

## Scenario 40

### **PAK ARMY & JUDICIARY IN 2003:**

#### ***PBC's White Paper against Judiciary:***

**8<sup>th</sup> March 2003:** Due to open partisanship of the two consecutive Chief Justices with the military regime, the Pakistan Bar Council (PBC) once decided to boycott the Supreme Court (SC) by refusing to challenge any constitutional question before it; reason being that PBC was not expecting a fair and impartial decision from the SC. The matter did not end there; the lawyers had observed 8<sup>th</sup> March 2003, the day the Chief Justice of Pakistan, Sh Riaz Ahmed had to originally retire before the three-year extension, as a black day.

The PBC also held conventions throughout Pakistan against the judiciary and brought out a white paper in which it described their 'noble deeds & decisions'. These measures by the legal community were unprecedented in the history of Pakistan. The matter reached such a stage was unfortunate but the situation raised a number of questions. The PBC charged that corruption had plagued the institution of judiciary for the past 55 years but the pestilence peaked after Gen Musharraf came to power in October 1999. The PBC held that:

*'Chief Justice Sheikh Riaz Ahmad and his predecessor Irshad Hassan Khan have destroyed the institution of judiciary which should have been an effective and independent organ of the state, and now corruption and incompetence in the judiciary have become the order of the day.'*

'**Daily Times**' quoted from the 83-page White Paper, the first such to be released by the Pakistani Bar in the judicial history of Pakistan. The document said:

*'The judiciary, due to its role and performance for the last three years, has relegated itself to the position of subservience to the military rulers. Its role has been to support the regime of Gen Musharraf without any regard for the constitutional dictates and the law laid down by the Supreme Court in its previous cases.'*

The said white paper on the then prevailing scenario stated that:

*'The inclusion (in the constitution) of provisions relating to the president's powers to dissolve the assemblies, simultaneous holding of two offices of the army chief and president by one person, three-year extension in the superannuation age of judges of superior courts and the constitution of the National Security Council was aimed at enslaving the constitution and the people's will.'*

The white paper also charged that '*In most cases, a corrupt judge, if he happens to be a chief justice, can easily be manipulated by a dictatorial regime, which maintains dossiers on the judges*'. This reference was pointing to the then Chief Justice Sh Riaz Ahmad, who had administered oath of the office to Gen Musharraf just before last year's general elections. The General was previously given an additional three years to remain in office by the previous CJP.

The Bar Council's words were also spread out to the judicial minds of the world. Later the '**Daily Mail**' (UK) dated 6<sup>th</sup> May 2005 said that:

*'By the continuing of Chief Justice Sheikh Riaz Ahmad for three more years, he (Gen Musharraf) can count on a pliable chief justice to manage a verdict favourable to him'*

*in case he dissolves the National Assembly (NA) under his discretionary powers to get rid of a hostile or recalcitrant parliament. Thus the judiciary has been reduced to the level of being a protector of a military ruler who is bent upon "contaminating" the Constitution to perpetuate his rule'.*

At another occasion the same article said that:

*The [Pakistani] judiciary is acting under the dictates of the military ruler in defiance of the constitutional provisions and the Supreme Court's own previous judgment. Ironically, the chief justice administered oath of office to the president under the Constitution before the NA had met and the election to the senate had taken place.*

*This was done despite the existence of his own judgment in a reference case, in which the chief justice had maintained that the consequences of the referendum would be settled by the parliament'.*

The other newspapers of the west had also hailed the PBC's effort to show mirror to the then military regime. In fact the judiciary had miserably failed to protect, preserve and defend the Constitution and the oath of office that members of the judiciary make at the time of induction as judges. The judiciary had thus reduced itself to the position to bring protector, preserver and defender of the unconstitutional acts and orders of the military regime.

The powers of the chief justice to form benches had been misused throughout the history of Pakistan but it was abused to the maximum during the years from 2000 till then. It was generally felt that the military government of Gen Musharraf needed the services of only five judges; chief justice of the Supreme Court and the four other like minded judges to obtain a favourable verdict. Gen Musharraf had also ensured that he had five judges predisposed towards him and that they would and had actually managed verdicts beneficial to him throughout his tenure till then. The chief justice of Pakistan alone could manage all the verdicts desired by the military rulers. Chief Justice Sheikh Riaz Ahmad blatantly established how the power to constitute sympathizer benches could be exercised.

It was apparent that the then Pakistan Bar Council had full grip on the legal and constitutional matters which needed immediate attention. All the subjects were mentioned in the white paper to attract the attention of judiciary and the parliamentarians for a better Pakistan. The subjects included:

- Proclamation of Emergency October 1999,
- Oath of Office (Judges) Order 1999,
- President Succession Order 2001,
- Legal Framework (Amendment) Order 2001,
- Extracts from the judgment in Syed Zafar Ali Shah's case,
- Extracts from the judgment in Qazi Hussain Ahmad's case,
- Letters addressed to the CJP Sheikh Riaz Ahmad; Justice Qazi Mohammad Farooq, a Supreme Court judge and Justice M Ashraf Leghari, judge of the Sindh High Court, requesting them to lay down robes in view of their having attained the age of superannuating under the 1973 Constitution.
- Army role in politics,
- Implementation of Hamood ur Rehman Commission Report,
- *Suo-moto* powers of the CJ when he was retiring,
- Elevation of junior judges to the Supreme Court,
- Appointment of J (Rtd) Irshad Hassan Khan as the Chief Election Commissioner.

President of the Supreme Court Bar Association Hamid Khan told that the entire lawyer's fraternity had worked very hard to gather data for the White Paper saying that '*we are ready to face the consequences of publishing this paper*'. The white paper also held:

*'The military regime seems happy over corruption in the judiciary because it thinks that judges with 'compromised integrity' will not question their [the military's] corruption.'*

Realistically, the PBC had cogent weight in their arguments. The Council was of the opinion that the litmus test of the judiciary's independence would lie in its decisions against the dictators when they were still in power. But the Supreme Court had continuously failed that test when it upheld all martial laws and military take-overs alike; as for in the cases of Gen Yahya, Gen Ziaul Haq and then of Gen Musharraf.

In the latest test when the military takeover by Gen Musharraf was challenged, the Supreme Court not only justified it but also granted three years to the military regime to implement its program; in addition to granting the right to make amendments to the Constitution; a right even the Court did not possess itself. It is noteworthy that though the Court did not stipulate the removal of the then President Rafiq Tarrar in its judgment, but the later was removed and Gen Musharraf was administered oath as President by the Chief Justice of Pakistan. The act was patently unconstitutional.

Most observers noticed that the then Chief Justice Irshad Hassan Khan was rewarded for this bounteousness and generosity by Gen Musharraf when he was made the Chief Election Commissioner after retirement.

It had come possible partially through concerted efforts of the then Federal Law Secretary, Faqir M Khokhar, who was also given an out of turn appointment as a Supreme Court judge even though he was a junior judge of the Lahore High Court. This was in clear violation of the principle laid down in the 1996 Judges' Case which had stipulated the seniority rule in the matter of appointment of judges. This and other appointments of junior judges were challenged but were turned down by a special bench presided over by Chief Justice Sh Riaz Ahmad himself.

By granting extension to the judges of the superior courts, Gen Musharraf violated his commitment to the nation that no amendment would be done in the Constitution in ordinary course of nature. Interestingly, the extension period corresponded with the period granted by the judges to Gen Musharraf as the Chief Executive. It was not the extension itself granted by the military but rather the manner and the method in which it was granted. This was so because it clearly smacked of a bribe for 'services' rendered by judges; the bar and the parliament were not involved in the process.

**On 31<sup>st</sup> March 2003**, Pakistan Country Report on Human Rights for the year 2002 was released mainly stating that:

*'Former Prime Minister Benazir Bhutto's husband Asif Zardari waited for more than 5 years for the start of his trial on charges of killing his brother-in-law, Murtaza Bhutto in 1997. In April 1999, Zardari was tried and convicted separately on corruption charges. In December 2001 Zardari received bail but was not released; the NAB ordered his continued detention on suspicion of corruption. Despite government claims that NAB cases would be pursued independent of an individual's political affiliation, NAB had taken a selective approach to anti-corruption efforts.'*

*Gen Musharraf's NAB was created in part to deal with \$4 billion (PKR 208 billion then) that was estimated to be owed to the country's state owned banks by debtors, primarily from among the wealthy elite. The Musharraf Government stated that it would not target genuine business failures or small defaulters but the NAB acted otherwise with selective accountability.'*

#### **MEETING THE PRESIDENT BUSH (2003):**

During a meeting at Camp David in mid June 2003, Gen Musharraf was offered by the US President George Bush a package of conditional \$3 billion provided:

- Firstly; the Congress gives its approval.
- Secondly; Gen Musharraf continues to arrest Islamic militants and support the US military occupation of Afghanistan;
- Thirdly; Pakistan makes no trouble with India over Kashmir;
- Fourthly; Pakistan doesn't supply nuclear technology to North Korea.

In an article appeared in media on **30<sup>th</sup> June 2003** captioned as '**Soldier of the RAJ**', an American columnist **Eric Margolis** had clearly written that Mr Bush had mentioned of the first clause because the American Congress used to hate Pakistan the most as country but had decorated Gen Musharraf with the labels of 'statesman' and 'the friend of freedom' for the time being.

At so many public occasions, deliberately making it a public insult, President Bush had refused his 'friend and ally Gen Musharraf' to release F-16 fighters bought by Pakistan in 1989. Pro-Israel members of the Congress had blocked delivery of those aircrafts to punish Pakistan for its nuclear program. The same Congress heads had once assured the US that Iraq was bristling with deadly weapons that could annihilate the US and UK 'in 45 minutes'. Later the world had known about truth in it.

In his concluding paragraph, Eric Margolis wrote that Gen Musharraf used to plead Mr Bush to help resolve the Kashmir dispute - the world's most dangerous crisis that risks nuclear war between India and Pakistan – but was ignored. '**Take your money, go home, arrest more militants and don't cause trouble,**' was Washington's dazzling & stunning send-off message to Gen Musharraf.

**On 25<sup>th</sup> July 2003**, two civil judges and a magistrate were killed by prisoners of the Sialkot District Jail while they were on an official visit to the jail premises accompanying a heavy contingent of the local police.

Why did they have to kill the judges? Dr Farrukh Saleem, an Islamabad based economist and analyst, rightly pointed out that: '*..... It is important for the judiciary to peep into their own history for answers.*'

**On 23<sup>rd</sup> September 2003:** Pakistan and the UK judiciary signed an agreement under which both the countries would establish a body in each country to help the parents and abducted children of Pakistani origin British nationals. The agreement was signed by the CJP Sheikh Riaz Ahmad, and Dame Elizabeth Buttler Sloss, president of the Family Division of Courts of Appeal and Wales. The agreement was signed in furtherance of protocol signed by the Pakistan and British judiciary in January 2003.

*[Under the judicial protocol if a child is removed either from Pakistan to the United Kingdom or from the United Kingdom to Pakistan, the child would be sent back to the country of his / her habitual residence. If a court of country of habitual residence of the child, passed any restraint order, the court of the country to which the child has been removed, would not exercise jurisdiction over the child and order him to return.]*

From Pakistan, Justice Munir A Sheikh was appointed as liaison judge, and Lord Justice Matthew Thorpe from the UK side. When a naughty media person asked that Pakistan's judiciary bore allegiance to one man and did not represent the nation as it has not taken oath under the Constitution, the British delegation refused to take the question saying '**Don't ask such questions**'.

### **PAK ARMY CAUGHT IN FATA:**

In 2003, the army had negotiated a deal with the Taliban in the Pak-Afghan border area and as a result 213 soldiers were handed over by the militants to the *Jirga* at *Tiarza* village in the *Mahsud* tribal territory, and then driven in 13 vehicles to Wana. In Wana, the freed soldiers were handed over to the military authorities. The militants gifted a pair of new *shalwar-kameez & chappals* to each soldier before seeing them off at *Tiarza*. Among the freed soldiers were six army officers; including a colonel, majors and captains. Colonel Zafar led the military convoy that was seized by the militants.

It was a deal of the prisoner's swap, militants & Pak Army soldiers; became possible when the government agreed to release 25 of their tribesmen which were collected from different jails in various cities and brought to Dera Ismail Khan before being flown to Wana in a helicopter. These men were then handed over to the tribal *Jirga* which brought them to *Tiarza* to complete the prisoner's swap deal. Contrary to the claims by government officials, almost all of them were booked on terrorism charges and jailed.

These 25 men included one Suhail Zeb, a cousin of militants' commander Baitullah Mahsud. He was arrested by the police from a bungalow on Canal Road in Dera Ismail Khan along with three suicide bombers reportedly wearing explosives-filled jackets. They were later tried in a court and sentenced to 24 years imprisonment. Two of these 25 men were arrested in Karachi and were being held in a jail there.

**30<sup>th</sup> December 2003:** Through the 17<sup>th</sup> Amendment passed on this day, the three-years extension in the retirement age of the judges of the higher judiciary was withdrawn and Chief Justice of Pakistan Sheikh Riaz Ahmed, Justice Munir A Sheikh and Justice Qazi Muhammad Farooq were asked not to hear cases. Before the extension was awarded, the chief justice was supposed to retire on 8<sup>th</sup> March 2003, Justice Munir A Sheikh on 1<sup>st</sup> July 2003 and Justice Qazi Muhammad Farooq on 5<sup>th</sup> January 2003. According to the agreement signed between the government and the MMA, the constitutional bill was to be enforced from 1<sup>st</sup> January 2004.

Gen Musharraf had to appoint the new chief justice under Article 177 of the Constitution by 1<sup>st</sup> January 2004. Justice Nazim Hussain Siddiqui was poised to be the new chief justice of the apex court after the retirement of CJP Sh Riaz Ahmed and the other two senior judges. The new chief justice later administered the oath to Gen Musharraf as the president.

*[Gen Musharraf as the chief executive of Pakistan had amended the Article 179 and 195 of the Constitution through his Executive Order No 24 of 2002 under the Legal Framework Order during the night between 9<sup>th</sup> October and 10<sup>th</sup> of 2002, a few hours before the general elections of the national and provincial assemblies. With that amendment, the retirement age of the Supreme Court judges was extended from 65 to 68 years and the age of High Court judges was extended from 62 to 65 years.]*

Opposition parties and the legal fraternity strongly opposed that extension and Gen Musharraf had agreed to withdraw the amendment at an appropriate time. The General had used the judiciary in his favour and then was looking for the moments to throw them away like a used toilet tissue; 17<sup>th</sup> Amendment was the proper occasion to do that.

### **17<sup>th</sup> AMENDMENT FINALLY PASSED (2003):**

17<sup>th</sup> Constitutional Amendment was basically the confirmation of LFO of 2002 that was accepted with minor modifications to become part of the 1973 Constitution. A year-old constitutional deadlock was broken only because of 'flexibility' shown by Gen Musharraf and the top MMA leadership. The amendment allowed Gen Musharraf to serve out his five years term as President, which ended in 2007. This amendment had also formalized special powers he had decreed himself giving him the right to sack the prime minister and disband the parliament. In return, Gen Musharraf had committed to step down as army chief by 31<sup>st</sup> December 2004 which he never fulfilled.

A vote of confidence was passed in favour of the President on 1<sup>st</sup> January 2004 by members of both National Assembly and the Senate as per requirement of the 17<sup>th</sup> Amendment. Despite the fact that MMA abstained from giving the vote of confidence to the President, it had indirectly accepted him as elected president by allowing vote of confidence from both houses of parliament and provincial assemblies. At the same time the MMA was a bit successful in getting a probable action of dissolution of assemblies referred to the highest court. Under Article 58(2)(b):

*'The President, in case of dissolution of the National Assembly shall, within fifteen days of the dissolution, refer the matter to the Supreme Court and the Supreme Court shall decide the reference within thirty days whose decision shall be final'.*

Similar provision was made in Article 112 of the constitution in respect of the provincial assemblies. Gen Musharraf had also managed to get indemnity to all his actions since military action of 12<sup>th</sup> October 1999 as according to the amended Article 270AA, the Parliament had:

*'Affirmed, adopted and declared to have been duly made by the competent authority ... all laws made between 12<sup>th</sup> October 1999 and the date on which the Article comes into force'.*

It was widely perceived that the PPP's government, after coming in power in 2008, would give priority to plan of removing the stigma of 17<sup>th</sup> Amendment from their original Constitution of 1973 but, as per disclosures of the WikiLeaks, President Zardari in a meeting with US Ambassador Anne Patterson had told her that he was not interested in abolishing the same. Mr Zardari had openly told the US Ambassador that:

*'He does not want to transfer the Presidential powers [of Article 58(2)(b)] to the Prime Minister Gilani though he had demanded it through many public meetings. Opposition Leader Nawaz Sharif had also joined that orchestra with PM Gilani in the name of popular public demand. He would also try to limit the powers of Chief Justice of Pakistan Iftikhar Chaudhry'.*

It may be remembered that Gen Musharraf's term as the army chief technically had expired firstly on 6<sup>th</sup> October 2001 and by stretch in August 2003 when he reached retirement age, but the 17<sup>th</sup> Amendment in the Constitution of Pakistan, manoeuvred by him with the help of Muslim league (Q) and Maulana Fazlur Rehman, Leader of the Opposition in the Parliament and MMA, allowed him to carry on as both president and army chief until 15<sup>th</sup> November 2007.

Ten (10) laws were added by the LFO to the Sixth Schedule: the *'laws that are not to be altered, repealed or amended without the previous sanction of the President.'* After 17<sup>th</sup> Constitutional Amendment, five of those laws would lose their Sixth Schedule protection after six years. Laws to be freed included the four laws that established the system of democratic local governments. Those in favour of this change had argued that it would enable each province to evolve its own system till then. Opponents feared that authoritarian provincial governments could dis-empower or even dismantle the system of local democracies. However, it was left at the whims of Gen Musharraf and his military advisors.

Astonishingly, once Justice Saeeduzzaman Siddiqui, Justice Fakhruddin Ebrahim and others in 1999 had suggested about the ability of the Supreme Court to strike down a constitutional amendment while Barrister Akram Sheikh had cited Justice Sajjad Ali Shah's suspension of the 13<sup>th</sup> and 14<sup>th</sup> Amendments in 1997 as an argument. Those were the special circumstances when PM Nawaz Sharif had desired to get the judicial verdict on assigning himself as *Ameerul Momineen*. Some how the move could not get mature due to other political exigencies then cropped up. Much later, a cogent reply came from the Supreme Court's own judgment on the 17<sup>th</sup> Amendment Case. This judgment upheld Aitzaz Ahsan's contention that the Parliament was empowered to change the basic structure of the Constitution.

Justice Iftikhar Chaudhry was one of the five Supreme Court judges on the bench who had delivered this judgement. This judgment had dismissed all petitions questioning the legality of the 17th Amendment. Justice F G Ebrahim had told the media that:

*'In the latest example of 17th Amendment, the court has held that it can only point out the flaws in the constitutional amendment though in India, a principle has been laid down that the courts can strike down an amendment.'*

It was urged by the petitioners that the 17th Amendment in its entirety or at least specifically, Article 41(7)(b) and Article 41(8) should be struck down as violative of the basic structure of the Constitution; but it was held, quoting numerous cases of the past, that this Court did not have the jurisdiction to strike down provisions of the Constitution on substantive grounds.

Let us travel back to history for a while, may it help us comparing:

*[After the crash of Gen Ziaul Haq in 1988, as the Constitution was operative, there was smooth transfer of power and Chairman Senate Mr Ghulam Ishaq Khan took over as acting President and elections were held in the normal course. From 1988 to 1999, for about 12 years, there was no martial law in the country because of the presence of Article 58(2)(b) in the Constitution, which was introduced by Gen Ziaul Haq and which empowered the President to dismiss the Prime Minister at his discretion and hold elections within 90 days.*

*Four Prime Ministers were dismissed by the respective Presidents and finally that provision was undone by the 13th Amendment in the Constitution of Pakistan, manoeuvred by the then PM Nawaz Sharif, opening the way for military intervention yet again.]*

In all parts of the world where the countries had been subjected to army rule in the past, the pages of history lead us that the rate of economic growth and pace of social developments remained below the optimum level during military regimes. The military dictators did paint very glorious pictures of prosperity but the people could not get any fruit. The corruption and under-hand deals remained the hallmarks of their rule though the media concerns were forced to print and praise their cooked figures of pseudo developments and mega projects. When military rulers were sent home then each country had proved that the people were pushed into quagmires of rosy figures and statistics and nothing practical beyond that.

Many countries can be named which adopted a real path of progress and socio-economic growth when democracy prevailed there. Pakistan is one of those unlucky mentionable states where every type of fashion comes late except the military form of government. Once it comes here then it does not go without bloodshed or a major tragedy. In early 80s Pakistan was not the only country ruled by a General, so many other countries were there to taste this fruit. Argentina was run by Gen Gattieri, Chile by Gen Pinochet, Philippines by Marcos, Nigeria by Maj-Gen Buhari, Brazil by Gen Figueiredo, Bangladesh by Gen Ershad, Turkey by Gen Kenan Erven, South Korea by Gen Chun, and Poland by Gen Wojciech Jaruzalski to name a few. A little more details:

- In Argentina elections were held in 1983 and democracy has survived despite huge economic crisis.
- In Chile, Pinochet lost referendum in 1988, stepped down as head of state in 1990 and relinquished his army office in 1998. Since then, there has been a functioning democracy in the country while Pinochet was brought to justice for human rights abuses in 2000.
- In Philippines, Marcos had to lift martial law in 1981 and held elections in 1986 which paved the way for return of democracy.
- In Nigeria, military rule ended in 1999 and first free legislative elections held in 2003.
- In Brazil, elections were held under an electoral college set up by military in 1985 and since then it remains on democratic path.

- In Bangladesh, Gen Ershad's rule ended in 1990 and democracy was restored in 1991 (the General was convicted and jailed afterwards). Despite domestic crisis and partisan politics, Bangladesh continues to march along the democratic path.
- In Turkey, elections were held in 1983 and since then military's influence has gradually weakened and still the democracy prevails.
- In South Korea, the constitution was amended in 1986 to allow direct election of President and later free parliamentary elections were held in 1988. Despite East Asian crisis of 1998 and several scandals, South Korea has stayed on democratic course.
- In Poland, martial law was lifted in 1983 and in 1989 roundtable talks held among the Solidarity, Communists, and the Church led to free elections and today Poland is a member of the EU as a democratic state.

Each country has moved forward by breaking the cycle of military interventions and made considerable economical progress. In fact, most of them faced serious political and economic disasters in the last ten years. But their adherence to civil and democratic system largely stems from the consensus within military leadership and society based on the past experience that military rules end up creating more and bigger problems than what they seek to address through take-overs.

In an age of empowerment and information revolution, people have to be given primary responsibility for running the affairs of society through representative political structures. Unfortunately, Pakistan is one such country which defies this logic and where what was written in 1982 about it by the CIA applies word to word even after quarter of a century.

When this power game in Pakistan would end, no body knows. Military take-overs attract the people because they consider the politicians, belonging to all major parties like PPPs and PMLs equally corrupt, their leaders take their parties as their family business [***18<sup>th</sup> Amendment is an example under which the political parties are not bound to hold elections within parties***]. All have their business interests, families and homes abroad. When the military comes, they start their rule seriously but after a year or so, trying to stick to the personal power gains, contacting the *jagirdars* and feudal stalwarts belonging to the same secret mafias of white collar crimes, indulge in the same kind of political corruptions, bargains and compromises.

Let us hope for a sun shine.