

Scenario 95

SC REF - BHUTTO's JUD KILLING:

Once in Pakistan's Judicial History, an event occurred in early 2004 that a petition [*by one Mian Hanif Tahir of the People's Lawyers Forum*] against a Former Chief Justice of Supreme Court of Pakistan was filed, seeking registration of a case against him on charges of abetting in the 'murder' of former Prime Minister Zulfikar Ali Bhutto. A division bench comprising Justices Sheikh Abdur Rashid and Bilal Khan of Lahore High Court held that the petition hardly qualified for processing – full details of it are given in '***Judges & Generals in Pakistan VOL-I***' (Chapter 5) on pages 44-49.

The bench of the Lahore High Court, **on 12th February 2004**, had dismissed the petition *in lamina*.

BACKGROUND OF 2011's REF:

Seven years later, an 18 page reference seeking to reopen the case of former prime minister and PPP founder Zulfikar Ali Bhutto was **signed on 1st April 2011** by President Asif Zardari, after the approval of PPP's Central Executive Committee and the federal cabinet.

This Presidential reference was filed under Article 186 of the Constitution of Pakistan seeking a revisit of the prejudiced trial of Z A Bhutto to pronounce if the country's superior judiciary had conducted itself in an illegal and unconstitutional manner. The SC constituted an 11-member bench for the hearing.

The reference was submitted to the Supreme Court on **3rd April 2011** and was registered by the SC registrar as 'Reference 1 of 2011'. It requested the SC and the CJP to pass observations against the judges of the Lahore High Court [LHC], headed by the then CJ Maulvi Mushtaq, and wherein an essential tier of judiciary – the Sessions Court – was bypassed. This was the most unique murder trial in the legal and judicial history which denied ZAB the basic opportunity of trial by the Sessions.

Another request made was that the SC, if desired, might re-open the murder trial to conclude if capital punishment passed in the case was fair keeping in view that no murder accused was convicted to death under the provision of abetment of an approver, Masood Mahmood. Legally speaking, no murder accused was ever awarded capital punishment before Bhutto and courts never passed such sentence after that event.

The reference annexed a statement of Justice Naseem Hasan Shah, a member of the then SC bench which had confirmed the LHC decision, that the court pronounced its decision under pressure by Gen Ziaul Haq regime. The SC office did not raise any objection to the reference and the SC accepted it for hearing.

The same was placed before the Chief Justice Iftikhar M Chaudhry next day and the SC had confirmed its filing in a formal way. A 7 - judges SC bench had upheld the Lahore High Court verdict of awarding death sentence to the former PM in March 1979 during the military regime of Gen Ziaul Haq, who had overthrown the PPP government on 5th July 1977. **(PLD 1979 SC pages 38-53)**

Mr Babar Awan, the then Federal Law Minister held that the reference to reopen the case could not be filed during the previous two governments of the PPP due to their eventual dismissals by the then presidents Ghulam Ishaq Khan and Farooq Leghari. The critics took it as a blurred excuse because PPP's both tenures were long enough to file such reference at least but this time Mr Zardari had opened that venue to **'teach a lesson to all institutions that collision with PPP would not let them have a fast sleep'**.

The fact remains that this reference was a very smart move from the Presidency. The intelligentsia opined that Mr Zardai was in trouble from all the four corners because of the Supreme Court's various decisions and thus he needed a strong antidote to survive in the given situation.

The game started from the SC's decision of July 2009 in which Gen Musharraf's Emergency Orders of 3rd November 2007 were reversed and **the PPP's favourite judges were sent home**. It was an indirect blow to the ruling political party and its government. The direct attacks started with the knocking down of NRO in ending 2009, reversing availed benefits of PPP's all NROed persons including alleged PPP's favourite government officers while belonging to other parties especially of MQM went safe.

Amongst all, the most pinching aspect of that 16th December 2009 decision was SC's direction for the government to:

The Living History of Pakistan Vol-I

- *'Firstly; write a letter to the Swiss authorities for withdrawal of GoP's earlier letter of Justice Qayyum for reopening of old cases of money laundering against Mr Zardari.*
- *Secondly; the Supreme Court once ordered to post six judges in the high courts of Punjab and Sindh which was declined by the presidency on which the SC felt deeply injured.*
- *Thirdly; the Supreme Court had passed judgment for removal of Mr Waseem Ahmed DG FIA, which order was kept pending for months; and when the DG retired, the PPP gave him better slot in Sindh government.*
- *Fourthly; the Supreme Court had conveyed to the executive that the posting of the Chairman NAB should be done in consultation with the SC, but the orders were ignored. When the government appointed Justice Deedar Hussain Shah as Chairman NAB, the SC had to send him home declaring him permanently disqualified.*
- *Fifthly; a situation developed when the SC called PPP's two responsible persons from Sindh, Sharjeel Memon and Taj Haider, to explain that why they had called a general strike in Sindh against SC orders. Both the PPP leaders came with whole of the Sindh Assembly vowing that they would give arrests but would not bow their heads before the apex court. It was embarrassing for the superior judiciary.'*

Once there was a general feeling among the politicians that if that atmosphere of non-cooperation prevailed, the Lahore High Court could declare another odd decision against Mr Zardari where a reference was pending for keeping two portfolios; of party co-chairman and of the President, in his possession simultaneously which was unconstitutional. Thus PPP and Mr Zardari in particular, played a very intelligent move using their famous 'Sindh Card' again though without naming it.

Coming back to Z A Bhutto's reference, the execution had been widely termed as '**judicial murder**' [*as has been discussed in detail in Vol – I of this book*] by the jurists world over. The media men were accurate to understand that the PPP regime had initiated this spectacular act to divert their worker's attention from:

- Benazir Bhutto's murder which case was purposefully distracted, miss-handled, shelved and after three years given to FIA just to keep crawling with the file. No clue traced, no responsibility fixed except that two police officers arrested and the entire burden was shifted upon their shoulders to keep the actual culprits safe.

The Living History of Pakistan Vol-I

- Power shortage, load shedding of gas, rising unemployment rate, shortage of fuel and energy, closing factories and production units, un-ending target killings in Karachi, un-controllable drone attacks in FATA, escalating suicidal bombings on shrines and scarcity of food etc – all those menaces throughout the country.

The filing of the reference had disturbed many patriotic countrymen and top jurists fearing that its acceptance might open floodgates for many similar cases. Somebody would cry for implementation of Hamood ur Rehman Commission report, someone may raise a question of investigating the famous slogan of '***Idhar ham Udhar tum***' ultimately causing an episode of breaking Pakistan. There may be voices from DG Khan for reopening of Dr Nazir's murder case, orders for Balochistan Operation in 1974 etc. If it becomes a routine practice then every government in case of an adverse decision against it would institute a review petition whenever 'their favourable' judges would be in high positions.

Going by the history of Pakistan's 65 years jurisprudence, it was the 10th reference. The last one was filed by Gen Musharraf against the Hasba Bill (2005-06), adopted by the then NWFP Assembly to enforce its own version of Islamic morality through an anti-vice ombudsman enjoying sweeping powers.

President Farooq Leghari had filed a reference in 1996 to determine whether the president could appoint judges in the superior courts without the prime minister's advice. Benazir Bhutto was the prime minister at that time. The apex court had held that the president was bound to follow the advice of the prime minister on the appointment of judges.

Mr Leghari had also filed a reference through Shahid Hamid about the appointment of judges, but later withdrew it when the then Attorney General objected that he had been by-passed.

A similar reference was filed by President Ghulam Ishaq Khan asking the SC whether the president or the prime minister was competent to appoint judges in the superior judiciary. He then withdrew the reference after the matter was amicably resolved between the head of the state and the then Prime Minister Benazir Bhutto.

President Ghulam Ishaq Khan had earlier filed another reference in the Supreme Court in 1989 which was about the utilisation of federal and provincial consolidated funds after the lapse of 120 days.

Through Special Reference No.1 of 1955, the then Governor General Ghulam Mohammad had asked the Federal Court for an advisory ruling regarding his powers. Justice Munir, relying on Bracton's maxim '*that which is otherwise not lawful is made lawful by necessity*', and on the Roman

law maxim urged by Jennings, 'the well-being of the people is the supreme law' declared that:

'Subject to the condition of absoluteness, extremeness, and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under stress of necessity, the necessity being referable to an intention to preserve the Constitution, the state, or the society, and to prevent it from dissolution, and affirms..... that necessity knows no law...necessity makes lawful which otherwise is not lawful.' (Ref: PLD 1955 FC240)

Governor General Ghulam Muhammad had filed in 1955 another reference seeking the then Federal Court's opinion whether the then provincial assembly was rightly dissolved or not.

In 1974, Zulfikar Ali Bhutto had filed a reference seeking Supreme Court's opinion whether or not to recognise Bangladesh, the former East Pakistan. It was a very ticklish, thorny and problematic situation because the masses all over Pakistan were not ready to hear this phrase of recognition and Mr Bhutto wanted to announce recognition. Ultimately he got the apex Court's approval and went ahead.

SC STARTS HEARING REF:

Concentrating on the **Reference 1 of 2011** now; during the initial hearing on **4th April 2011**, when the said reference on retrial of ZA Bhutto came before the SC Bench, the Court asked the government to frame specific questions of law which could be answered by the court on the controversial death sentence handed down to Mr Bhutto.

[The then Federal Law, Justice and Parliamentary Affairs Minister Babar Awan sought permission from the bench to argue in the reference case but the court refused by saying that 'being Law Minister you cannot be allowed to do so'.

*Babar Awan then presented his resignation before the Supreme Court **on 13th April 2011** during the hearing. Awan told the court that it was the prime minister's advice that he should resign and plead the case. The apex court had appreciated his gesture.*

The Chief Justice then asked Babar Awan to present the resignation to concerned authorities and plead the case upon revival of his license.]

The Living History of Pakistan Vol-I

Justice M Sair Ali, one of the three members bench told Mr Babar Awan, former Law Minister representing the case before the Apex Court that 'perhaps no question of law has actually been referred to in the reference.' CJP Iftikhar M Chaudhry, who was heading the bench, had also pointed out that 'there must be some specific questions in terms of Article 186 so that the court can answer.'

The apex court was reminding Babar Awan about shortcomings in such an important case and was evident from the chief justice's remarks that the reference had been drafted by someone who had mixed up political and legal aspects of the issue.

The Learned Counsel read out the entire reference before the bench and then quoted books of former CJP Dr Nasim Hasan Shah, Z A Bhutto's own book ***'If I'm assassinated'*** and of Col Rafi's book but was not able to answer the Court's questions. The case was adjourned with instructions for Mr Awan to carefully study the new concept of curative jurisdiction of the courts developed elsewhere in other countries.

The main testimony with Babar Awan was the reliance on the admission of former CJP Dr Nasim Hasan Shah in a media interview that 'the decision of Mr Bhutto's appeal was given under coercion' ; determined, strong-willed and executed by the then ruler Gen Ziaul Haq.

Dr Nasim Hasan Shah was a member of the bench that had upheld the death penalty awarded to Mr Bhutto. He had admitted in an interview that there was not enough evidence to take Mr Bhutto up to the gallows and that he should have voted against the hanging at least. This admission might be wrong in legal framework but it also spoke that how clean CJP Nasim Hasan was in his soul.

The reference 1 of 2011 also pointed out that Justice Ghulam Safdar Shah, who wrote a dissenting judgment in the Bhutto case, was subsequently 'witch-hunted', chased so vigorously that he had to leave Pakistan one day.

The reference also questioned why Mr Bhutto was not first tried by a Sessions Court. Never in the judicial history of Pakistan was a murder trial of an accused conducted by the high court in its original jurisdiction, thereby denying the accused a valuable right of appeal before the high court in its appellat jurisdiction.

In fact, up to the time of trial and conviction, there was absolutely no precedent of a conviction and sentence of capital punishment awarded on the testimony of an approver.

A cogent question that what exactly were the PPP leadership's intentions; were they serious in finding out the truth which was otherwise known to every student of law and politics that it was a glaring example of miscarriage of justice.

In a live **TV program of DM Digital Manchester dated 15th April 2011**, Barrister Amjad Malik was there to give much convincing and forceful arguments ending with:

'The PPP may not be really interested in retrospective justice but is definitely playing a strategy to drag the apex court into controversy amidst the possible reprimands in forthcoming NRO or missing persons or Hajj Scandal or alike cases of financial corruptions.'

Another point; that if the PPP chiefs were so much serious to dig out the 32 years old truth then why they were depending upon one lawyer [Mr Babar Awan]; why not others to help him and to accomplish that job collectively. PPP leader Barrister Aitzaz Ahsan himself told the media that:

'I would love to assist the court in such an important case if called as amicus curiae and I wish I had been consulted before the reference was filed.'

MEDIA MOVE AGAINST BABAR AWAN:

At that moment, the electronic media opened a special campaign against Babar Awan quoting his old affiliations with Gen Ziaul Haq. It was all a manoeuvred move from the PPP's opponents because in politics no one can put an embargo over the political worker's changing mind with the passage of time. Pakistan's whole history is stuffed with such accounts. The crux of media's move is given in the following paragraphs.

Either President Zardari himself wanted to settle some old scores with Bhutto's family by pulling the dead ZA Bhutto in controversy or his team had mislead and miss-guided him. It was because all PPP workers knew the fact that during Gen Ziaul Haq regime Mr Awan was often seen and pictured while shouting **slogans of 'Hang Bhutto'** and marching with play cards carrying the same and alike phrases. When Bhutto was actually hanged, then he was one of the persons who was seen and photographed while distributing sweets in the streets. Libraries still keep that record of publicly hating instances for Bhutto in which Babar Awan was also seen.

Ejazul Haq, the eldest son of late Gen Ziaul Haq, had once told to the media that Babar Awan was one of the staunch and die-hard workers with his father and he was so near to the General that he was the stage secre-

tary in the '*jalsa*' held at the first anniversary of Ziaul Haq on 17th August 1989 and those were the days of Benazir Bhutto's first premiership.

Cutting short when Babar Awan had joined the PPP in ending 1990s, he was not accepted open heartedly by the then PPP workers but he continued to strive and smile because [*as some media persons had negatively propagated*] by displaying his attachment with PPP; his clientele and business was catching unprecedented boom and thus wealth.

Another live TV program of Dr Danish at **ARY News dated 17th April 2011** gave a very appealing suggestion for the legal experts to ponder. In most of the rational investigations and by all maxims of justice, the authority or person extending harm to or causing death of other becomes equally potent culprit and deserve the same kind of punishment by law. Had the Supreme Court, while deciding the Reference no: 1 of 2011, reached the conclusion that Maulvi Mushtaq Hussain, or Dr Nasim Hasan Shah and other two judges were guilty of Bhutto's judicial murder, then Gen Ziaul Haq and some American office bearers would also be declared wrong doers of the same kind.

Had the SC taken this line of action then where would Babar Awan stand who had strengthened Gen Ziaul Haq's hands and endorsed his wrong cause by taking out processions in streets shouting slogans of '**Hang Bhutto**' and afterwards disbursing sweets to celebrate a leader's death.

The fact remains that Babar Awan might not be interested in forwarding that reference but he was forced to launch it under the Presidency's directions. It was a party decision and Babar Awan had to carry it over. Some party intrigues were also smelt in the matter because after putting in so much labour and sleepless nights by Babar Awan, what the poor party loyalist got at the end. Just a year later, Awan was sidelined in the party un-ceremonially while the SC had suspended his license to practice.

It was thus evident that the most suspicious and detracting intentions were at work. If the PPP were genuinely seeking to at least undo the legal mockery of the past that led to the hanging of its founder, it would be hard to argue against. But there were plenty of reasons to be doubtful because of the manner and timing of the reference, the PPP government had chosen to place the reference before the SC. Some tricks were likely to backfire leaving behind nothing but regrets, repentance and shame.

PROCEEDINGS AT SC WENT ON:

Chief Justice of Pakistan (CJP) Justice Iftikhar M Chaudhry said during preliminary hearing that in order for the death sentence of Mr Bhutto to

be revisited, the case would have to be sent to the trial court. The CJP was heading an 11-member larger bench [initially it was 7-judges bench but subsequently enlarged] of the SC hearing the presidential reference to revisit Bhutto's death sentence.

Babar Awan's arguments engulfed one main point that the SC had given a wrongful death sentence to Bhutto, thus it had the responsibility to undo the injustice and correct the error in judicial history. Further questions of fundamental rights, due process of law, and independent and unbiased judicial proceedings in his reference were to be argued later.

To a court query, Babar Awan said that the then CJP Anwarul Haq, in contradiction of admitted facts, had written in his order that in both cases of the state as well as the prosecution, only Bhutto was accused whereas, in fact, two more accused were presented by the prosecution; one was the then IGP [late] Rao Rashid Ahmed and the other was Saeed Ahmed, Special Assistant to the PM.

Babar Awan said that the CJP gave the benefit of doubt to LHC Justice Maulvi Mushtaq Hussain, setting aside the global legal principle that the slightest benefit of doubt should go in favour of the accused. He further said that when Maulvi Mushtaq was hearing the murder case against Bhutto, he had filed a complaint with the police that he was afraid Bhutto would kill him, and that Mr Bhutto would be responsible if anything happened to him.

Babar Awan questioned how a judge who had become a complainant against Bhutto could give him justice.

Babar Awan cited 10 verdicts from various countries where the courts, legislature, and the executive acquitted various convicts posthumously. To a court query, Babar Awan said most of these cases were decided by the courts of ultimate jurisdiction and not the trial courts. Justice Javed Iqbal told Babar Awan that the cases he had cited were reopened on the basis of new evidence coming to light, whereas no new evidence had been produced in the said Bhutto's case / reference.

Justice Jawwad S Khawaja told Babar Awan that the cases he had cited were related to pardon, and Babar Awan clarified that Bhutto had never asked for pardon, even when he was in prison, and he had also not permitted his family to file a mercy petition for his life.

Babar Awan said that Justice Dorab Patel, one of the three judges who had written dissenting notes in the Bhutto case verdict, had said that there was no case against Bhutto. At that moment, Justice Sarmad Jalal Osmany pointed out that why Justice Shafiur Rehman's report had not been made public yet.

Though it is never too late but the eminent jurists maintained that the said reference of Mr Bhutto's judicial murder should have been taken up by Benazir Bhutto on assumption of her first power in 1988. She made a deal with the army and Ghulam Ishaq Khan that she wouldn't be vindictive against them. She needed courage which she lacked in; after all Hasina Wajid had also brought an army General to justice after 32 years in Bangladesh for the murder of her father.

President Zardari could have issued an ordinance instead of moving the reference in the apex court, incorporating in it the actual spirit of Article 188 of the Constitution which he had used only to move Mr Bhutto's retrial. The intelligentsia pointed out that the PPP was beating a dead horse after thirty years but, due to unknown reasons, avoiding seriously picking up investigation of Benazir Bhutto for which the PPP had been making continuous announcements that *'they know about the culprits'*.

Najam Sethi, in his interview with TV host Munib Farooq, referring to the daily *'Jang'* of 5th April 2011, opined that **Mr Zardari had played a 'cunning game'** by moving Bhutto's retrial case in the SC. If the SC reached the conclusion that Mr Bhutto was wrongly hanged, it would leave a black spot on judiciary's face for ever and if the court upheld the earlier decision, the people would come out in the streets with anti-judiciary slogans. In both ways, Zardari would emerge as a winner.

In fact the PPP government had chalked out its strategy to use the reference as a **'double - edged' weapon** against the superior judiciary. Any court decision on the reference could be used as a catalyst for winning public sympathies for the PPP which had lost public confidence due to its malfunctioning. The top PPP leaders later revealed that the reference was to be used to mobilise the general public against the superior judiciary if the court termed it **"non-maintainable"**. The brain involved in the preparation of the reference told media that:

"We will win the next polls if the court accepts our plea and terms the Bhutto hanging a judicial murder or a decision closer to that. But if the court rejects this reference, we will get a two-thirds majority in next elections riding the sympathy wave."

However, a sharp contrast between the extraordinary enthusiasm and interest shown by the PPP stalwarts towards the hearing of the ZA Bhutto reference and total ignorance coupled with lack of attention to court proceedings of Benazir Bhutto assassination case raised many questions – but no PPP leader came out to explain the reasoning for that. The older PPP lot had called the contrast **"very strange and hazardous"** for the party.

Astonishingly, the PPP chief ministers, provincial and federal ministers, MNAs, senators and MPAs were directed by the PPP leadership to ensure their presence at the hearing of ZA Bhutto reference in the Supreme Court premises but no one was seen at the Adiyala Jail where the in-camera proceedings of the BB's case were in process. Most of the PPP ministers did not even know what the dates of the hearing of Benazir Bhutto murder case were and claimed that they could not attend the hearing.

– But alas, the history witnessed that none of Zardari's two propositions came true. The reference died at its own.

JUDICIARY ITSELF ON TRIAL:

On **18th April 2011**, a special cabinet meeting allowed Babar Awan, the counsel of President Asif Ali Zardari, to place the questions before the apex court. Next day Mr Awan accomplished that uphill task. After the presentation of the questions, the SC bench comprising CJ Iftikhar M Chaudhry, Justice Mohammad Sair Ali and Justice Ghulam Rabbani observed that the preliminary hearings had been completed and now a larger bench, the composition of which would be announced later, would take over the hearing.

Before postponing further proceedings for 2nd May, the SC nominated ten senior jurists as *amicus curiae* from the four provinces to assist it in view of the significance of the case. The names were: Ali Ahmed Kurd, Tariq Mahmood, Abdul Hafeez Pirzada, Fakhruddin G. Ebrahim, Khalid Anwar, Makhdoom Ali Khan, S. M. Zafar, Aitzaz Ahsan, Barrister Zahoorul Haq and Abdul Latif Afridi. Supreme Court Bar Association President Asma Jahangir, Attorney General Maulvi Anwarul Haq and Advocates General of all the provinces were asked to assist the court too.

The five questions read out by Babar Awan before the court were:

(1) Whether the decision of the Lahore High Court as well as the Supreme Court in the murder trial against former prime minister Zulfikar Ali Bhutto meets the requirements of fundamental rights as guaranteed in the Constitution under Article 4(1) and (2a) (right of individuals to be dealt with in accordance with law), 8 (laws inconsistent with or in derogation of fundamental rights to be void), 9 (security of persons), 10A (due process), 14 (inviola-

bility of dignity of man), 25 (equality of citizens)? If it does not, its effect and consequences?

(2) Whether the conviction leading to execution of Zulfikar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of law in terms of Article 189 that asks the courts to follow apex court's judgment? If not, its effect and consequences?

(3) Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Zulfikar Ali Bhutto?

(4) Whether the decision in the case of murder trial against Zulfikar Ali Bhutto fulfils the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in different Suras of Holy Quran: Sura Al-Nisa: verses 17 and 18, Sura Al-Baqara: verses 159, 160 and 222, Sura Al-Maida: verse 39, Sura Al-Aaraaf: verse 153, Sura Al-Nehal: verse 119, Sura Al-Taha: verse 82 as well as Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395. What are effects and consequences of doctrine of repentance?

(5) Whether on the basis of conclusions arrived at and inferences drawn from the evidence / material in the case an order for conviction and sentence against Zulfikar Ali Bhutto could have been recorded?

The court, however, declined to accept a request made by Babar Awan, based on a desire of the president to allow at least one camera to video record the entire court proceedings in a similar fashion as was done in the O. J. Simpson murder trial held by the US superior court and the Nuremberg trials.

'We are not so advanced,' the chief justice observed but requisitioned the original record of the trial of Mr Bhutto's case from the Lahore High Court to enable the counsel for the referring authority (Mr Awan) to obtain copies of the same, if need be, for preparation of arguments.

In retrospect, it was apparent that not only Mr Bhutto but also the judiciary itself had been on trial; denoting miscarriage of justice, the details of

which have already been given in chapter '**Bhutto's Judicial Murder' in volume-I of this book**. Pointing towards the earlier observations of the apex court on this reference of 2011 that questions of law were needed from the government for the court's consideration, the following queries [as opined by one Tariq Hasan on the media pages] were worth consideration:

— Whether the following constitutional rights of Mr Bhutto have been violated or usurped?

a. To enjoy the protection of law and to be treated in accordance with law [Article 4(1) & 4(2)(a), which, inter alia, states that "*no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law*"].

b. Security of person [Article 9, which provides that "*no person shall be deprived of life or liberty save in accordance with law*"].

c. Right to fair trial [Article 10A, which, in relevant part, provides that "*a person shall be entitled to a fair trial and due process in any criminal charge against him*". This would necessitate a determination of whether the right to a fair trial extends to a person who has been wrongfully executed and whether this right would apply to Mr Bhutto retroactively.

— Whether there has been any manifest injustice or miscarriage of justice in the conviction of Mr Bhutto by the LHC or the Supreme Court of Pakistan?

— Whether there has been unjustified execution of death penalty or wrongful execution of Mr Bhutto particularly in view of his acquittal by the dissenting judges in the Supreme Court appeal and the well-established judicial guidelines and precedents for the award of capital punishment?

— Whether the manifest injustice or miscarriage of justice or unjustified execution of death penalty or wrongful execution, if any, was intentional or unintentional and the legal consequences thereof?

— Whether Mr Bhutto's family has the right to be compensated for his wrongful execution?

— Whether the following legal maxims are applicable to this matter:

a. *Actus curiae neminem gravabit* (an act of court shall prejudice no man)

b. *Ubi jus ibi remedium* (where there is a right there is a remedy)

— Whether the Supreme Court considers the violation or usurpation, if any, of Mr Bhutto's constitutional rights to be a matter of public importance for which it is able to make an order under Article 184(3) of the constitution?

The given questions were based on constitutional, judicial, and international legal norms. In particular, the right to fair trial was well established and recognised universally and its addition in the Pakistan constitution by virtue of the 18th Amendment was only a reaffirmation of that right.

The quest for truth & justice and public interest, however, demanded that the Supreme Court had to exercise and demonstrate its fairness in undertaking the trial of its own judiciary through the aforementioned legal questions at least.

BHUTTO'S REF – AN ANALYSIS:

Many jurists were of the opinion that the PPP should have done a more solid job for the Pakistani populace in general by moving a bill in the Parliament on similar lines so that hundreds of those innocent prisoners, who might have been convicted wrongly, could avail access to the justice. Instead, the PPP opted to take up only one case of Z A Bhutto which was nothing but just to keep the Pakistani nation busy in expressing blind sentiments rather to think that what they got from the PPP government since 2008 till then.

[As per world media reports; the PPP was unable to deliver even a single relief for the general populace except up to 20 hours load-shedding in power, scarcity of gas, rising graph of unemployment; virtual closure of Railways, PIA and Steel Mills; continuous and massive target killings in Karachi, loot sale of OGDC like organisations by placing them under control of PM's jail-mate criminals having GCSE fail education only and on many more counts.]

The PPP could have brought a bill in the Parliament, like of America, from where he had picked the idea of agitating the SC in Mr Bhutto's retrial.

Long ago, in 1912, an article on '**state security in the US criminal justice system**' appeared in American newspapers which had attracted immediate attention of Dean of School of Law at North Western University. The disciples of that Dean started investigating various closed cases of murder where there had been hue & cry in the legal or print - media circles. Those cases were in hundreds but many of them were placed before the courts just as a piece of knowledge [& of course warning] asking

them to remain careful while taking the relevant evidence into consideration.

When the electronic media and modern investigation techniques, especially the research done in the DNA field, and with hundreds of revisited files proved that many prisoners were decaying in the jails on wrong decisions by the courts, the American Congress passed '*Innocence Protection Act*' in 2004.

Relying upon provisions of Section 411 of this Act, most of the prisoners were subjected to DNA test and many of them were released free even their death sentences were confirmed by the American Supreme Court. Referring to statistics gathered by Barrister Sh Akram; for the period 1973 – 2005, 123 convicts from 25 States were ordered to be released to lead their remaining lives as honourable citizens.

An interesting comparison may not be out of place to mention here; that is regarding Mr Zardari and of Nawaz Sharif, the chiefs of two ranking one political parties of Pakistan. During the said reference of April 2011 revisiting Mr Bhutto's case, certain voices were also raised before the Supreme Court that the then judges of the apex court who were responsible for the judicial murder of Mr Bhutto should be tried under Article 6 of the Constitution [dealing with treason], might be not alive.

Because of the fact that all the four judges of the appellant bench of the SC who had upheld the LHC's judgment in 1978-79 were from Punjab so the whole scenario was seen in the perspective of 'Sindhi Nationalism'. Sindh Card was frequently discussed at all forums, in all contexts and at all places by the PPP stalwarts and sometimes by Mr Zardari too.

Now recall the sentences awarded to Sharifs in the '**Plane Hijacking Case**' instituted by Gen Musharraf in 1999. On 6th April 2000, a judge of Anti Terrorist Court (ATC) named Rehmat Hussain Jaffery had announced punishments for Nawaz Sharif. Mr Jaffery was born, educated, and practiced in Larkana but Nawaz Sharif never criticised over his origin. Nawaz Sharif's appeal was rejected by a 3-judges bench [J Syed Saeed Ashhad, J Sarmad Jalal Osmany & J Wahid Bux Brohi] of the Sindh High Court.

After seven years exile when Nawaz Sharif came back in Pakistan and moved the SC against his sentences, he had not prayed for any action against any of the Sindhi judges. His petition was heard by 5-judges bench [J Tasadduq Jilani, J Nasirul Mulk, J Moosa Leghari, J Sh Hakim Ali & J Ghulam Rabbani] of the SC and on 17th July 2009, Nawaz Sharif was exonerated from the punishment in a 55 pages judgment.

Though the CJP Iftikhar M Chaudhry was not on the bench but the critics were of definite opinion that Nawaz Sharif's long march of March 2009

had brought him fruit and it was an 'influenced decision, but the hallmark of that judgment was that Nawaz Sharif never agitated for Article 6 like thing against any of the judges for being part of Gen Musharraf's B team.

[That was another maxim which some jurists believed that the SC bench should not have admitted Nawaz Sharif's petition after eight years on a legal principle. This type of admission is not normally available to all petitioners.]

All the three earlier mentioned judges of the Sindh HC were subsequently elevated to the Supreme Court in routine and no one was objected by the Punjabi leaders.

SIDE BENEFITS OF 2011'S REF:

On 4th January 2012; Chief Justice Iftikhar M Chaudhry, while hearing the presidential reference for revisiting the murder trial of the PPP founder ZA Bhutto, said that *'the system is being run according to the Constitution, not the rulings of military courts'*. The chief justice also stood up for the Supreme Court's role in applying the law, remarking that the SC had ended the law of military courts, after ruling against them in the 1990s.

It was a charged day of hearings. Sindh Advocate General Fateh Malik, while speaking in defense of the reference, submitted that Bhutto was hanged by a dictator, thus the case demanded justice; the SC would decide whether to revisit the case or not based on Article 186 of the Constitution. Fateh Malik forgot that hundreds of mercy petitions were pending with the president. Had the presidential reference be defended on legal and constitutional grounds instead of emotional arguments, it was easier for the apex court to understand the case.

Malik contended that the apex court had heard Nawaz Sharif's case, even after a delay of EIGHT years, by expanding its jurisdiction but he again went astray because Nawaz Sharif's case was not filed under Article 186 of the Constitution. Meanwhile, Justice Saqib Nisar remarked that ***the parliament was authorized to declare the judicial decision null and void, adding that parliament was an appropriate platform to review the presidential reference.***

One of the *amicus curiae*, Fakhruddin G Ebrahim, said that the court had to decide whether Bhutto's trial was legal or illegal, as well as deciding the jurisdiction of the court in the presidential reference. He once again

repeated that Justice Nasim Hasan Shah had confessed in a TV program that he was under immense pressure to deliver a verdict against the former premier. Hence it was enough evidence of a biased approach in Bhutto's trial. Ebrahim also said that during martial law, judges had one eye on the law and the other on GHQ, and judges were in the pockets of the military ruler then.

Abdul Hafeez Pirzada held that it was a prerogative of the president to decide which matter was of public importance. In SC's judgment in the Sindh High Court Bar Association Case, for restoration of the Constitution and to uphold its sanctity, the Chief Justice of Pakistan Iftikhar M Chaudhry, had declared the appointment of 102 judges illegal.

Once commenting on the reference case, Supreme Court Advocate Ahmed Raza Kasuri, who was a key party in the reference case as Bhutto was hanged on his FIR, said:

"As per law of the land, only a current issue can qualify for a reference. I think Zardari sahib has not prepared the reference as the president of Pakistan, rather as the son-in-law of Zulfikar Ali Bhutto which does not hold any valid ground.

*If such outdated judgments start reopening or getting reversed then there will be a flood of references; **why there are two laws – one for Bhutto and the other for the general public.**"*

SM Masood, a former law minister, however, believed that:

"Under clause 211 of the Pakistan Penal Code (PPC), any person could be tried under the same article if he or she prepared false charges or provided false evidence to the court which caused harm to an innocent person.

Under this provision, the decision of Bhutto's conviction could be reversed and responsible elements, who prepared false charges, could be tried. If [some] judges themselves confessed [for being under immense pressure] of such a blunder, then why has a trial not been initiated against those judges and the victim proven innocent?"

PPP SIDE - LINED BABAR AWAN:

On 5th January 2012, the SC, headed by the CJP Iftikhar M Chaudhry, issued contempt of court notice to Babar Awan during hearing of 2011's Reference on Mr Bhutto's verdict. The apex court said:

'Prima facie, we are of the view that the conduct of Dr Babar Awan is unbecoming of an advocate of the Supreme Court; therefore, we issue notice to him under Rule 30 of Order IV of the Supreme Court Rules 1980 to explain why his name not be removed from the Roll of the Advocates of this court.'

Putting off the hearing of the ZAB reference and issuing a second notice to Babar Awan for contempt of court, the court also sought Awan's past record. Mr Awan had allegedly used some derogatory words for the Supreme Court while talking to the media persons in the Court premises after his last hearing.

Soon after losing his bar licence **on 17th January 2012**, Babar Awan drove off to the Presidency to redeem his post as the law minister from which he had resigned a few months earlier to pursue the Bhutto reference in the apex court. In a meeting that was attended by the sitting Law Minister, Maula Baksh Chandio, the president seemed willing to take his friend back as the law minister.

This perception was strengthened by the fact that later, in the evening, Mr Chandio refused to take up his business in the Senate. Leader of the House Senator Nayer Bokhari had to ask the chair to defer the 20th Amendment, which was under discussion for want of Senat's consent, since there was no law minister, despite the fact that Mr Chandio was sitting right next to him.

However, Babar Awan was not re-instated to avoid a confrontation with the judiciary. Some had gone so far to suggest that Senator Awan's days in the party were over. The fact remained that Babar Awan was the president's top confidant and also that:

'Mr Awan's opinion prevails all other opinions from party men and even though Mr Chandio is the law minister, Mr Awan controls everything in the ministry.'

Babar Awan's opponents within the PPP, however, off the record, attributed the majority of the PPP's on-going mishaps to his influence over the president. Many cabinet members had categorically asked Mr Zardari not to choose Babar Awan to represent the prime minister in the court [***in January 2012's Contempt Case***] because he himself was facing two contempt charges and that would not help the government's case.

Many did concede that with Aitzaz Ahsan's coming back to the party, there was a change of hearts and Babar Awan was no more able to command his earlier influence on the party. The PPP's better lot flared in derogatory terms that in the 1970s and 1980s, Mr Awan had tried his luck with different political parties before becoming part of the PPP. During his

college days in the 70s, he was associated with Jamaat e Islami (JI). Then through Raja Zafarul Haq, a senior PML(N) leader, he remained close with the Gen Ziaul Haq regime. He picked PPP in the 90s when the late BB was facing court cases where he represented her in courts that earned him respect within the party.

Later on, he acted as the chief counsel of President Zardari during his long imprisonment, which further strengthened his position within the party. All his efforts paid off when Benazir Bhutto awarded him a Senate ticket in 2006, and then he turned out to be the most powerful figure when the PPP came into power in March 2008 – but the other PPP fellows had gone jealous with his person.

No further proceedings were seen after that SC's hearing of 5th January 2012 and the reference died in the record rooms of the SC without any verdict of any kind; the PPP itself never raised its voice thereafter.

On 27th November 2012, in a letter to the CJP, President Zardari urged him to fix an early date for the reference's hearing on a day-to-day basis in order to conclude it soon. The plea was made through a special messenger a day after the apex court had rejected the federation's petition for a review of its decision to declare the controversial National Reconciliation Ordinance (NRO) illegal and unconstitutional.

It was expected that the Supreme Court's opinion in Z A Bhutto's reference would decrease tension between two organs of the state, judiciary & the Executive, but the matter went *sub-judice* for two years; till the departure of the CJP Chaudhry in ending 2013 at least. Legal experts had urged the CJP many times to decide the said reference before his retirement but no heed.

Pakistan Bar Council [PBC] reminded the SC to take the matter about the implementation of its judgement in Asghar Khan Case for eradicating the perception that superior courts had a soft corner for PML(N) – but had never been considered worth.

Throughout the years 2012-15, till this volume going to press at least, no progress in the said reference was heard.