Scenario 108

JUDICIARY vs PAK-ARMY [2012]

In Pakistan, the controversy between the judiciary and the executive over the appointment of superior court judges is not a new development. The rift between the judiciary and the executive on the appointment of superior court judges is available on record since decades.

One can recall the history that when Benazir government was dismissed second time **on 5th November 1996**, governors of Punjab and NWFP [now Khyber PK] provinces considered Benazir loyalists were removed and chief justices of high courts were sworn in as acting governors. President Farooq Leghari had pressurized the two justices turned acting governors to dissolve provincial assemblies and assured them that if they resigned from judiciary they would be retained as permanent governors.

President M Rafiq Tarar once met the Chief Justice Ajmal Mian in his chamber at Supreme Court [in 1999] and asked him not to appoint Justice Falak Sher as Acting Chief Justice [ACJ] of Lahore High Court ***as he did not suit the Sharif Brothers***. Chief Justice declined but government went ahead and nominated a junior Justice Allah Nawaz as ACJ.

During her second term, PM Benazir Bhutto had appointed Sajjad Ali Shah as Chief Justice by-passing three senior justices. She thought that Shah would return the favour. When tensions rose between CJP Shah and Benazir about the issue of appointment of some judges in 1995, the government decided to strike back. First, former Sindh Chief Minister Qaim Ali Shah spilled the beans in media claiming that he had persuaded Benazir during her first term to elevate Sajjad to the post of Chief Justice of Sindh High Court. In the second term, Benazir didn't want to elevate Sajjad to the post of CJP but he along with CM Sindh Abdullah Shah and Federal Defense Minister Aftab Shaban Mirani (all Sindhis) persuaded Benzair to appoint him [J Sajjad A. Shah] as CJP.

In the Judges' Case of March 1996, the Supreme Court had ruled that senior most judge should be considered for appointment if there is no valid negative element against him. Benazir's government decided to beat the CJP with his own stick and filed a review petition asking the court whether the rule of seniority applied to the Chief Justice of the Supreme Court (referring to Justice Shah's own elevation against the rule of seniority). Counsel for federation raised objection to Justice Shah heading the bench to decide about his own appointment.

The same issue was later taken up by the next PM Nawaz Sharif which ended in a 'sober attack on the SC' in ending 1997 and CJP Sajjad A Shah sending home. Afterwards, several incidents such as snatching of car of that CJ at gun point and arrest of an armed intruder from his residence had raised suspicion about harassment. His son-in-law and other relatives were sacked from their jobs and police harassed them, too.

On 17th February 2011; the Supreme Court overruled the Parliamentary Committee [PC]'s decision that denied extension to four additional judges of the Lahore High Court. A two-member SC bench noted that the PC had not complied with clause 12 of Article 175A of the Constitution, therefore the recommendations of the PC in respect of the four judges mentioned in the petition were suspended and the respondents were restrained from issuing any notification in pursuance of the recommendations made by the Parliamentary Committee.

The bench comprising Justice Mahmood Akhtar Shahid Siddiqui and Justice Jawwad S Khawja issued the direction on a constitution petition filed on behalf of the petitioners. Makhdoom Ali Khan, counsel for the petitioners, contended that the Justice Muhammad Yawar Ali, Justice Syed Mazahir Ali Akbar Naqvi, Justice Mamoon Rashid Sheikh and Justice Muhammad Farrukh Irfan Khan - were entitled to be appointed as judges on the basis of the recommendations made by the Judicial Commission [JC] headed by Chief Justice of Pakistan. The PC had not given its reasons for not confirming the nomination of the four judges.

The JC, on 22nd January, had recommended the PC to give one-year extension to 24 additional judges of the Lahore High Court [LHC] while the Commission itself dropped the names of ten judges. The PC, however, accepted the proposal of the Commission to award one-year extension to 20 additional judges whereas it rejected extension to four.

On the same day of 17th February 2011, the JC considered the appointment of two ad hoc judges in the Supreme Court and confirmation of nine additional judges of High Court of Sindh. Earlier, on 14th February, the JC headed by CJP Chaudhry had proposed that Justice Khalilur Rehmman Ramday and Justice Rahmat Hussain Jaffery, who retired on 21st November 2010, would be requested to rejoin the court as ad hoc judges under Article 182 of the Constitution to work for a period of one and two years respectively.

FAIRY TALE OF IHC JUDGES:

On 22nd October 2012; another judicial crisis started cropping up when the JC on Appointment of Judges had recommended IHC's additional judge Shaukat Aziz Siddiqui to be made permanent and also vowed for a six-month extension in the tenure of IHC's additional judge Noorul Haq N Qureshi. Presided over by the CJP Iftikhar M Chaudhry, the JC, however, rejected Justice Azeem Afridi, whose name was also on the list for confirmation, nor his tenure as the additional judge was extended. All the three judges were appointed as additional judges on 20th November 2011.

Conspicuously Law Minister Farooq H. Naek was absent from the meeting; the Attorney General Irfan Qadir and Pakistan Bar Council representative Dr Khalid Ranjha had raised objections over the consideration of the three judges for confirmation but of no avail.

On 6th November 2012; the PC for Appointment of Judges had also endorsed the recommendations of the JC but the Law Ministry did not issue a notification for extension in the tenure of these two judges as President Zardari had not given approval to the nominations, questioning the composition of the JC that it was not valid because the 'most senior' judge of the IHC Justice Riaz Ahmad was not invited to attend the commission's meeting on 22nd October. The fact remains that Justice Riaz Ahmed Khan was in Saudi Arabia for Haj when the J Commission had met.

On 22nd November 2012, the Attorney General of Pakistan Irfan Qadir informed the apex court that the government wanted to file a presidential reference over the issue. The SC gave two weeks to the government to file the reference. The lawyer community termed the presidential reference as ***'challenging the entire process of appointment of superior court judges'*** including judges' seniority, powers of the Judicial Commission *vis-à-vis* the parliamentary committee, and the role of the president.

On 7th December 2012; the law ministry moved the Supreme Court with a presidential reference, under Article 186 of the Constitution, to resolve the following key questions:

- *Whether the 11-members Judicial Commission acted on 5th November 2012 in accordance with the Constitution and conventions thereof in recommending a junior judge as chief justice of the IHC? [the JC had appointed Justice M Anwar Kasi as the Chief Justice of the Islamabad High Court in place of senior judge Justice Riaz Ahmed Khan]*
- *Whether the commission was properly constituted as per provision of Article 175-A of the Constitution as Justice Kasi who participated in the meeting was not a member thereof and was a stranger to the proceedings?*
- *Whether the president who is bound by oath of office to preserve, protect and defend the Constitution is obliged to make the appointments which are not in accordance with the provisions of the Constitution and what should be the manner, mode and criteria before the Judicial Commission with respect to the nomination of a person as a judge of high court, Supreme Court and Federal Shariat Court in terms of Clause (8) of Article 175-A of the Constitution of Islamic Republic of Pakistan. 1973?*
- *While seeking the opinion of the apex court, what is the proper role of the Judicial Commission [JC] and Parliamentary Committee [PC] under the Constitution of Pakistan with respect to appointment of judges of Supreme Court, high courts and Federal Shariat Court?*
- *Whether in view of the decision by the chief justice of the IHC that Justice Riaz Ahmed was the senior most judge of the IHC [which decision of the chief justice was also confirmed by the President of Pakistan] Justice Kasi could be treated as most senior Judge of the IHC.*
- *Whether Mr Justice Riaz had a legitimate expectancy to be appointed as chief justice of the IHC on the ground that he was the most senior judge of that court in the light of the judgment of the Supreme Court in the Al-Jehad case?*
- *What should be the criteria for elevating a judge / chief justice of the high court to the Supreme Court? Is it their seniority inter-se as judge of the high court or their seniority inter-se as chief justice of the respective high court be the consideration for elevation to the Supreme Court?*
- *Whether the government views that the constitution authorizes the president to have a role in appointments of judges, as the link between the JC and the PC as clarified by the 18th Amendment, was based on correct perceptions?.*
- *What is the true import and meaning of the word "confirm" and what is the effect of the proviso to Clause 12 of Article 175-A which reads as: "…Provided further that if nomination is not confirmed, the Commission shall send another nomination."*
- *Whether by not providing in camera proceeding for the Judicial Commission in Article 175-A of Constitution of Pakistan, the intention of the legislature is to ensure complete transparency and open scrutiny?*

Including above, the Presidential reference posed 13 questions but seeking the judiciary's guidance mainly on who is constitutionally empowered to appoint judges in superior courts, the reference has also sought clarification on the role of JC and the PC in such appointments. In fact, ***the reference questioned the acts and constitution of the JC regarding the appointments of judges in the Islamabad High Court (IHC) after the changes made in the Constitution through the 18th and 19th constitutional amendments.***

The said presidential reference was signed by President Asif Ali Zardari, seeking advice of the apex court.

The reference brought controversy that arose when the JC decided to elevate the chief justice of the IHC, Justice Iqbal Hameed ur Rahman, to the Supreme Court and both the JC and the PC decided to elevate Justice M Anwar Kasi as the IHC chief justice. But when the summary appeared before President Zardari for routine signing, it was found that Justice Riaz Ahmed Khan was senior to Justice Kasi and, therefore, qualified to be the new CJ of IHC. The new situation brewed the debate in the context as to whether the president should apply his mind on such appointments or sign on the dotted lines.

The Supreme Court constituted a 5-member Bench, headed by Justice Khilji Arif Hussain, and comprising Justice Tariq Parvez, Justice Ejaz Afzal Khan, Justice Gulzar Ahmed and Justice Sh Azmat Saeed, to hear the constitution petition [*filed by Nadeem Ahmed through his counsel M Akram Sheikh, senior advocate*] challenging the delay of appointment of judges in the IHC and presidential reference.

> [Advocate Akram Sheikh had asked the **apex court to direct the president** to issue notifications of the judges and told the court that the president had no authority to hold the issuance of these notifications for more than six weeks.
>
> *The president's role is just clerical and there is no constitutional dispensation involved in the process,'* he contended. Justice Ejaz Afzal Khan said that *'the premier has no reason to not forward the approved names to the president and the president has no reason to stop the issuance of these notifications'*.
>
> Subsequently, AG Irfan Qadir told the bench that *'…… the high functionaries of the government – of which the president was also a part – could disregard any unconstitutional and unlawful order of the Supreme Court.'* On this Justice Asif Khosa had observed that ***'Mr Attorney General, you are advancing to a very dangerous argument.'***]

The reference stated that the 18th and 19th amendments of the Constitution made significant and important changes in the manner regarding appointment of the judges of the Supreme Court, high courts and Federal Shariat Court. This was done by introducing a new Article 175-A in the Constitution and the new procedure envisages a three-stage process for the appointment of judges, including nomination of Judicial Commission, confirmation by a Parliamentary Committee, and appointment by the President of Pakistan.

The most uncharacteristic in the whole episode was the acquiescing role of the PC which was required to scrutinize the JC's recommendations. This eventually gave birth to a dilemma for the Presidency within the meaning of the 18th and 19th Amendments. The 19th Amendment to the Constitution was an attempt to remove some deficiencies in the new mode for appointments in the superior judiciary [*some argued that it was CJP Chaudhry's personal whim*], as they appeared in the Eighteenth Amendment, in the light of the Supreme Court order of 21st October 2010.

> [*It was in the **Al Jihad Trust case of 1996** that the Supreme Court elaborated the meaning of the word "consultation" as contained in Article 177 and 193 dealing with appointment of high court judges. The court held that "……the consultation should be effective, meaningful, purposive, consensus oriented and leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the chief justice of a high court on to the suitability of a candidate for judgeship may, thus, be accepted only in the absence of sound reasons to be recorded by the president or the executive".*]

The players at the heart of that wholesome game were all the three big fish: The judiciary, whose recommendations stood ignored, the Presidency, which was not implementing the recommendations, and the army, which, though not directly involved, was certainly a stake-holder in this latest situation. Both Justice Siddiqui and Justice Qureshi had taken oath on 21st November 2011, as additional judges for one year.

> [*The two judges whose reappointment expired due to the delay in Presidency were, on 22nd November 2012, on the bench of a potentially explosive case – a petition against the government's decision to give a three-year extension to incumbent Chief of Army Staff Gen Ashfaq Parvez Kayani.*]

Legal experts believed that the situation was heading towards another judicial crisis. As per summary of the Law Ministry, sent to the President, Justice Riaz and Justice Kasi though took oath the same day but Justice Riaz was senior by age. There prevails a normal practice that if a judge is not confirmed, he cannot continue services after the expiry of his tenure.

Thus as the president had not signed the summary of Justice Siddiqui, he was no longer a judge after 20th November and Justice Anwar Kasi was not able to assume charge as the chief justice of the IHC. Both the judges had relinquished their charge on that day as there was no notification available to give effect to their continuation.

The political elite were of the view that the role of the Judicial Commission [JC] was to make a nomination for the appointment of a judge, passing on to the Parliamentary Committee [PC] for confirmation and in the end the president to make the appointment. But actually it was the JC headed by the Chief Justice which prevailed in the end because neither the PC nor the president could reject its nomination. The PC at best could refuse confirmation of a judge with a three-fourths majority vote, but for that it was supposed to record reasons which again was up to the JC to accept or reject them.

Above all, it was felt that there was no definite role in the appointment of a judge for the president who was the eventual appointing authority but constrained to make a formal an-nouncement. The SC was asked to explain in definite terms what role the president should play in this regard. The said reference was being filed in response to a petition which had challenged President Zardari's refusal to sign notifications for the appointment of two judges of the IHC.

The bench comprising Justice Khilji Arif Hussain, Justice Asif Saeed Khan Khosa, Justice Ijaz Ahmed Chaudhry and Justice Ejaz Afzal Khan heard the petition filed by Advocate Nadeem Ahmed seeking issuance of a notification for six months' extension of Justice Noorul Haq N. Qureshi and permanent appointment of Justice Shaukat Aziz Siddiqui in the IHC. The two judges were nominated by the JC and approved by the PC.

The presidency returned the recommendations back to the JC with observations to reconsider the nominations since the Commission was not constituted properly. Consequently, the judi-cial term of the two judges had expired when they completed their tenure on 20th November 2012. However, Justice Ejaz Afzal objected the appointment of Justice Anwar Kasi and sug-gested the name of Justice Riaz as CJ IHC on the basis of his seniority in a separate note.

It was also mentioned in the verdict that except the Chief Justice of Pakistan and Chief Jus-tice of High Court, no one else has the authority to nominate judges in high court. The con-troversy was about the composition of the 11-member JC on which Justice M Anwar Khan Kasi sat in the absence of Justice Riaz Ahmed Khan who had gone to Saudi Arabia to perform Hajj. Being a senior judge of the high court, Justice Riaz Ahmed Khan was supposed to at-tend the meeting.

On 31st January 2013, in a response to the presidential reference on the issue of judges' appointment, the Supreme Court declared valid the appointment of Justice Anwar Khan Kasi as Chief Justice of the Islamabad High Court (IHC), adding that the president was bound to approve the recommendations put forward by the JC. The court's answer constituting 102 pages had responded to all the 13 questions raised in the reference sent by President Zardari. The court's reply said:

> ***'.....that the president and the prime minister have no role with respect to the appointment of judges.'***

Perhaps that was the most surprising and perturbing part of the judgment because near most jurists, the apex court's opinion that the JC, in violation of constitutional convention and the principle of ***'legitimate expectancy'***, could appoint a junior judge to become Chief Justice of a High Court. SC's order / advice also added that:

- *'After the passage of the 18th and 19th amendments, the president only enjoyed nominal authority on the matter;*
- *that the president was bound to accept and approve the Judicial Commission's recommendations;*
- *that a decision on the seniority of judges could not be made through a presidential reference.*
- *that in the cases of Justice Riaz Ahmed Khan and Justice Kasi seniority was not relevant, adding that the JC could make any judge the chief justice of a high court.*
- that the JC could also state its reasons for not making a senior judge a high court chief justice.

Interestingly; the reference had, on record, a conclusion of Justice Rehman who had held Justice Riaz as the senior judge, instead of Justice Kasi, and asked - could Justice Kasi be treated as most senior judge of the IHC. It asked whether Justice Riaz had a legitimate expectancy to be appointed as the IHC chief justice in the light of the judgment in the 1996 Al-Jihad Trust case and whether the JC acted in accordance with the Constitution and conventions while recommending a junior judge as the chief justice.

Justice Kasi and not Justice Riaz sat in the meetings of the JC which had recommended elevation of IHC Chief Justice Iqbal Hameedur Rehman as a judge of the Supreme Court and Justice Kasi to fill his position ignoring Justice Riaz.

Firstly; the governing law: Article 175A of the Constitution sets out the procedure for appointment of judges to the superior judiciary. Article 175A (3) mandates the senior-most judge of the Supreme Court "shall" (must) be appointed as Chief Justice of Pakistan. However, the Constitution has no *para materia* provision requiring the senior-most Judge to be made Chief Justice of the High Courts.

Instead, a 'constitutional convention' has developed over the time to fill this void. Specifically, per *Al Jehad Trust* case (PLD 1996 SC 324), the senior-most judge entertains "legitimate expectancy" to be made Chief Justice of the High Court, unless:

- *He "not be physically capable to take over the burden of the office" or*
- *He "not be willing to take upon himself the above responsibility".*

Barring these exceptions (neither of which apply in the case of Justice Riaz), such a judge could not be superseded for "extraneous considerations". This convention was endorsed in *Asad Ali*'s case (PLD 1998 SC 33) which states that "in the absence of any concrete and valid reason", the senior-most judge "has to be" appointed as the Chief Justice of the High Court. And the dicta was further strengthened later in *Munir Hussain Bhatti*'s case (PLD 2011 SC 407) which declared that the legitimate expectancy of the senior-most judge, and the

convention of appointing him Chief Justice, are *"applicable even more strongly after the introduction of the newly constituted bodies [the Judicial Commission and the Parliamentary Committee] under Article 175-A."*

In fact, the seeds of this constitutional convention can be found in the very text of the Constitution itself – which mandates (in Article 175A (5)(iv)) that when the JC is deciding on who to nominate as the next provincial Chief Justice, the senior-most Judge of the concerned Court (having legitimate expectancy) should not participate in the said meeting (so as not to be a judge of his own cause).

Contrary to these principles, the majority judgment, authored by Justice Khilji, declared that ***while breaching this convention is "not desirable", the same "cannot be termed as violative of the Constitution***". In constructing this argument, Justice Khilji clearly indicated that these recommendations were being made for the satisfaction of the Chief Justice and that the JC's verdict was not open to judicial review. Justice Khilji's opinion, however, failed to point out how departure from precedent and convention by the JC, without stating any reason or cause, did not amount to whim or caprice?

Furthermore, Justice Khilji emphasized that ***'the seniority of a judge cannot be determined by the court in its advisory jurisdiction***'. Consequently, anyone aggrieved by the JC's recommendation should be able to seek remedy from some 'adjudicatory forum' but in so deciding, the judgment missed the vital point. The issue of seniority between Justice Riaz and Justice Kasi was not the dispute. Justice Riaz had already been notified as being senior, by the Chief Justice of the IHC (and confirmed by the President).

The only question left to be answered was one of the law: could the JC appoint a junior judge as Chief Justice of the High Court, without giving any cogent reasons for ignoring the senior judge? And this question could certainly be answered declaratively in advisory jurisdiction. And as such, after laying down the convention, endorsing its merits, and recommending its application, why Justice Khilji's opinion stopped short of declaring that the JC's verdicts were violative of the constitutional convention and mandate, was certainly a black dot on CJP Chaudhry's 'independent' judiciary.

On the contrary, Justice Afzal's additional note, in essence a courageous dissent, declared that Justice Riaz, in line with the convention and the principle of legitimate expectancy was ***entitled to be appointed*** as the Chief Justice. Breaking ranks with the majority opinion and not bowing in reverence to the non-speaking decision of the JC [a Herculean act in CJP Chaudhry's Court], Justice Afzal concluded that:

> ***"I, therefore, have no hesitation to hold that the premises recorded by the Commission for departing from the well established principle of determining seniority are not correct."***

It remains a fact that CJP Chaudhry had manoeuvred JC's those two main decisions i.e. getting justice Iqbal Hameed ur Rehman elevated to the Supreme Court and getting Justice Anwar Kasi to be recommended as CJ of the IHC instead of his senior Justice Riaz through noticeable gimmicks.

- Firstly, CJP Chaudhry, in a private sitting, directed Dr Faqir Hussain, Registrar Supreme Court to watch the demeanour of the Court during hearing of Judges Case.
- Secondly, he purposely included Justice Ijaz Afzal Khan in the Bench in-spite of Justice Riaz's reservations, valid alarms & apprehensions as Judge IHC.

Thus allegedly, CJP Chaudhry hatched a conspiracy & influenced others to disbelieve official reports & accept as true 'off the record' material to ouster Justice Riaz from the list. ***He***

probably settled the encounter with Malik Riaz of Bahria Town, after punishing the authors of the judgment in WPs No. 2009 / 2012 & 2076 / 2012.

CJP Chaudhry played another trick not desirable for CJ's stature. The decision of the Judges Case through a short order and the JC's summary by the Supreme Court without furnishing the needed advice sought by President Zardari, was ***sent to the PM Raja Ashraf [for onward passing to the Presidency] but accompanied by a notice from the apex court in the name of PM for his Son-in-law's appointment case***.

Refusal of the President of Pakistan to assent to the summary, in spite of the said notice to the PM & then filing of Review against the said Judgment was encountered with the ***issuance of warrant of arrest against the Prime Minister*** of Pakistan, trumpeted by media, with extras & orchestras, for his arrest in 24 hours was a reality; recall Maulana Tahirul Qadri's *dharna* in Islamabad and his jubilations during his address to the audience in the evening hours.

The whole show was followed by the issuance of **abrupt, hasty & rushed notification of appointment of Judges** by the law & Justice Division, before the dawn of the deadline day and the **resolve of the Supreme Court to hear the case of Prime Minister till 10 PM**, as trumpeted by the media, was a reality. The adjournment of the same after oath by the aforesaid elevated Judges of Islamabad High Court would remain on the pages of judicial history for all ages.

Consequential suicidal death of one Kamran Faisal, [an officer of the NAB] due to the above performances of stress & strains might be haunting CJP Chaudhry even today and for all times to come.

The selection of judges should no longer be done behind closed doors and for silent reasons known only to a select few or just at the sweet wish of the presiding Chief Justice of Pakistan.

'Dramas staged; performers knowingly or unknowingly, innocently or maliciously appreciated, lauded & applauded in the constitutional chain of commands & in the Territory of Capital of Islamabad, at the risk & cost of the national interest, would never see or perceive success', were the ending lines of an Islamabad daily.

CONTEMPT NOTICE TO ALTAF HUSSAIN:

On 16th December 2012 [Sunday], the Supreme Court of Pakistan issued written orders on the contempt notice to Muttahida Qaumi Movement (MQM) Chief Altaf Hussain on account of using improper language against the judges. The order was issued by a 3 members bench headed by the CJP Iftikhar M Chaudhry, the other members being Justice Jawwad S. Khwaja and Justice Anwar Zaheer Jamali.

According to the court order, issued under Article 204 of the Constitution and Section 3 of the Contempt of Court law, the words used by Altaf Hussain in his speech were equivalent to interference in court matters and intimidation of the judges. No appeal was filed against the SC decision regarding the delimitation of constituencies in Karachi but the court said:

> *'Altaf Hussain used threatening and humiliating language against the judges of the Supreme Court during his address at a public gathering and this act comes under the contempt of court category'.*

The contempt notice against Mr Hussain came on an office note put up by Supreme Court Registrar Dr Faqir Hussain who had invited the court's attention towards Mr Hussain's "un-called-for aspersions on the judges".

The Supreme Court ordered Altaf Hussain to personally appear before the apex court on 7th January 2013. One court 'notice' was sent on the London address of the MQM Chief through the Foreign Secretary and the other through Deputy Convener of the MQM, Dr Farooq Sattar, on the address 494/8, Azizabad Karachi.

> [*The MQM Chief had said in his telephonic address of 2nd December 2012 from London that* ***'certain judges of the Supreme Court are part of the process of eliminating the MQM'****. He had also demanded an apology for using the word 'monopoly' in the order given by the Supreme Court over electoral constituencies in Karachi.*
>
> *Altaf Hussain, in his speech, had also termed the judges "unconstitutional" and "undemocratic"; calling the Chief Justice, President Zardari and the federal government to take notice of the remarks, adding that constitutional action should be taken against the judges.*]

Mr Hussain was not the first politician to face the contempt notice. Former Prime Minister Yousuf Raza Gilani had lost his coveted office after he was sentenced by the apex court on 26th April 2012 for not writing a letter to the Swiss authorities and was eventually disqualified on 19th June.

Mr Gilani's successor PM Raja Pervez Ashraf narrowly escaped the same charges when his administration agreed to write the letter. Interior Minister Rehman Malik, former law minister Babar Awan, PPP Senator Taj Haider and Sindh Information Minister Sharjeel Memon were already in row to face contempt charges on various counts.

On 7th January 2013, MQM's Senator Frogh Naseem appeared in the Supreme Court as Altaf Hussain's Counsel and submitted unconditional apology on behalf of his chairman. The apology was accepted and the cntempt notice was filed.

ARMY ACT 1952 PREVAILED :

On 18th July 2011, a joint constitutional petition was filed in the Supreme Court, seeking that certain provisions of military laws be fixed down because they deny fundamental rights of fair trial and due process of law through independent and impartial tribunals. The petition was filed through advocate Ch M Akram by five persons detained in Faisalabad and Rawalpindi Jails.

The petitioners were civilians convicted for suicidal attacks attempted on the life of Gen Musharraf on 14th & 25th December 2003, at *Jhanda Chichi Bridge* and at nearby petrol pump in Rawalpindi respectively. The petitioners, along with some military personnel, were tried by the Field Court Marshal General [FCMG] under military laws; both military men and civilians were awarded death sentences in July 2005 to all under the Army Act 1952, which were later confirmed by the Vice Chief of the Army Staff.

The petitioners challenged the *vires* of certain provisions of the law embodied in the Pakistan Army Act 1952, Pakistan Air Force Act 1953 and Pakistan Navy Ordinance 1961 and prayed that:

- *That amendments be made in military laws and at least one opportunity of appeal be provided against the decision of army tribunals before the apex court.*
- *That the Federal Government be asked to legislate for independent military tribunals and re-examine all pending cases by a larger bench.*
- *That the Armed Forces tribunals had exercised the jurisdiction of other courts of law erroneously by trying the civilians accused.*
- *That the cases of civilians be re-examined on the basis of constitutional rights available to the public at large in Pakistan.*
- *That Section 133 of the Army Act 1952, along with some other provisions, be declared ultra vires and in negation of Article 2A, 4, 5, 9, 10, 10A and 25 of the Constitution and in denial of rights under Article 175 and 203 of the Constitution.*
- *That the Section 2(1)(d) of Defence Services Law Amendment Ordinance 1967 incorporated in the Pakistan Army Act, Air Force Act 2(1)(dd) and Naval Ordinance 2(3), which brought civilians within the jurisdiction of Military tribunals, was ultra-vires and liable to be struck down under Article 8 of the Constitution.*
- *That the Pakistan Army Act 1952, Pakistan Air Force Act 1953 and Pakistan Naval Ordinance 1961 were in conflict among themselves on sections 31(d), 37(c), and 36(3) respectively; the same are discriminatory in character.*

It was not the case that the higher courts were approached first time to take notice of alleged 'injustice' incorporated in the Army Act or so. Earlier **on 2nd May 2007** two Army commandos of Zarar Company, namely Lance Havaldar Ghulam Ahmad and Sepoy Shahid Shehzad, who had opposed the ***Lal Masjid Operation of 2nd July 2007*** and were subsequently court-martialled, were denied the right of appeal in superior courts. Both above named soldiers were kept in confinement for 15 months; then were court-martialled in August 2008; sentenced 14-years and 7-years respectively.

During trial, it was proved that ***both of them were in contact with the Lal Masjid administration and kept on updating them about the military operational details.***

It was an act of **'cheat & Gaddari [betrayal]'** of your own force – not tolerated in any army of any country. ***That was the reason the Army court of appeal upheld the verdict.*** Lanc Hav Ghulam Ahmed had approached the Supreme Court for relief but even refused from there.

Even earlier than that one Abdul Islam Siddiqui, a soldier of the Pakistan Army was hanged in 2005 after military trial for his alleged involvement in the December 2003 attack on former president Gen Musharraf's convoy.

The Army Act 1952 keeps a provision since decades to hold court martial of civilians - but only when at least one of the accused belonged to the armed forces. **On 10th November 2007**, Gen Musharraf had promulgated an ordinance making amendments to the Army Act giving more powers to military courts as per requirements of the changing times. In fact, the said amendment was required for the military courts to try civilians on charges of terrorism, anti-national activities, sedition, attacks on Army personnel and officers.

That was what required for the civil courts too. During the last decade Pakistan lost about 47,000 lives, including about 5000 army officers and men, in the terrorism related crimes, blasts, suicidal attacks, bombings etc – hundreds were arrested, investigated and jailed but all the civilian courts including the subordinate or superior judiciary could not pun-

ish even a single accused – even the red handed one. Why so – because the Parliament or the superior courts could not amend their 170 years old CrPC, Evidence Act, procedures etc.

[***Full details of this lethargic tragedy can be seen in the initial pages of this volume under title: AN URGE – AN APPEAL***]

Previously, offences under the Prevention of Anti-National Activities Act were tried by a specially constituted tribunal headed by a judge of the high court, appointed with the consultation of the concerned chief justice. Later, through an ordinance the heinous offences were made try-able by military courts. Lawyers, intelligentsia and civil society activists got it denounced, declaring them oppressive – in the name of human rights and the Constitutional provisions etc.

Thus the lawyer community preferred to stand by the killers [***and not by the families who lost their lives***] because it is easy to get the killers freed on the basis of 170 years old legal and procedural provisions.

Military trials are normally not open to public hearings; civilian lawyers are only allowed to be there in military court if the permission is granted to them to represent the accused. Mostly investigations are carried out by military officers themselves and normal rules of evidence are not applied – and that is only good thing to maintain discipline in ranks – contrary to the civil courts of Pakistan where a judge CANNOT accept video, audio, photographs, CCTV, admission before police, confessional statement before the magistrates etc.

In which fool society the Pakistanis are living – that is why Pakistan is ranked at 192th out of 197 countries when speedy justice or conviction rates are considered and compared. The judiciary, bar associations and legal fraternity always remained silent on that side of the story.

According to Pakistan Army Act's section 133-A and 133-B, the decision of the Army's appellant court ***'shall be final and shall not be called into question before any court of authority'*** - the Army's appellant courts can enhance sentences as well. For instance, an accused in Gen Musharraf's attack case, Rana Naveed, was granted life sentence by the court martial but the Army's appellant court converted it into death sentence.

Is there any provision or example in the civil justice system?

Long ago in 1993, Col (rtd) Akram, a lawyer had agitated this issue in the superior courts through his two petitions. The issue was brought up before the Federal Shariat Court in *Col (Rtd) M Akram vs State* (FSC 44 / I / 1993). The Court had *directed the Federal Government to amend Rules of the Pakistan Army Act 1952.'* The petitioner sought review from the court again in 2008. The FSC upheld its earlier decision giving six months to the government to bring amendments through the Parliamentary process – but no one bothered.

> [*The Federal* ***Shariat Court*** *[FSC], meant to mainly deal with cases under Hadood Laws,* ***could not get even a single MALE convicted in Zina or allied cases since its inception in 1980*** *– fourteen poor ladies involved have been* ***'sangsarred'.***
>
> *See the media statistics that how many events of Zina occurred since the last 35 years – disgusting for the whole nation. The FSC could not get its own Hadood Laws refined or developed or transformed to get conviction for the wrong-doers; and shamefully recommending amendments in Army Act – what a mockery*.]

But in Pakistan, who cares for the poor victims, whether they are in Zina cases or families of Peshawar Army School. In 1993, the decisions were not implemented though it was an era of uprising political governance; the same trend travelled through 2008 and still in vogue today.

Since the promulgation of Hadood Ordinance on 20th April 1979, not a single male culprit could be punished or flogged for rape, deflowering of girls, adultery, criminal maltreatment with women, and acid throwing incidents etc. Since 35 years in perspective, some lower courts do exhibited courage to announce punishments but the convictions were invariably set-aside by the appellant courts for 'lack of evidence'. What does it speak on the part of courts and legislators? They could not identify the blank spots where the fault lies.

However, 14 women were stoned to death in rape / adultery cases while men were freed for want of admissible evidence.

Nothing was on the government agenda seriously – as the Parliament and the superior courts [***the Federal Shariat Court was never considered as the superior court even***] are both impotent regarding legal formulation matters.

> [*In Pakistan, the Laws of Evidence are 170 years old, testimony of police officer is not admissible; Parliamentarians have no courage and acumen to frame new laws; existing laws suit the Lawyers because it is easy for them to get relief for their 'be-charey' killers; higher courts judges do not want to set appropriate rulings to make available evidence admissible – so the bonanza is going on.*
>
> *That's why the people have always shown faith in the military courts because there the defence lawyers cannot play gimmicks on the basis of poor laws and faulty investigation files.*]

One thing became more evident that granting military courts jurisdiction to try offences like multiple murders, rapes, arsons, terrorist attacks etc the general public were successfully given a message that the representatives they had sent to the assemblies were not capable enough to provide them justice and peace; nor were they competent to frame new laws required as per changing circumstances.

Coming back; **on 12th November 2012**, the Pak-Army authorities, however, formally opposed that dormant petition of Col (rtd) M Akram originally prayed in 1993, seeking amendments in the Pakistan Army Act 1952.

The GHQ, in its written reply submitted before a 3-judges bench of the Supreme Court, stated that the Army Act was a special act and that any attempt to bring it in line with the general law was to defeat the very purpose of that law. Military authorities argued that the petition was not maintainable as it did not raise a question of ***'general public importance'*** to invoke the jurisdiction of the Supreme Court with regard to Article 184 (3) of the Constitution, nor did it seek to enforce any fundamental rights conferred by the Constitution. The GHQ further held that:

> *'Any law relating to the armed forces is outside the operation of the normal scheme of the Constitution. The petition is a virtual plea to bring a special law at par with the general law. The Pakistan Army Act is a special law applicable to a specific class and is a complete code by itself which, interalia, provides for appointment, enrollment, service discipline, inquiries and investigation, summary punishments and trial by courts martial.'*

The GHQ told the apex court that *'Section 31 of the Army Act allows an accused to submit a petition against the findings or decision of a military court.'*

During that hearing, the Supreme Court asked the federal government to consider amending the Pakistan Army Act 1952 to remove an inconsistency because of which important documents of the Field General Court Martial [FGCM] were not provided to an accused. However,

the wording of the SC's order was of 'advisory' nature; saying that: ***'the Ministry of Defence may consider amendment to the Pakistan Army Act ……..'***

The 3-judge bench comprising CJP Iftikhar M Chaudhry, Justice Gulzar Ahmed and Justice Sh Azmat Saeed, while dealing with those two petitions of Col (rtd) M Akram, remained in a fix that from where the court could derive jurisdiction to direct the government to amend the said law because the powers of the judiciary and that of the executive were different. One could recall that how the apex court dealt with the Contempt of Court Act 2012 which was challenged before it. The Supreme Court had simply struck down the law, but never asked the government to resurrect it or bring a new law in place.

The SC bench, however, granted three weeks to the army authorities to amend the law. Later the bench was told that the counsel had suggested relevant authorities to make the Army Act compatible with Pakistan Navy and Air Force Act AND that the army authorities had agreed to amend certain [discriminatory] clauses of the act.

When the SC bench resumed again **in January 2013**, the petitioner Col (rtd) M Akram did not pursue the case; ***the petitions were verbally dismissed [being not contested] but the files were sent to the cold room, perhaps without written final verdict***. The petitions were filed in 1993, then again in 2008, then in 2013 – then should have been fixed again after a decade; but it surfaced up sooner.

On 26th January 2015, after two years long pace, the Supreme Court restored the petitions of Col (rtd) M Akram again for hearing, which were once rejected by the apex court in January 2013. The court ordered that the petitions for hearings be fixed within two weeks despite government's opposition. A 2-member bench of the SC, presided over by Justice Jawwad S Khawaja, took up the said dismissed petitions again and restored the same for hearing.

This time Col (rtd) Akram argued that the charge-sheet carrying the allegations was not served to the accused during a court martial and he even did not know for what he was being convicted and what he was being punished for. The accused was not even provided access to the record, while the facility provided to the accused for filing an appeal against the conviction was equal to nil. Apparantly, it seemed that lies were told to Col Akram by the family members of the convict.

The Deputy Attorney General [DAG] opposed the petitions saying that: ***'the court has already rejected these applications because it had not been persuaded by them earlier. The law does not allow for restoration of these petitions after one year.'***

The court remarked that the matter was crucial, therefore it would hear it.

Though the above words were placed on record, but then realizing that the petitions already stand closed by a 3-member bench headed by the CJP, Justice Khawaja never called those files again till at least his retirement in September 2015.

GEN KAYANI SPEAKS OUT:

On 5th November 2012, while speaking to his officers at GHQ, Pakistan's Army Chief Gen Ashfaq Kayani said:

> *'As a nation we are passing through a defining phase…Weakening of the institutions and trying to assume more than one's role will set us back…Any effort, which wittingly or unwittingly draws a wedge between the people and Armed Forces of Pakistan, undermines the larger national interest.*

> *…….that no individual or institution can decide what is right or wrong in defining the ultimate national interest.*
>
> *……. that entire institutions shouldn't be blamed for an individual's mistakes.'*

After the ISPR's press release, some anchorpersons, analysts and commentators started tossing around the question whether it was a warning shot to the judiciary or media or both. The fact remained that there was a lot of military - bashing in the media for the aberrations of some retired Generals since the announcement of SC's judgment in Asghar Khan Case.

Since early 2008, there had been growing confrontation between the Parliament and the Judiciary and now it appeared that judiciary and military were at loggerheads.

On the same day, the office of CJP Iftikhar M Chaudhry released a nine-page speech that he had made to a group of visiting bureaucrats but that seemed timed to counter the criticism made by Gen Kayani. In it, Justice Chaudhry noted that his court's paramount authority was enshrined in the Constitution. For the first time in Pakistan's history, the two giants' hard-hitting comments displayed that they were in complete disagreement with each other over the role and the status of the institutions they supervised - and revealed the issues they had with each other's individual performances. CJP Chaudhry got the ball rolling when he asserted his institution's supremacy; while saying that:

> *"A heavy responsibility lies upon the judges of the Supreme Court* ***to uphold the canons of constitutional predominance and its supremacy over all other institutions and authorities.***
>
> *Gone are the days when stability and security of the country were defined in terms of the number of missiles and tanks as a manifestation of hard power available at the disposal of the state*.***"***

CJP Chaudhry had manifested — a pointed reference to the GHQ straightaway but forgetting that ***Pakistan's judiciary was being ranked at no:192 out of 197 countries whereas Pakistan's Army was rated as the sixth largest and most professional***.

The CJP Iftikhar A Chaudhry might have said it in some different context, but the timing created misperceptions. There were certain earlier observations which added up the spice. For instance, in missing persons' case, an esteemed judge on the bench had remarked that: *'for every third missing person the fingers are raised towards the Frontier Constabulary'* which was not a fact at all – no statistics were available to say that.

In October 2012, CJP Chaudhry had resumed the hearing on a petition filed on the law and order situation in Balochistan, in which Baloch nationalist leader Sardar Akhtar Mengal made varied submissions including his six points. The CJP said in his concluding remarks that:

> *'The missing persons would be recovered and that the court would go to any extent, if needed, to achieve the purpose. The death squads of ISI and MI agencies should be abolished.'*

That was what Sardar Akhtar Mengal wanted to hear. The military circles had felt the pinch of judiciary's remarks because, in their opinion, the dissident Baloch Sardars had their own agenda and never wanted to hold negotiations with the government or the military considering them responsible for all the woes and problems they were facing. Insinuation against the military and negative sentiments against intelligence agencies were already grown up. Gen Kayani was even criticized when [before flying to Moscow] he had said *'the army would support any solution to the Balochistan crisis provided it was within the constitution'.*

The fact remains that there was no conflict between the army and the judiciary but the routine utterances of their chiefs were blown out of proportion in the media just because the ruling political party, PPP, wanted to brew benefits out of the situation. Even the statements of the two chiefs were not in conflict with the Constitution. When the dust, blown up by the PPP sponsored media, settled down, the intelligentsia felt that army chief's speech in the GHQ was reflective of the opinion of his fellow generals and the Pakistan army. Similarly, nothing unusual in the statement of the CJP could be seen as *'he keeps on saying such things quite often'*.

It was a mere coincidence that the two statements appeared on the same day in the media; but they were not issued in reaction to each other. The army chief's speech, in fact, reflected the views of his companions and the army as an institution. Likewise, the chief justice also expressed his views while delivering a speech at a function; though an ambiguity prevailed about the background in which the speeches were made. Though some media persons behaved *'improperly'* but the retired Generals should not have given them a shut up call; this hasty act had tarnished their own image before the public.

The tension appeared to stem from the Supreme Court's judgment in Asghar Khan Case in which criminal proceedings against two former army and spy chiefs were ordered for their part to election rigging in 1990. Parallel to this, about nine retired Generals were facing judicial scrutiny for alleged financial irregularities in different cases. The court had also exerted full pressure on military intelligence agencies in the cases of '*enforced disappearances*' — the illegal abduction, torture and sometimes extrajudicial execution of suspected militants and rebels, especially in Balochistan.

The October court ruling had come in connection with the famous case dating back to 1996 in which (rtd) AM Asghar Khan had filed a petition against the then COAS for sponsoring a political alliance. The Supreme Court had asked the federal government to take necessary steps under the constitution against two retired Generals named in the case. However, Pakistan's government had little sway over the military Generals who normally enjoy a high esteem amongst the general populace in Pakistan. Gen Kayani had gracefully said:

> *"While individual mistakes might have been made by all of us in the country, these should be left to the due process of law. Let us not pre-judge anyone, be it civilian or a military person, and extend it, unnecessarily, to undermine respective institutions. Any effort which wittingly or unwittingly draws a wedge between the people and Armed Forces of Pakistan undermines the larger national interest."*

The intelligentsia had felt that through his speech, Gen Kayani was successful in repeating Pak-Army's resolve of keeping Pakistan's security first with backing of the general populace; ignoring nexus of few corrupt politicians and allegedly compromising judiciary.

In those days, there had been much hot debates on all the TV channels and in print media concerning role of Pakistan Army & ISI in politics sparked after SC's judgment in AM (Rtd) asghar Khan Case. Gen Aslam Beg and Gen Asad Durrani were focussed in person and they appeared in live TV talks; and when the statements from the two Chiefs appeared in Pakistani press almost simultaneously, Gen Aslam Beg tried to twist the public opinion through his warnings that *'the statements of the Army Chief and the Chief Justice harbinger a grave danger for the country'*.

Gen Beg held that Gen Kayani's statement *'clearly warns the Parliament to perform its immediate role to avoid a roll-back of the political setting'*. [Gen Beg's exclusive interview to **GEO TV channel on 7th November 2012** is referred] The General also said that:

> *'The misunderstanding between Pakistan Army and Supreme Court is indicative of a dangerous situation. Whatever we did in the past five years, will turn to dust.*

> *Gen Tikka Khan did not execute a coup nor will General Kayani take such a step. Someone else will indulge in this action. Go through General Kayani's statement closely which conveys this message.'*

However, the media remained busy that whole week deciphering the statements issued by the COAS & CJP. The pessimists [mostly the PPP] viewed the statements as a direct confrontation between the army and the judiciary, while optimists believed that since both upheld the supremacy of the Constitution, thus good omen for the country. Fact remained that since his election as president in September 2008, Mr Zardari was perceived as the joint target of both the military leadership and superior judiciary at one point or the other. This time too, at the end, distrust between the PPP, military and judiciary went wider.

One could recall the most recent events firstly of October 2012 when Mr Zardari's closest friend Hussain Haqqani was declared guilty of forwarding the controversial memo to the US military. Gen Kayani and former DG ISI Gen Shuja Pasha, had submitted their witnesses in the probe. Secondly; of November 2012, when the long standing letter was ultimately sent to Swiss authorities against Mr Zardari for reopening the graft cases. Earlier in 2011, the PPP had lost army's favours after 2nd May raid at Osama's hide-out in Abbottabad. Though Mr Zardari hailed the American attack in his essay that he wrote for the Washington Post, the GHQ criticised the government for media handling in derogatory manners.

The PPP, however, had refused to pick sides between the COAS and the CJ but [***referring to 'Dawn' dated 9th November 2012***] the PPP held that:

> *'We don't know if there is a real or perceived conflict between the judiciary and military, the ensuing discussion in the media is going our way.*
>
> *Throughout our tenure in the government since 2008 general elections, the PPP had been painted as the villain party that had refused to accept court orders, and put the national interest at stake by pitting itself against the military establishment. It's a blessing in disguise that with general elections around the corner, such events are shaking off these ignominious tags from the party.'*

The PPP went jubilous saying that with the elections around the corner, the right way of playing the game would be by sitting on the fence.

When army Generals cross their constitutional limits and step into domains outside their jurisdiction, they do so in their professional capacity and hence could be taken with positive considerations if sitting together on table to share wider national interest.