result of the elections held on 7th March 1977, as well as the Federal and Provincial governments formed thereafter had been continuously and forcefully repudiated throughout the country over a prolonged period of nearly four months. With the result that the national life stood disrupted.

A situation had arisen for which the constitution provided no solution. The atmosphere was surcharged with the possibility of further violence, confusion and chaos. As the constitution itself could not measure up to the situation, the doctrine of state necessity became applicable for where the safety of the state and the welfare of the people are in imminent danger. Necessity justifies a departure from the ordinary principles of law. In these circumstances the step taken by the armed forces in imposing martial law stands validated, on the principle of state necessity, as urged by the learned Attorney General (Mr Sharifuddin Pirzada)'.

All the nine judges had unanimously declared that the petition challenging the army coup was liable to be dismissed.

J Malik Qayyum, in an interview published in daily ***the 'Jang' dated 5th February 2006***, however, had pointed out that:

'The Supreme Court should have given 90 days period to Gen Ziaul Haq to go for general elections. [Gen Zia had originally announced such elections within 90 days; dates were also announced but then postponed for indefinite period in the name of Islamic rule.] Through this judgment a military coup was accepted as legal which was wrong. Though my father J Malik Akram was one of the judges on that bench of the SC but I, being a student of law, dare to differ with that opinion and the said judgment.'

In nut shell; the Supreme Court had observed that *'the declared objectives of the imposition of Martial Law are to create conditions suitable for holding free and fair elections in terms of the 1973 constitution, which was not being abrogated, and only certain parts of which were being held in abeyance, namely, the parts dealing with the federal and provincial executives and legislatures.'*

The President of Pakistan was to continue to discharge his duties as heretofore under the same constitution. Soon after the polls, the power was to be transferred to the elected representatives of the people but, in the name of accountability of some politicians; elections were postponed.

Accountability of that military ruler, Gen Ziaul Haq, did not end till his plane was blown up in air on 17th August 1988. The dead body was not available from the crime scene. Some days later, certain Afghan *Mujahideen* offered his '*Janaza*' prayer at the side space of Faisal Mosque Islamabad and soon after Nawaz Sharif got built his tomb there.

Still the people believe that in that tomb only the fractured eye-glasses of Gen Ziaul Haq are buried, not any part of his body, because nothing could be found from the crash scene.