

## **Scenario 69**

### **INDEPENDENCE OF PAK-JUDICIARY [2010]:**

Abdul Hafeez Pirzada, while drafting the 1973's constitution, might have trusted innocently that Pakistani and Indian's living were similar and both countries had experienced the same legacy of English rule so the judicial systems of the two countries could go alike. Thus he had worked out correctly that in Pakistani constitution the method of appointment of judges be inserted on the pattern as in Indian Constitution wherein the same or similar provisions were given in sections 124 & 217 though now stands much reformed through various stages.

It was OK then but the time has gone much fast. Our Pakistani politicians and military rulers have been using this way of appointments in a wrong way that is why Pakistani court verdicts [mostly] are not trusted at any world forum [till 2009 at least]. Our courts are not believed; our decisions are not quoted anywhere, not even in Indian courts, declaring worthless.

Basically Pakistan had got a force of political appointees in the courts having constitutional security of service up to a certain age. What happened; that when a seat occurred in some High Court, the sitting political government or military ruler used to forward names of some advocates, having the required period of bar membership and age. They used to be either relatives of known politicians, or staunch workers of that political party, or 'paid sources' of ISI in military regime or they might have 'invested' huge amount of money to get their names approved, or might be lawyers but not be good law knowing persons with crystal conscious. Good lawyers earn much more money than judges.

Contrarily, some very competent lawyers might be available in the same bar but because they were not having any 'connection' with a top politician or a serving military General so could not come forward. This had been the situation which multiplied our hard luck.

There was always a mixture of political appointees in all the High Courts; old & fresh judges but with multiple attitudes, variant orientations and diverse senses of direction. All the bar members and the media knew well that which judge usually favours which party or military executive, therefore, it could easily be ensured that the cases of political nature or cases in which government was party, would go to 'certain named' judges only.

Once in the PML(N) government, the then Chief of *Ehtesab* Bureau Mian Saifur Rehman made sure that all the corruption cases on Benazir Bhutto and Mr Zardari were not to be dealt with on merit. He managed to place them before Justice Malik Qayyum.

It is still on record that in 1997, when the *Ehtesab* slogan was initially trumpeted high by Mian Saif, a deputy secretary named Aftab Syed from Establishment Division was specially sent from Islamabad to Lahore to 'launch & chase' those cases of corruption against Ms Bhutto, Mr Zardari, PPP's nearby officers and politicians. He stayed there initially for 22 days in a 5 star hotel on government expenses till he was sure that all 'important' cases were fixed before Justice Malik Qayyum.

This officer and another 'so-called honest' Deputy Secretary Nusratullah were later on awarded for getting all pre-arrest bails rejected, temporary injunctions terminated and permissions of FIRs granted against PPP-connected persons and some senior officers, all jobs accomplished by J Malik Qayyum; a judge on Ehtesab Bench of the Lahore High Court and real brother of one MNA Pervez Malik of PML, who was given an unopposed seat of the National Assembly vacated by the Prime Minister Nawaz Sharif himself from Lahore.

There were 30-35 more judges in Lahore High Court then, why only J Malik Qayyum and J Ehsan Paracha were entrusted this sacred job; because they were close to PML and thus in contact with Saifur Rehman all the time. Benazir Bhutto thought that 'enough is enough'. She was in exile at London and was mostly encouraging her associates to come forward with suggestions for a better Pakistan. Most of their deliberations were incorporated in '**Meesaq e Jamhooriat**' finalized in May 2006.

### ***PRESIDENT'S POWERS TAKEN OFF:***

In Pakistan, the standing practice was that the Chief Justice used to recommend a list of names of proposed judges to the President and the President selected Judges from the said list. The recommendations of the Chief Justice were binding on the President, except for sound reasons to be recorded by the President.

Similarly, the most senior judge [normally] used to be appointed as the Chief Justice, except for concrete and valid reasons to be recorded by the President. In February 2010 an issue cropped up between the CJP and President Zardari on judges appointments. The rumours cropped up that Mr Zardari was being sent home by the SC; it could not happen but powers to select superior court's judges were, however, snatched by judiciary's smart moves.

The script of ousting Mr Zardari was being written and staged by many players. ***The Wall Street Journal of 23<sup>rd</sup> February 2010*** had once mentioned that:

*'It was Mr Chaudhry's dismissal by then President Pervez Musharraf in 2007 that triggered street protests by lawyers and judges under the twin banners of democracy and judicial independence.*

*This effort eventually led to Mr. Musharraf's resignation in 2008. Yet **it is now Mr Chaudhry himself who is violating those principles, having evidently embarked on a campaign to undermine and perhaps even oust President Asif Zardari.***

*Any involvement in politics by a sitting judge, not to mention a chief justice, is utterly inconsistent with an independent judiciary's proper role. What is even worse, Chief Justice Chaudhry has been using the court to advance his anti-Zardari campaign. Two recent court actions are emblematic of this effort.'*

**David Rivikin Jr & Lee A Casey**, while giving above opinion were in fact referring to two judgments of the SC; one of 16<sup>th</sup> December 2009 in NRO case and the other was related with blocking of appointments in the superior judiciary by the SC in February 2010; a 3-member bench of the SC had given the verdict that 'the president failed to consult with the CJP'.

This constitutional excuse had never been used before. The paper concluded by saying:

*'..... The second anti-Zardari effort occurred just a few days ago. There were street protests [sponsored by Nawaz Sharif's panel of lawyers]. Former PM Nawaz Sharif is now a leading opponent of the regime. There is a strong sense among the Pakistani elites that Justice Chaudhry has become Mr Sharif's key ally.'*

*The stakes are stark indeed. **Rule by unaccountable judges is no better than rule by the Generals**'.* [Ref: **Judicial Coup in Pakistan** by Rivikin & Casey]

Taking light from the '**TIME**' magazine of 27<sup>th</sup> March 2010 the bill [of 18<sup>th</sup> Amendment] was actually meant to take superior judicial appointments out of the hands of the president and place them before a legal committee that also included several justices. Instead of President, judges were to be confirmed by a parliamentary vote.

The analysts held that in fact the Prime Minister Gilani had very shrewdly played the double role in deflowering his own party's leader, President Zardari. The TIME's article spelled out that:

*'Chief Justice's hand in the eleventh-hour stalling of parliamentary debate on the package through Nawaz Sharif was visible who objected to proposals on the selection of judges. Sharif's opposition resulted from being pressured by Chaudhry [the CJP].*

***The chief justice threatened. He said he'd open up all cases against him. The other faction keeps that the conflict is caused by the government wanting a chief justice and court which is compliant, not independent.'***

The fact remained that Pakistan historically lived with the military's whims; transitions had been disrupted, and the judiciary in the past had invariably supported every military intervention. Thus there were perceptions that the Generals might be colluding with the judges to limit the civilian powers, already groaning under the weight of the president's sagging popularity.

Amidst all conspiracy theories **18<sup>th</sup> Constitutional Amendment was passed on 20<sup>th</sup> April 2010.**

In pursuance of the 18<sup>th</sup> & 19<sup>th</sup> Amendments, a Judicial Commission was proposed to be created to recommend the appointment of Judges of the Superior Courts in Pakistan. Following is the collective text of the Article 175 (A) which was inserted in the constitution of Pakistan through this amendment.

Article **175 A**. Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court:

(1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.

(2) For appointment of Judges of the Supreme Court, the Commission shall consist of---

- (i) Chief Justice of Pakistan; Chairman
- (ii) [four] most senior Judges of the Supreme Court as Members
- (iii) a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the [four] member Judges, for a term of two years; Member
- (iv) Federal Minister for Law and Justice as Member
- (v) Attorney-General for Pakistan as Member
- (vi) a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years as Member

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause 2 shall also include the following, namely:-

- (i) Chief Justice of the High Court to which the appointment is being made; Member
- (ii) The most senior Judge of that High Court; Member
- (iii) Provincial Minister for Law; Member

(iv) an advocate having not less than fifteen year practice in the High Court to be nominated by the concerned Bar Council for a term of two years; Member

[Provided that for appointment of the Chief Justice of a High Court the most Senior Judge mentioned in paragraph (ii) shall not be member of the Commission:

Provided further that if for any reason the Chief Justice of High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the four member judges of the Commission mentioned in paragraph (ii) of clause (2)]

(6) For appointment of judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:-

(i) Chief Justice of the Islamabad High Court as Member

(ii) most senior Judge of that High Court; Member

Provided that for initial appointment of the [Chief Justice and the] Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission.

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, mutatis mutandis, apply.

(7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos to clause (5) shall, mutatis mutandis, apply.

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be;

(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:

(i) four members from the Senate; and

(ii) four members from the National Assembly.

Provided that when the National Assembly is dissolved, the total membership of the parliamentary Committee shall consist of the members from the Senate only mentioned in paragraph (i) and the provisions of this Article shall, mutatis mutandis, apply.

(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

(11) Secretary, Senate shall act as the Secretary of the Committee.

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

Provided that the Committee for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period.

Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister.

Provided further that if a nomination is not confirmed, the Commission shall send another nomination.

(13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

(14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

(15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.

(16) The provisions of Article 68 shall not apply to the proceedings of the Committee.

(17) The Committee may make rules for regulating its procedure.

### **18<sup>TH</sup> CONSTITUTIONAL AMENDMENT:**

Till 20<sup>th</sup> April 2010, the day the 18th Constitutional Amendment was passed in the Parliament, the power to appoint judges to the Supreme Court (SC) was enjoyed by the President & the CJP; a system perhaps contrary to what the Constitution had suggested.

Through 18th Amendment in 2010, Pakistan got two forums for appointment of judges to the superior judiciary: a Judicial Commission with representation from the judiciary, lawyers and the federal government, responsible for recommending names of prospective judges; and a parliamentary committee to approve or reject these names but with assigning reasons if some name is rejected.

This mechanism had in fact curtailed the powers of the President and the political executive, which was also objectionable in deed, but the propaganda in the media was made that '**CJP's powers have been curtailed**' in the name of 'meaningful consultation' [*the phrase devised and more emphasized by the CJP Sajjad Ali Shah, in fact*]; poor PPP workers.

It was after the Al Jihad Trust Case (PLD 1996 SC 34) that the Supreme Court elaborated the meaning of the word 'consultation' and held that '*the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for unfair play*'.

In fact, the 1973 constitution intended to give the executive a lot of discretion in the appointment of judges. That was the reason they used the word 'consultation' and not 'advice' in Article 177 as well as Article 193 of the Constitution.

The 18th amendment also provided (vide Para 3 of Article 175A) that the president shall appoint the senior most judge of the Supreme Court to the office of the CJP thus formally recognising the principle of seniority and legitimate expectancy enunciated by the apex court in the Al-Jihad case and subsequently reiterated in some other cases.

The above given text of article 175A was inserted in the Constitution as 18<sup>th</sup> Amendment which was specifically concerned with 'judges appointments' but was challenged [**or manoeuvred to be challenged**] in the apex court on the pretext of independence of judiciary, a basic feature of the Constitution.

**13<sup>th</sup> May 2010:** Chief Justice Iftikhar M Chaudhry constituted a full bench [comprising of 17 judges] to hear petitions against the 18th amendment to commence on 24<sup>th</sup> May; about 15

petitions were filed in that row. Article 175 of the 18th amendment, dealing with the appointment of judges, was also challenged by some of the petitioners.

**On 28<sup>th</sup> May 2010**, the federal government raised objections on presence of the CJ in the larger bench hearing those petitions as was directly involved in the appointment of judges. The government was of the view that *'the Supreme Court can interpret the constitution but can not nullify an amendment'*.

It was urged that the 18th Amendment was not going to affect the judiciary's independence, as the three pillars of state were being given representation for judges' appointment; thus the petitions were liable to be dismissed.

Contrarily, the petitioners had insisted that the JCP's part for the appointment of superior courts' judges was against the basic structure of the Constitution. Advocate Akram Sheikh argued that the procedure for appointing judges was not included in the mandate of the parliamentary committee. He also requested for Article 175, dealing with the procedure of appointing judges, to be declared as null and void.

The proceedings went on day to day basis. On 3<sup>rd</sup> June 2010, Justice Ramday asked rhetorically: *'who would be responsible if the system itself commits suicide.'* Akram Sheikh maintained that the independence of the judiciary had been undermined with the insertion of Article 175-A in the Constitution. Justice Asif Saeed Khosa asked Mr Sheikh to give arguments on the merit of Article 175-A.

There appeared to be a vivid division amongst the respectable judges of the bench and once the CJP had to observe that *'the judiciary never claimed to be above the Constitution and the points raised by the judges of this bench "including me", are their personal opinions. However, the case would be decided on merit.'*

Justice Saqib Nisar inquired from Sheikh Akram whether the right of judicial review has been weakened with the inclusion of Article 175-A in the 18th Amendment. Further, that with three judges of the SC, Attorney-General and law minister included in the JCP, how could the judiciary's independence be undermined; even if two members of the Commission were from the outside.

Mr Sheikh continued that, due to this legislation, the judiciary had been undermined as two members, essentially outsiders and uneducated about such matters, would be authorized to appoint judges of the superior courts. *'The parliament did not say so nor the right to judicial review had been taken away'*; the CJ had observed

Lawyer Hamid Khan had argued that the procedure detailed in article 175-A for appointing judges to the superior courts violated the Objectives Resolution and contrary to the basic structure of the constitution; he criticized the composition of the JCP but from different angle. He also addressed the scope of presidential discretion in making appointments saying that:

*"While making the 1973 constitution, Bhutto consulted the then chief justice of Pakistan regarding the appointment of judges and those consultations were made part of the legislation.*

*Since the US has a presidential system of governance, the Senate is authorized to appoint judges."*

Justice Tariq elaborated that *'not only does the US president appoint judges but also ministers and diplomats, in consultation with the Senate. It's just in Pakistan that the Parliamentary Committee [PC] has been established just to appoint judges.'*

Mr Hamid Khan told the apex court that he had objections to the inclusion of the Law Minister and Attorney General in the Judicial Commission. *'As the offices of these two people are temporary, therefore, should be excluded from the commission; also that the chief justice of Pakistan should head the judicial commission for the appointment of judges,'* Mr Khan maintained.

Meanwhile, Justice Khalil-ur-Rehman Ramday also objected to the inclusion of retired judges in the Judicial Commission.

### **PM GILANI WENT AGGRESSIVE:**

**On 18<sup>th</sup> October 2010,** PM Gilani conveyed his legal team appearing before the SC that day, not to give anything in writing from his office to confirm or deny previous week's development as he was greatly hurt and humiliated. His words as the chief executive of Pakistan were not believed by judges on bench despite his loud denial about unconfirmed reports of withdrawal of notification of judges' restoration.

It was with reference to rumours in the capital that, to end the Judiciary – Executive row, the PM was going to issue a notification of withdrawing his order of 16<sup>th</sup> March 2009 so that the whole set of 'reinstated judges', including the CJ Iftikhar M Chaudhry, would once more go home.

PM's utterance was a sort of defiance because the 17 judges clearly wanted a written statement from PM Gilani to confirm or deny the news about withdrawal of judges' restoration notification in writing because the SC did not believe in his verbal assurance. It was the most difficult day of PM Gilani's political life, since after 16<sup>th</sup> March 2009, when he had to convince President Zardari to restore judges.

PM Gilani was otherwise upset on two more counts; firstly because the MQM had suddenly announced a day before court hearing to send resignation of the Sindh Governor to the President. Secondly; because of an unexpected press conference of Nawaz Sharif in London in which he first time sent a loud message to all that finally Mr Gilani's government might not last long.

PM Gilani was under strong impression that he had good working relationship with the CJP. On several occasions, during hearing of various cases, the CJ had been making positive comments about PM Gilani. Likewise, first it was an uninvited PM Gilani, who had landed in the Supreme Court some months back in the evening followed by CJ's visit to PM House. This meeting had helped both sides to resolve the issue of Lahore High Court judges' appointment.

In those days, the working relationship between the two institutions were so good that PM Gilani had even issued instructions to his Principal Secretary Nargis Sethi that every file or order sent from the CJ office should be implemented even without brining the file before him.

However, last week's dramatic development had greatly disappointed the PM and he openly reflected his disappointment in his speech to the nation. That unexpected hard-hitting speech, full of carrot and stick policy, was jointly authored allegedly by PM Gilani and his Law Ministry.

By keeping the three provincial chief ministers at his flanks while making the speech, PM Gilani had tried to send a loud message that if his government was sent home; it would mean coup as three smaller provinces had complete faith in his government. The CM Punjab Shahbaz Sharif was not invited to attend that important meeting.

### **19<sup>TH</sup> AMENDMENT IN CONSTITUTION:**

**On 21<sup>st</sup> October 2010**, the Supreme Court resolved many objections in the original text and for procedural implementation it asked the Parliament to reconsider Article 175A, thus the *19th Amendment in the Constitution* was passed which gave effect to the Supreme Court's observations. The changes made were:

Firstly; the number of the judicial members of the commission was raised to four from two (excluding the CJP).

Secondly; in case the PC rejects a JC's nominee, it would give reasons for the same to the latter through prime minister [in original 18<sup>th</sup> amendment the PC could reject any name without assigning any reason].

Thirdly; the meetings of the PC would be held in camera, where it might discuss the conduct of superior court judges [in original 18<sup>th</sup> Amendment it was not so provided].

Fourthly; in the event of the dissolution of the National Assembly, the PC shall comprise the members drawn from the Senate only.

The Charter of Democracy signed in London by Benazir Bhutto and Nawaz Sharif in May 2006 had provided a similar mechanism, no doubt, but in fact the Chief Justice had prevailed upon the political set up then in vogue. In doing so, it is said, that the PM Gilani's secret hand or his incapacity [*to smell the intrigue being the Chief Executive*] played a vital role.

What intrigue; one can compare the formation of the SJC and the Parliamentary Committee [PC] with the JSC [Judges Selection Commission] proposed in the Charter of Democracy.

- In the Chief Justice's SJC the names of the judges to be considered would always come out of the pocket of the CJP; no recommendations from Executive, or Bar Councils or any other legal forum.
- Think! which names or list of judges would be considered in the SJC; nothing except the CJP's sweet wish.
- CJP got the veto power to bring his own team of judges through SJC & PC gimmicks.
- SJC has the majority of judges in it and PC cannot discard the selection made by SJC.

Whereas in the original plans of Benazir Bhutto, the list was to be prepared by the Judges Selection Committee from open applications, from all practising lawyers on merits and through vast advertisements as now prevails in the British Judicial System.

Thus the tussle between the PPP government and Chief Justice Iftikhar M Choudhry once reached a decisive point when the Supreme Court was about to give its decision on the 18th Amendment; both parties entered an end game phase apparently. Babar Awan put up a boasting performance in his press conference and pointedly warned:

*'There is also the case of some judges who have challenged the validity of the contempt of court notices issued to them.'*

His message adequately hit his target as the SC's judgement on the 18th Amendment turned out to be a non-event [though the poor guy paid a heavy price later for saying such facts].

The SC's decision of 18<sup>th</sup> May 2011 used the 18<sup>th</sup> Amendment as tool declaring that *'the PCO judges can not be regarded as judges from 20<sup>th</sup> April 2010 when the 18th Amendment was passed and their removal from office therefore does not need the Supreme Judicial Council (SJC) process which applies only for judges.'*

The government had not accepted the SC verdict initially but had to de-notify the said judges under 'warnings & threats' from the apex court.

Referring to Sa'ad Rasool in **'Pakistan Today' of 2<sup>nd</sup> June 2012:**



*'...and perhaps most disappointingly, a resurgent Supreme Court that prides itself on its independence, also seems to have fallen prey to the same ideology of demonstrating institutional solidarity – apparent from the fact that **over the past three years (since restoration of the honourable judges) there has been no voice of dissent from any judge, on any bench, in any case** (with the exception of a partial dissent from Justice Nasir-ul-Mulk in the Mukhtaran Mai's case).'*

See the 18th Constitutional Amendment through which an Article 63A was included in the Constitution which expressly declared that any member of the Parliament who "Votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs shall cease to be a member of the House" upon the recommendation of the 'Party Head'.

In other words, no member of the parliament was able to exercise his or her own mind to independently support or oppose a prime ministerial candidate or the budget, or any change in the Constitution. Even then Article 63A was unanimously accepted and endorsed by all.

More disturbingly, when the 18th Amendment was challenged in the Supreme Court, no one (the lawyers or the judges) suggested that inclusion of Article 63A had affected the 'basic structure' of Pakistan's constitution. The character of this constitution is trumpeted high as democratic but it is not; it has never been so.

Every political party in Pakistan is headed by some one Zardari, Sharif, Chaudhry, Pir, Wali or a Religious leader who then transfers that party to their sons & daughters taking it as family property; no elections in any party have been held ever. All party tickets in national & provincial assemblies and even for senates are either sold or given to their family members. All nominations are sold in the name of 'party fund', which is in fact the pocket of that Party Chief because the parties have never submitted their accounts to the Election Commission [till ending 2012 at least].

Who was to bother about; the judges and the CJP remained worried defending an age-old process of their own appointments.

The tragedy with Pakistan is the greed and incompetence of mostly ruling politicians belonging to all sects and parties. Due to their incompetence there were 'martial laws' and behind all the four martial laws there was a nexus of Generals, judges and a section of the press having 'good relations' with ISI or GHQ. Once Justice Ramday of the Supreme Court of Pakistan had opined that:

*'Whereas the higher judiciary gave a temporary reprieve to military rulers, parliaments gave them permanent relief'.*

**Ayaz Amir**, in his column in **'the News' of 16<sup>th</sup> July 2010**, had not considered it as the whole truth. The fact remained that the parliaments which sanctified the actions of military dictators were the creatures of those dictators and shaped by them but the judges who legitimized military takeovers were not under such compulsion. They were on their benches before those takeovers.

It is generally argued that no constitution in the world says there should be elections in political parties; not even American which poses as champion of democracy. Yet the lordships of Pakistan's superior courts observed that:

*'With the provision of party elections deleted from the constitution, the command of the constitution is affected'.*

The picture should be seen from both sides. In Pakistan, the politicians got it inserted through the 18<sup>th</sup> Amendments in the Constitution, making it mandatory, that there would be no elections in the political parties. Like the outer world it was not left open as choice of time.

In the rest of the world, the democracy stands established since centuries; why not we argue that there is no constitution in United Kingdom so why in Pakistan. In Pakistan our big politicians got this clause inserted only to keep the rule in their families; consider the PPP, PML(N), PML(Q), JUI(F), PML(Functional), ANP in that perspective

### **JUDGES BEHAVIOUR IN ARMY & CIVIL RULE:**

The flag bearers of **independence of the judiciary** soon started roaring in the name of '*flouting the Constitution*' and approached the SC. Some held the opinion that it was basically instigated by the custodians of the apex judiciary because the CJP's chair was losing 'some powers' for all times to come; some held that it was the president who had lost all his powers.

The SC heard the case for five months and '**directed the Parliament**' to amend the mechanism [*many believed that the SC had no authority to issue directions to the Parliament requiring it to amend the Constitution*]. The Parliament, however, had incorporated the Court's directions through the 19<sup>th</sup> Amendment to assign a 'bit larger' role to the CJP; the Parliamentary Committee would state reasons for rejecting the Judicial Commission's nominations.

Going into details; the SC Bar Association and some senior lawyers had filed the above mentioned petitions challenging the 18<sup>th</sup> Amendment largely on the basis that:

- (i) The apex court has the authority to consider amendments to the Constitution on their merit and strike them down if they are found inconsistent with the Constitution's 'basic structure.'
- (ii) The new mechanism for appointment of judges undermines the independence of the judiciary and should thus be declared invalid.

Babar Sattar, in his analysis [*'the News' of 24<sup>th</sup> April 2010* is referred], opined that '*the court can change its mind on a matter involving constitutional interpretation but Hamid Khan, Qazi Anwar and Akram Sheikh should have acknowledged that they are once again asking the court to do what it has refused many times over the last 35 years; making India's structure theory a part of Pakistan's constitutional doctrine and strike down constitutional amendments on its basis.*'

India's basic structure theory is that the parliament's amendment powers do not give it the right to alter the basic structure of the constitution as determined by the judiciary. This theory raises two fundamental questions:

- (a) How is a written constitution to be amended, and can a parliament bind successor parliaments; and
- (b) What are the limits of judicial review powers and whether judges make law or interpret it?

In Pakistan's case, Article 239 unequivocally states that (i) there is no limitation on the authority of parliament to amend the Constitution, and (ii) the court must not entertain legal challenges against constitutional amendments.

In the light of these phrases the court should not disregard unambiguous provisions of Article 239 under the garb of constitutional interpretation nor should it inject judicial assumptions into the Constitution. In fact Articles 238 and 239 were incorporated in the 1973's Constitution to specifically empower future parliaments to facilitate the evolution of our fundamental law in accordance with changing needs and wishes of the society.

In the past, Pakistan's Supreme Court has maintained through its earlier case laws that '*the court has no authority to strike down a constitutional amendment*'. However, the apex court's

contention that 'the parliament has limited authority to amend the salient features of the Constitution' seems to be stepping out its limits because it is the domain of the people of Pakistan not of the court.

However, the lawyer's community went divided on the 'basic structure' doctrine. One thing which was felt missing from all this drama was the quotes of relevant jurisprudence. In ***State v. Zia ur Rehman, PLD 1973 SC 49*** the Supreme Court had held:

*'So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution ..... And that it will confine itself within the limits set by the Constitution.'*

In the case of ***Federation of Pakistan v. Saeed Ahmed Khan, PLD 1974 SC 151*** the Court's response was:

*'In any event, it is not possible for us to declare that a provision of the Constitution is not law ..... We cannot strike it down. We can only interpret it, according to the accepted rules of interpretation and define its nature and scope.'*

In the case of ***Islamic Republic of Pakistan v. Abdul Wali Khan, PLD 1976 SC 57***, the court had stated that:

*'This Court is committed to the view that the judiciary cannot declare any provision of the Constitution to be invalid or repugnant to the national aspirations of the people and the validity of a Constitutional amendment can only be challenged if it is adopted in a manner different to that prescribed by the Constitution.'*

In 1977, the Supreme Court again rejected the argument that it could strike down a constitutional amendment; this time in the case of ***Federation of Pakistan v. United Sugar Mills Ltd., PLD 1977 SC 397***. This case is particularly significant because the challenge here was to the 4<sup>th</sup> Amendment which restricted the power of the courts to grant interim relief and thus directly affected judicial power. Here too, the Supreme Court upheld the amendment and rejected the basic structure argument.

However, in many subsequent judgments, the Supreme Court of Pakistan had noted that 'certain basic features of the Constitution cannot be altered by the Parliament'. For example, in the case of ***Mehmood Khan Achakzai v. Federation of Pakistan, PLD 1997 SC 426***, the then Chief Justice Sajjad Ali Shah identified these basic features as "federalism and Parliamentary Form of government blended with Islamic provisions." [However, two other judges (Justice Saleem Akhtar & Justice Raja Afrasiab) had differed with their CJ.]

Later, the whole issue of basic structure was re-examined by a seven member full bench in the case of ***Wukala Mahaz Barai Tahaffuz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263***. In his leading judgment, the Chief Justice Ajmal Mian had concluded that:

*'It is evident that in Pakistan the basic structure theory consistently had not been accepted. But if the Parliament by a Constitutional Amendment makes Pakistan as a secular State, though Pakistan is founded as an Islamic Ideological State, can it be argued that this Court will have no power to examine the vires of such an amendment.'*

**[One can ponder into the saga of our judicial past that the three case laws relating to the 1970's had judgments declaring that Constitutional Amendments 'cannot be altered by the SC'.**

**The later three case laws which said that 'SC can take up petitions challenging Constitutional Amendments' belong to the 1990's, also an era of democratic rule in Pakistan.]**

Finally, in the case of ***Zafar Ali Shah v. Federation of Pakistan, PLD 2000 SC 869***, the Supreme Court held that while Gen Musharraf could amend the Constitution in his discretion,

he could not alter the basic features of the Constitution (this time declared as 'independence of Judiciary, federalism and parliamentary system blended with Islamic provision.')

Let us move forward. In the case of ***Pakistan Lawyers Forum v. Federation of Pakistan, reported as PLD 2005 SC 719***, a five-member bench of the Supreme Court again examined the whole basic structure controversy and noted that:

*'It has repeatedly been held in numerous cases that this Court does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds. The 1973 Constitution has certain "basic features" but this did not mean that it was the job of the judiciary to enforce those basic features.*

*[Observed in Para 56 that] while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary but by the body politic, i.e. the people of Pakistan.'*

The 2005's judgment in the Pakistan Lawyers Forum Case was signed by Justice Iftikhar M Chaudhary [CJP at the time of 18<sup>th</sup> Amendment and its challenging petitions] and Justice Javed Iqbal [later retired].

The judgment given by the SC in Al-Jehad Trust Case [in 1996] had provided opening for a new constitutional order by redefining the amended constitution in a manner conceived to promote a process of genuine democratization. Whereas some argued that the Supreme Court, in the 'Judges Case' had acted beyond its jurisdiction and had gone to the extent of enacting the law rather than interpreting it.

Several constitutional experts had disagreed with the CJ Sajjad Ali Shah's Court ruling on the binding recommendations of the Chief Justices for the appointment of judges because the President, not the Chief Justices concerned, was the appointing authority. In some countries the appointment of the judges of the superior courts is made by the Chief Executive.

The 1973 constitution, in force during the 3<sup>rd</sup> spill of PPP's political rule, still retained some features of the anti-democratic amendments which Gen Ziaul Haq had incorporated at the gun point. The apex court had struck down in those days Gen Zia's legacy of Article 203-C, (which provided for the transfer of judges to the Shariah Court) being in conflict with Article 209; though had entered an uncharted terrain but it was a healthy development.

### **DISCRIMINATION FOR LADY JUDGES:**

The percentage of women judges in superior courts has been 2.91 % as against the 33 percent required by the UN Beijing Conference of 1996 to which Pakistan is a signatory. The reasons defined by the activists were:

- Firstly, that there is no culture in the superior courts for accepting women as being intelligent and capable of becoming a good judge.
- Secondly, that the female judges cannot provide justice because they are more concerned about their dress and covering their body parts rather to concentrate on the case law during a hearing.

The mindset is strong in the higher judiciary that the appointment of female judges should be resisted. Two senior women judges were 'convinced' to withdraw their names from the list for elevation to the Supreme Court; **Justice Mrs Fakhrunnisa** of the Lahore High Court had been very active in the Black Coat Movement but was dropped being a woman.

**Justice Mrs Khalida Rasheed**, former judge of Peshawar High Court [PHC] was qualified to become the chief justice of the PHC in 1997 but, to block her way to the Supreme Court, was given an international assignment. She was the only candidate qualified to fill that vacancy then. This was PML government which wanted to impose Shariah law though it was

finally rejected by the Senate but Mrs Khalida was made a scapegoat in the name of Shariah implementation.

Instances are there where the women judges were not treated as equal partners. A former lady judge, **Justice Qaiser Iqbal** of Sindh provincial High Court, was terminated on the charges of taking the oath on the PCO of Gen Musharraf.

During her appeal in the Supreme Court, the judges at the bench, including the Chief Justice in person had insulted her and passed sarcastic remarks on many occasions. She was made to stand for the whole day before the bench and was not allowed to take a chair; an utter disgrace for a lady judge of the High Court. She became so dejected by the insults at the hands of SC's bench that *she once tried to commit suicide*.

**Justice Mrs Yasmin Abbasi** of the Sindh High Court was also terminated on the charges of taking oath under Gen Musharraf's PCO. She fought her case bravely but was assigned a government job instead. She was bold enough to tell the Supreme Court bench that she would not apologise at any cost; she never took the oath illegally. Later, she was transferred to the Ministry of Law as Secretary.

**Justice Ms Rukhsana Ahmed**, confirmed judge since 2010, was terminated on medical grounds, and accused by male judges of being mentally ill as she always decided cases on merit. She further angered them by not agreeing with the chief justice's opinions on politically motivated cases. It was hard to punish her on the charges of taking her oath under the PCO being a confirmed judge so was simply sent home on other grounds.

**Justice Majida Rizvi**, was the first woman judge in Pakistan, was also not given the position of senior judge when a dispute arose amongst justice Bhagwan Das, Justice Nazim Siddiqui and her. She was appointed as judge in Sindh High Court in 1994 when Benazir Bhutto became PM for the second time. If she was given the status of senior judge of the High Court she would have become the judge of the Supreme Court along with justice Bhagwan Das.

Fact remains that women judges have never been considered for the Supreme Court slots; a clear indication of gender discrimination. **There has been no woman judge in the SC since decades.** The Federal Shariah Court has two judges neither of which are women. The Islamabad High Court has three judges once again none of them are women. It is generally felt that there is a mindset in the superior judiciary of Pakistan to neglect women or undermine their capabilities of doing justice.

A judicial policy was announced in 2009 by the Chief Justice Iftikhar M Chaudhry where there was no mention of seats for women judges nor there do any mention about the court's will to work against this discrimination. The Asian Development Bank has spent more than USD 350 Million for the reforms in Pakistan's judiciary and has mentioned that woman judges should be appointed; but no heeds.

### **LAST WORDS – NOT PERSONAL:**

Black Coat Movement of March 2007-09 brought many other virtues in the superior judiciary in Pakistan; reinstatement of CJP Iftikhar M Chaudhry and his fellow judges was the initial benefit which had marked the history. But vendetta and revenge in Pakistan's judiciary and politics remained intact since decades and continuing till today even; one can see CJP Iftikhar M Chaudhry's numerous hearings after 2009.

In 1994, when Dr Nasim Hasan Shah retired as Chief Justice of the Supreme Court, Justice Sa'ad Saud Jan should have rightly taken his place; but was superseded by Justice Sajjad Ali Shah, who ranked third in the seniority.

The ***US Human Rights Report on Pakistan [1995]*** had termed Pakistan's judiciary as 'not independent in reality'. It stated that:

*'The constitution provides for an independent judiciary but in reality the judiciary is not independent. Through the President's power to transfer high court justices and appoint temporary and ad hoc justices, the executive branch is able to influence the Supreme Court, the provincial high courts, and the lower levels of the judicial system.*

*It has become a standard practice to appoint judges to the high courts and Supreme Court on temporary basis for a period of one year and later confirm or terminate their appointments after an evaluation of their performance. Those temporary judges, eager to be confirmed tend to favour the government's case in their deliberations. Judges in the Special Terrorism Courts are retired jurists, who are hired on renewable contracts.*

*The Supreme Court once denied bail to an MNA of opposition in case where bail would routinely have been granted by a lower court.*

*On 31<sup>st</sup> July 1994, Qurban Sadiq, a special judge for the Banking Court, was removed from the post a day after he granted interim bail to the father of opposition leader Nawaz Sharif.'*

**On 19<sup>th</sup> April 1999**, the Chief Justice of the Sindh High Court (SHC), when elevated to the Supreme Court had admitted in a full court reference held in his honour that:

*'Confidence of the people in the judiciary had been shaken. The concept of accountability of the superior judiciary [under Article 209] by the Supreme Judicial Council (SJC) has failed in checking and containing malpractice, corruption and misconduct within the judiciary.*

*The council, constituted under Article 209 of the constitution, performs its functions only at the whim and fancy of the president'.*

Let us hope if the dreams come true.

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