

Scenario 81

ON JUDICIAL ACTIVISM IN PAKISTAN:

On 7th April 2009, the Supreme Court (SC) of Pakistan ordered for an independent commission headed by former SC judge Rana Bhagwandas for an inquiry into the soaring prices of petroleum products and profits earned by the oil companies. The identical constitutional petitions moved by PPP Senator Rukhsana Zuberi, PML(N)'s Zafar Iqbal Jhagra and others were earlier taken up by a 3-member bench of the apex court headed by the CJP Iftikhar M Chaudhry on 30th March instant. The Court opined that ten (10) questions pertaining to the misuse of authority and objectionable regulatory provisions should be answered by the Commission.

Chief Justice Iftikhar M Chaudhry ordered investigations into cases of "forced disappearances" arising as part of the 'war on terror' in which the Pakistan military and ISI, as discussed in the previous chapter, were allegedly stated to have imprisoned hundreds of persons without due process. Many of those who had "disappeared" were allegedly from Balochistan where an insurgency was continuing. CJP's efforts resulted in the return of some of the missing persons but the frustration prevailed.

Since the birth of the independent judiciary in Pakistan during March 2009, various populist rulings by the CJP Iftikhar M Chaudhry against the executive displayed a type of judicial activism considered to be unsettling for the [PPP's] government. Under him, the Supreme Court took action on its own initiative to question the government on the role of the military, its intelligence wings and their policy decisions in Khyber PK, Balochistan and FATA affairs, financial malpractices and social injustices etc.

The SC's **verdict of 16th December 2009** in the NRO case followed by its pledge to come down on mega loan defaulters [referring to SC's thunderous announcements dated 22nd December 2009] had shaken some politicians but soon the people started divulging their resentment because not even a single date was proposed for serious proceeding in that loan eater's case. While heading a Supreme Court bench on *suo motu* notice of last written off dubious loans worth Rs:54 billion sanctioned by the State Bank, the Chief Justice Iftikhar M Chaudhry had observed:

'For [the] nation's sake, we are ready to accept blame for our involvement in the loan write-off matter, but across the board action will be taken after providing opportunity to the bankers and the defaulters to pay back the outstanding money. We are making it clear that the Supreme Court intends to pursue cases of corruption and graft vigorously and indiscriminately.'

A group of influential lawyers, who had allegedly joined hands with the loan eaters and had got their shares in the name of 'fees & pleading charges' conveyed threats to the bench that the proceedings in loan cases would not be so easy-going for the 'bench and bar' on collective basis. Some circles did not even spare the higher judiciary labelling it as a stooge in the hands of one section of PML(N). It was apparent because some big politicians were shrewd enough to dictate NRO decision to the judges but opening up the 'Loan Cases' was not acceptable to them so termed it as beyond the apex court's constitutional role.

The prominent lawyers had thus turned their back to a basic principle that the real, meaningful, fair and principled justice ought never to worry about 'being blamed'. Those who have done wrong in the eyes of law were meant to be punished by the judiciary that is, after all,

one of the primary purposes of the institution. Those **rich lawyers wanted the judicial activism in the name of 'independent judiciary'** but were simply dictating the benches for the fields of their peculiar choices. If the judiciary went contrary to their wish and choices, they raised flags against the whole process of judicial activism terming it 'victimization'.

HISTORY OF JUDICIAL ACTIVISM:

What is judicial activism? The former Chief Justice Sajjad Ali Shah, in his essay published in the daily '**Dawn**' of **26th September 2006** has given its background details. According to him:

'Before partition, the judicial system in the subcontinent was provided by the British government that did not interfere with the personal laws of its subjects. Muslims were governed by their laws of inheritance, matrimonial affairs, custody of children, pre-emption in purchase and sale of land, etc, as rooted in their religion. Likewise, Hindus, Parsis and Christians were governed by their own personal laws.

The British gave us a system of courts, procedural laws and some substantive laws in codified form. For their own use, they have codified laws made by the parliament in Britain and rigidly followed conventions and precedent judgments.

The British are conservative by nature, but whenever their laws are silent and provide no remedy in a particular set of circumstances, they invoke equity, which means the use of good conscience and principles of natural justice and fair play. In fact, equity lays down the foundations of judicial activism so that courts do not feel helpless if the law does not allow remedy for any particular reason.'

When the British left in 1947, the emerging countries of India and Pakistan were allowed to follow the British legal order in the shape of the Government of India Act 1935 to be read with the Indian Independence Act 1947 until both countries drafted their own constitutions. The first case in court that demonstrated judicial activism in Pakistan was that of *Maulvi Tamizuddin Khan (PLD 1955 Sindh 96)*.

The Chief Court of Sindh interpreted the words 'assent' and 'dominion' in a broader and more liberal manner and used judicial activism. It gave a landmark judgment to the effect that the Governor - General had no powers to dismiss the constituent assembly, which was duty-bound to prepare a constitution for the country.

[It is available on record that the executive were not allowing Maulvi Tameezuddin Khan to approach the Chief Court of Sindh to file a writ petition against the Governor General Ghulam Mohammad. Even so, his advocate (Sharifuddin Pirzada)'s car was hit on his way to the court.

To avoid executive's pressures, Maulvi Khan managed to get a lady 'burqa' to disguise himself as a woman, got cycle rickshaw and reached Registrar's office. There he got services of one other advocate named Manzar Alam. The Registrar was former CJP Sajjad Ali Shah's father in those days. When the two were in Registrar's office, the information reached Chief Commissioner Karachi (either Hashim Raza or A T Naqvi) who immediately phoned the Registrar to refuse the petition. The Registrar did not heed to the Chief Commissioner's instructions.

Angrily, the Registrar was 'ordered' to come to Commissioner's office with that petition, which was also turned down. The Registrar, in the meantime, took the petition, entered it in diary register and immediately placed it before the CJ Sindh Chief Court, Mr Constantine.

Afterwards, a five member's bench had announced relief for Maulvi Khan declaring Governor General's orders void. The government went in appeal before the Federal

Court where Justice Ch Munir had given that 'stinking' decision in favour of GG Ghulam Mohammad while setting aside the verdict of Sindh Chief Court.]

In the contemporary legal history of Pakistan, the first argument against uncomfortable kind of judicial activism was brought forward in the name of 'principle of tri-chootomy' of powers and sovereignty of parliament as contained in the constitution of Pakistan under which the Apex Court had to respect the Parliament and the executive. The fact remains that the Parliament can dilute the powers and functions of the judiciary by amending the constitution but such amendments themselves are open to judicial review. They forget that to fill the vacuum resulting from any legislative-executive mal-functioning, the judiciary has to assert itself by providing relief to the sufferers of tyranny and by interpreting the respective laws.

Normally judicial activism is being exercised by the Supreme Court under Article 184, which is its original jurisdiction and the actions are initiated as ***suo moto***. It empowers the court to make an order if it 'considers' that a question of public importance is involved or the fundamental rights are violated. It is for the apex court to decide whether the matter is important enough or not. The real power of activism comes with Articles 187 and 190 by virtue of which the Supreme Court issues all such directions, orders and decrees and can secure the attendance of any person, call for any document, any executive or judicial authority to reach a just decision.

In Pakistan's recent judicial activism history, one can mention the case of *Darshan Masih v The State* in 1990, where the Supreme Court had converted a telegram sent by bonded labourers into a writ petition. Then the Supreme Court rapidly started using its prerogative taking up cases on the basis of letters and media reports. Earlier in 1988 when the Supreme Court decided *Benazir Bhutto v Federation of Pakistan (PLD 1988 SC 416)*, these broad constitutional powers were 'discovered' to provide justice to the people in public interest litigations.

Though judicial activism continued to be exercised since early years and CJP Sajjad Ali Shah was considered pioneer to give the term a meaningful interpretation but CJP Iftikhar M Chaudhry is the judge who has been using its jurisdiction at optimum level.

CJP Iftikhar M Chaudhry could not prove him bold enough during his earlier days of being Chief Justice; reference can be made towards ***bail of Javaid Hashmi, who was refused justice*** during days of Gen Musharraf and spent five years in jail on charges of false 'mutiny'. It was shameful for that time's judiciary. But later, CJP Chaudhry started taking *suo moto* actions on large scale giving weight to the public complaints, of course, without much annoying the military rule of Gen Musharraf barring one or two cases like of Pakistan Steel Mills.

Chief Justice Saeeduzzaman Siddiqui personally was against any kind of judicial activism. In his view the ***Court should not speak itself unless moved by some one to speak***; Supreme Court's duty is to work under the Constitution and to uphold rule of law but some one have to come to the court with his grievances. CJP Siddiqui held the opinion that 'judicial activism' indirectly means that the court is going beyond its limits and thus 'judicial restraints' should be the real goal.

In the Code of Conduct for superior judges, it is clearly written that judges should avoid earning 'fame' and judicial activism has always been used in Pakistan by judges who wanted to go for 'instant fame' by picking up mostly non-issues. See below:

[On 5th June 2011, Atiqa Odho, a well known TV & film actress, was caught at Islamabad Airport for possessing two bottles of imported liquor while travelling to Karachi from Islamabad by PK-319 flight. She was allowed to go by the officials concerned without taking any action apparently due to 'many' influences.

CJP J Iftikhar M Chaudhry took suo moto notice of the incident and the case was taken up for hearing on 8th June 2011. Officials of the Federal Board of Revenue and Airport Security Force submitted their explanations to a bench headed by the CJP

himself. They said the matter was settled without informing the police as the value of recovered liquor was very little.

Despite suo moto, Miss Odho remained blessed – no action.]

During CJP Sajjad Ali Shah's time, the media had taken it as '**judicial terrorism**' when certain Articles of the Constitution, freshly passed by the then Parliament, were suspended by the Supreme Court. How could a court do that; there was very thin line difference between the two.

First time in the judicial history of Pakistan, a special cell was created in the Supreme Court by the CJP Iftikhar M Chaudhry, in which media reports were examined, analyzed and judicial actions recommended there upon. 21,000 media reports and complaints were taken up for *suo moto* action and 6,000 were finalized within three months. This new wave of activism created disturbance among the police because in 90% cases senior police officers were called and bullied in the apex Court.

On the other hand, when SC's instructions were acted upon, the executive authorities got furious thus the officer class could not go happy with CJP Iftikhar Ch. In ***famous Monnu Bhel case***, one DIG Saleemullah Khan appeared before the SC and was harassed by his seniors and the Sindh Government. He went back to Sindh and acted upon the instructions of the SC. The Then Chief Minister Arbab Ghulam Rahim got angrier and placed him under suspension. The CJP could not save the senior police officer nor could speak against the CM. How brave our judiciary was then; many officers like Saleemullah Khan had lost their jobs [of course coupled with grace] during such '*dispensation of justice*'.

A fundamental equivalence of this issue, which is universally accepted too, is that an act of parliament is considered valid only if it does not conflict with the main spirit of the prevailing constitution. If a dispute arises as to the validity of an act of parliament, as was seen in the 18th Constitutional Amendment; or of an executive order, as was seen in '***out of turn promotions of the secretaries by PM Gilani in 2010***', it is for the superior judiciary to interpret but this interpretation should be within the limits laid down by the constitution itself.

Similarly, the courts cannot assume the power of amending the constitution. The Supreme Court had held in ***State vs Ziaur Rahman and others*** that:

'In the case of a Government set up under a written Constitution, the functions of the State are distributed among the various State functionaries and their respective powers defined by the Constitution.... It cannot, therefore, be said that a Legislature, under a written Constitution possesses the same powers of 'omnipotence' as the British Parliament. Its powers have necessarily to be derived from, and to be circumscribed within the four corners of the written Constitution.' (PLD 1973 SC 49)

JUDICIAL ACTIVISM IN RECENT TIMES:

In the contemporary judicial history of Pakistan, the year 2006 was probably a year of judicial activism as numerous high-profile cases with political, social, economic, constitutional and several human rights cases were taken up by the Supreme Court under its *suo moto* jurisdiction. The Chief Justice:

- Saved the Pakistan Steel Mills by striking down its illegal sell-off though political mins keep many reservations [*though subsequently the same PSM became a huge burden on Pakistan's economy – a real parasite*].
- Activated state machinery against the flow of counterfeit and bogus drugs.
- Cancelled the conversion of public parks into commercial ventures (like McDonald's outlet in F-9 National Park Islamabad; ***though it is still there***).
- Imposed ban on kite flying (referred to a case in the Punjab province) but here the people did not show any respect for the SC.

- Gave ruling against the notorious custom of *vanni* to stop the marriages of compensation.
- Stopped a number of projects which were proven hazardous to the environment.
- Ordered the authorities to recover the missing persons (specially pointing towards selling off certain people to the US by Gen Musharraf).
- Directed for closure of substandard private institutions & medical colleges (Baqai Medical College Islamabad was one of them).
- And above all, decided a number of human rights cases of abduction, elopement, marriages out of free will, detention, torture and murder etc.

Once in 2005, Gen Musharraf, in the capacity of President, had filed a reference against the **Hasba Bill**, which was passed by the NWFP Assembly, seeking opinion of the Supreme Court. A five-member bench of the apex court had directed the NWFP governor not to sign the bill.

Similarly, after an earthquake of 8th October 2005 the residents of a collapsed 10-storeyed Margalla Towers in Islamabad had filed a petition against the CDA and the building contractors, alleging that the respondents had failed to protect their fundamental rights of life, liberty and property. The Supreme Court had taken cognizance and ordered the CDA to provide accommodation to the displaced families of the Margalla Towers by acquiring residences of almost equal size.

To adjudicate maximum number of cases for clearance of the huge backlog, two additional judges were inducted on ad hoc basis. At the start of 2006 there were 19,000 cases pending in higher judiciary which, despite institution of fresh cases, were reduced to 13,876 cases till the last day of December that year.

A Human Rights Cell was established in the Supreme Court, which received hundreds of applications and complaints. An International Judicial Conference was also held in Islamabad in August 2006 in which about 75 delegates from 35 countries of all the continents participated.

During the year 2006, the Supreme Court had cancelled the lease deal of a CDA Public Park for its subsequent conversion into mini golf club, being contrary to fundamental rights of the general public. In another case, the Supreme Court on 15th December 2006 had ordered the private medical colleges to comply with the criteria of Pakistan Medical and Dental Council (PMDC) and ruled that after 14th August 2007 no substandard institution would be allowed to function in the country. The court, in a *suo moto* notice had also directed the Ministry of Health & authorities concerned to implement ban on smoking at public places.

Once the apex court was moved for abolishing the custom of '*vanni*' and '*swara*' (a mode of dispute settlement in which under aged girls of offenders family are given in marriage to the family of victim as a compensation for the crime committed by male members of the family), prevalent in some rural areas of the country. The Court directed the inspectors-general of police of the four provinces and the Northern Areas to protect women from being given in marriage as ransom being an un-Islamic and un-human custom. Though practically, this cruel custom is still there but at least the Court had taken notice of it and a law is there to curb this trend.

In nut shell, judicial activism is the last refuge against an arbitrary and irresponsible government. A vigilant but upright judiciary upholds the constitution, confining the legislative and executive to their constitutional spheres. However, if judicial activism is hijacked by individuals for personal exaggerations and not for the common man, then it can play havoc, disorder and disaster [as like cases of a girl's abduction or *karokaree* case in southern Punjab]. Theoretically, it must act as a check against the privileged power abusers of the society like the crime and drug mafias, corrupt parliamentarians and the influential law twisters [like in Steel Mills & Bank of Punjab cases].

More importantly, in ending 2007, before the expiration of five year term of Gen Musharraf as President, petitions were filed in the Supreme Court of Pakistan opposing his eligibility to contest the presidential election while also being the COAS. Just days before the pronouncement

of court decision on these petitions, on 3rd November 2007, Gen Musharraf suddenly issued a Proclamation of Emergency (POE) and the Constitution was suspended. The international community was at a loss to understand the cause and course of the General's action amidst hearing of election petitions against him.

Gen Musharraf stated that ***the action became imperative to end judicial activism and the hurdles which the Supreme Court was creating in the Government effort to return to complete civil rule.*** Quoting President Abraham Lincoln in support of his action the General declared that:

'He, too, 'broke laws and usurped the rights of the people to preserve the Constitution. On one hand, Pakistan's sovereignty has been seriously challenged by terrorists and on the other the country's system is semi-paralyzed due to judicial activism.'

In the back drop of 'judicial activism', the view of police beating the lawyers in public was a sight never seen before in Pakistan. Thousands of protesting lawyers were clubbed and tear gased. In Multan, two judges had fled the court on being threatened by the lawyers.

Some times the courts themselves provide a chance for the people to think adversely. As mentioned in earlier pages, it is on record that loans worth billions of rupees were waived off by commercial banks for political reasons. The Parliament have never taken cognizance of the matter but despite its own remarks of 22nd December 2009, the apex court never tried to touch the issue seriously; thus conveying a message to the people of Pakistan that the higher courts in poor countries are also meant for the rich and influential classes only; poor people's savings are eaten up, then what.

JUDICIAL ACTIVISM vs EXECUTIVE:

The problem comes that if the courts remain silent on the questionable or unjust acts of the government and do not exercise their constitutional jurisdiction; they are accused of being docile and subservient to the rulers. And if they do, they are charged with having a political agenda and are labelled with judicial activism. It is argued that judicial activism would undermine the authority of the parliament and the executive and thus weaken democracy. Speaking truly, such judicial activism is the effect rather than cause of ineffective role of both parliament and the executive.

Soon after his appointment as the Chief Justice of Pakistan (CJP) in 2005, Iftikhar M Chaudhry opted to exercise the court's *suo moto* powers. Many of these cases involved abuse of police powers, manipulation of legal processes by rural landed elites and corruption in the bureaucracy. These cases won the CJP & the SC increasing popularity amongst the populace as well as grudging respect amid the legal fraternity.

For instance, the Supreme Court set aside privatization of Pakistan Steel Mills which ruffled feathers of the Government and caused annoyance, especially for the Prime Minister who was responsible for making the order; the Government got wary of the CJP's style of judicial activism. The SC questioned freely high Government officials and threatened action against them in case they failed to show the legality of their actions; such exercise of judicial independence had upset the military regime.

Another issue; PM Nawaz Sharif was deposed in a bloodless coup by Gen Musharraf, he was charged and convicted on charges of tax evasion and treason. Instead of suffering imprisonment, by mutual agreement, Nawaz Sharif opted to go abroad on 10-year exile in December 2000. The 10-year exile term was brought to an end **on 23rd August 2007**, when the Supreme Court allowed his return to Pakistan. However, his return to Pakistan on 10th September 2007 proved even shorter when the police within hours of his landing at Islamabad Airport ordered him to board another flight for Saudi Arabia.

On 11th September 2007, Nawaz Sharif filed a contempt petition against the Government of Pakistan for refusing SC orders which was admitted. *On 17th October 2007* there was seen confrontation between Gen Musharraf and the judiciary when the CJP sought to pin point the official responsible for deportation of Nawaz Sharif in violation of its order.

The said tussle went on till *30th October 2007* when it was ascertained that PM Shaukat Aziz was ultimately responsible for that deportation. The Attorney General conceded government's guilt and promptly requested an adjournment to enable him to discuss the issue at the highest level. The court granted it until *8th November 2007* but it became obvious that the CJP would issue a notice of contempt to the Prime Minister.

This escalated judicial activism was another reason to proclaim emergency on 3rd November 2007 because the military ruler took it as a revengeful behaviour on the part of CJP in the back drop of March 2007 events in which J Iftikhar M Chaudhry was sent home.

However, the intelligentsia and sane minds were of the view that the CJP should not have granted favour to Nawaz Sharif on 23rd August 2007 as it was an un-called for injunction. There was ample documentary evidence that Nawaz Sharif had willingly maneuvered that 10 year exile through their Saudi Royal guarantors. Its full details have already been mentioned in an earlier chapter but only to supplement it; the CJP had chosen that way at its own by calling Nawaz Sharif before time just to flare up the sentiments of Gen Musharraf and to fight him jointly.

In November 2007, Gen Musharraf announced he would introduce a constitutional amendment to withdraw the Supreme Court's *suo moto* powers under the authority of his Provisional Constitutional Order (PCO) but refrained due to timely advice of his legal advisors.

As per Daily '**Dawn**' of **24th December 2009**:

'Given the broken system of governance in many areas, judicial intervention is probably necessary in many instances. But there is a thin line between wanted judicial intervention and unwanted judicial activism that encroaches on domains of the other institutions of the state.

Clearly, the constitution has made the judiciary the guarantor of the fundamental rights of the people and given the superior judiciary wide-ranging suo motu powers. However, the judges must pay heed to the fact that along with duties to the people, they also have a responsibility to fashion a stronger democratic and constitutional system.'

In Pakistan's contemporary history, its parliament remained silent over subversion of the constitution and dismissal of the judges by Gen Musharraf on 3rd November 2007. The Supreme Court had to invalidate and reverse those acts the same day. Similarly, when the NRO came up for hearing in the Supreme Court in December 2009, the court could either validate or invalidate it. Validation of the NRO was not possible because the sitting PPP government could not get it through its own elected Parliament; but targeting one person [Mr Zardari] leaving aside the whole lot of 8041 beneficiaries was also questionable.

On 13th February 2010, the CJP Iftikhar Chaudhry had rejected President Zardari's decision to elevate two judges of the Lahore High Court, including the Chief Justice of Punjab by taking *suo moto* notice of the presidential action. This move had shaken certain heads on two counts. Firstly, this move from the President House should have been resolved in a mutual official meeting or through correspondence and *suo-moto* could have been avoided.

Secondly, the CJ of the LHC Justice Kh Sharif was kept there because PML(N) wanted him there. It was thus considered as if the CJP Mr Chaudhry was trying to impose '**judicial dictatorship**' in the country. It was alleged that elevation of a junior judge of the LHC to the Supreme Court while retaining a senior judge, Kh Sharif, as Chief Justice of Lahore High Court was in itself a violation of the apex court's own verdicts of 1996 & 2002 which had set out the principle of seniority for appointment and elevation of the superior court judges.

By stretch of legal discussion, one may opine that verdicts of 1996 & 2002 have no explicit direction or connotation in the above maxim but one thing was quite obvious that ***Kh Sharif was not being kept in the LHC Punjab on merit; he was Sharif family's judge and they wanted to see him there.***

[The long march of 16th March 2009, coupled with smart political intents of Nawaz Sharif brought Justice Iftikhar M Chaudhry's team back in saddles but subsequent behaviour of some of them raised serious questions about independence of judiciary. The name of Kh Sharif, Chief Justice of the Lahore High Court [LHC], was one which had spoiled the basic spirit of whole Lawyer's Movement (2007-09) when he openly sided with the ruling PML(N). Most of the bar members were disappointed while saying that *'the current judiciary is no different than its predecessors'* because the requirements of due process were not observed and the neutrality of the judges was not at all visible.

The assertions by CJ LHC, Kh Sharif were absolutely deplorable. Making statements regarding a defendant, Rehman Malik, in a case because of being associated with the PPP was taken as absolutely contrary to the judicial responsibility required of judges.

On this particular issue, certain bar councils and NGOs had asked for the CJP's resignation due to his inability to maintain the independence and impartiality of Pakistan's judiciary. Due to the fact that the movement in which he was restored was ***NOT AT ALL political but a [Black Coat] Lawyer's Movement joined by the civil society***, all its supporters and enemies who were expected to be tried in the Supreme Court required the CJP Mr Chaudhry to reclaim himself as an independent entity.]

The **US Report on 'Pakistan's Rule of Law Assessment'** of **November 2008** had mentioned that the superior courts have the power to review legislation, over executive action and enforcement of fundamental rights set out in the Constitution. The power of the Chief Justices to initiate 'public interest litigation' is OK, however, the principle of judicial independence has been strong in rhetoric but weak in implementation. The Report categorically stated that:

'Pakistan's superior courts have been reluctant to challenge the executive to enforce fundamental rights, and have not invalidated any major legislation on account of in-conformity with fundamental rights provisions. The dominance of the executive over the judicial branch has been apparent at all levels, with judges from the lower courts to the higher courts often succumbing to political pressure throughout Pakistan's history.'

The lack of clarity and transparency in processes for the appointment and removal of judges has played a central role in enabling the executive to influence the judiciary. Articles 177 & 193 of the Constitution stand witness to it that the President and the Governors have 'much say' into the judges appointments [now the situation stands changed after 18th Constitutional Amendment].

Though 1996's 'Judges Case' is in vogue to regulate the judicial appointments but in practice, these principles have rarely been applied, and the selection process has largely been a product of back-room manoeuvring by various interests rather than an open process. There have been several incidents available in this regard.'

Thus, looking into the case from judiciary's viewpoint, one may like to approve Supreme Court's activism. In the famous 'Judges Case' of March 1996, the then Chief Justice Sajjad Ali Shah had declared that the CJP would have primacy in the appointment of judges to the superior judiciary. The 'consultation' with him by the executive regarding the appointment of judges, would have to be ***'purposive, meaningful and consensual'***. This case had effectively put an end to the executive practice of appointment of judges to the higher judiciary by over-riding the advice of the Chief Justice of Pakistan.

Due credit should be given to the CJP Sajjad Ali Shah who was the first Chief Justice to introduce a meaningful judicial activism or who had brought a **'one man judicial revolution'** in the country. Chief Justices Committee was also formed to take notice of excesses of the executive side where needed though the public could not see any tangible cognizance on that count. It was CJP Sajjad Ali Shah who in 1996 had forced the PPP government to promulgate the Legal Reforms Ordinance 1996, which separated the judiciary from the executive at the lower level.

Coming back, the fact remained that Nawaz Sharif of the PML(N) had decided to openly side with the judiciary in the aforesaid battle on the issue of raising two LHC judges to the Supreme Court between the two giants. The PPP had claimed that the Chief Justice was consulted in that regard but his recommendation was rejected by the president as he was the final authority to appoint and elevate judges of the superior courts. Contrarily, the CJP was contemplating to initiate contempt of court proceedings against President Zardari and PM Gilani for overlooking his recommendations for elevation of the two judges; one of them was consistently close to the Sharif brothers.

Contempt of Court proceedings in such administrative matters were not called for in fact but the judiciary had [always] opted to threaten so. PPP's version was that as per constitutional provisions, the Chief Justice was only a consultee, and it was the President who had the ultimate authority to take a final decision. However, the CJP's action of suspending the presidential orders within three hours of their issuance was described by the PPP circles as a **'judicial martial law'**, as opined by Ayaz Amir in his article published on **15th February 2010** in **'the News'**.

Waseem A Qureshi, in his article available at internet rightly said that:

'Judicial activism has never been a feature of Pakistan's polity. Instead, our judicial history is replete with landmark decisions which legitimized executive arbitrariness and extra-constitutional adventures. Our higher judiciary has condoned, at various times, the dissolution of the first Constituent Assembly and the proclamation of martial laws in 1958, 1969 and 1977.

t would be short-sighted to put all the blame for the above on the judiciary alone. A free and assertive judiciary does not grow in vacuum. It needs a free and democratic dispensation to nurture it.'

There are no two opinions that the Supreme Court of Pakistan wanted to inject spirit of judicial activism by describing *'The Court wants that political institutions, elected representatives and government officials should perform their duties in a befitting manner which was very critical for good governance, socio-economic development and political development'*.

To an extent it meant that the judiciary could even make law and implement when the other branches fail to do so. The idea was probably imported from India where it was upheld by various Supreme Court judgments (*Vishaka v. State of Rajasthan, Vineet Narain v. Union of India*).

However, we preferred to move a step further. In India, the Supreme Court had held that questions of policy would not be interfered with and were the specific domain of the executive. In 2009, Pakistani higher judiciary interfered in the executive domain to determine an appropriate price of sugar which was not their prerogative; apparently leading to a conflict between the executive's and judiciary's realm of working and power. Even in India there was lot of criticism on such judicial verdicts.

Hussain Zaidi, in his essay published in the **'Dawn'** of **3rd January 2010**, rightly opined that:

'... while parliament can rename the Supreme Court as the Federal Court or fix the number of judges, it cannot abolish the court itself. The former will be a change within the basic framework of the constitution and hence an amendment; however, the later will not qualify as an amendment to the constitution.'

Wise judicial minds avoid such clashes in the name of judicial activism sometimes taken as interference by many.

OPPOSITE SCHOOL OF THOUGHT:

One school of thought, **of CJ Saeeduzzaman Siddiqui**, keeps the opinion that excessive judicial activism undermines the independence of judiciary. The more a judiciary reacts to popular sentiment, the more prone it will become to deciding cases on the basis of what the public opinion wants and not on the basis of what the law says and justice commands.

Also, by allowing itself to be influenced by popular opinion, the judiciary permits outside interference in its affairs as well as lack of independence in dispensing justice. The **cases of sugar price fixing & Petrol pricing** can be cited again in that context.

In 2009, the LHC took suo *motu notice* of rising sugar prices and suddenly fixed the price of sugar at Rs:40 per kilogram when its market price was 50-60 rupees. The producers appealed to the SC, which upheld the LHC decision. This only made matters worse, leading to the sudden disappearance of sugar from the market and an increase in its price to almost double of what it was before the high court intervention. When sugar came in the market again, its price started from Rs: 70 per kg.

In this regard **'The Friday Times' of 19th March 2010** is referred which had held that:

'Unlike elected governments who are subject to recall by the masses, there is no equivalent mechanism for correction by the public when it comes to judges.

'If the judiciary becomes overly fond of the spotlight, there will come a time when the same forces of public passion that today shout slogans in favour of judicial independence will instead riot in opposition. It would be better for all concerned if that day never came.'

When the higher judiciary becomes controversial, its reputation is damaged and public confidence in its impartiality suffers. Dissenting opinions are often seen as a barometer of how independent a judiciary is.

Since 64 years our judiciary could not earn the name of neutrality, fairness and fearlessness; it always compromised with the rulers, whether civil or military, on one pretext or the other. A very few judges could be termed as respectable in the chequered history of Pakistan while the main lot never realized that a judge is remembered by his decisions not by face or tenure.

PPP vs JUDICIARY ROW IN 2008 -13:

When the two PPP stalwarts, Sharjeel Memon and Taj Haider, were issued contempt notices for organizing public protests and processions of PPP workers in all over Sindh, some PPP worker **circulated on 29th March 2011**, the history [up till then] in the media, of the alleged mis-judgments, often referring to the sayings of Maula Bux Chandio, a parliamentarian of the PPP and later Federal Law Minister of Pakistan. Here are the scripts:

- Contrarily, NRO case taken up. The case was not an issue; the government, over the signals of dismay however, decided to maintain good relations with apex court and submitted in the court room that the Ordinance may be declared void ab-initio, but the court decided to prolong the process and go into nitty-gritty.

- Even a person like Justice (rtd) Fakhruddin G Ebrahim was angry on the proceedings. **'There is no point to prolong the proceedings when the government was willing to declare the Ordinance void-ab initio'**, he commented when court started detailed hearing of NRO case later.
- Justice Ramday went to the extent of very personal remarks [during hearing of NRO Case] like **"apnay client (Asif Zardari) se kaho k Swiss banks main deposited 60 million dollars return karay; apni bhi jan churai aur hamari bhi choray"**. (Tell your client, Asif Zardari, to return 60 million dollars deposited with Swiss banks & get himself off the hook and also save us from undue bother).
- Further moving in the same direction, an action was ordered against Justice [rtd] Qayyum, the former Attorney General who had written letter to Swiss authorities for withdrawal of cases against Mr Zardari on the verbal instruction of the then President Gen Musharraf but without formal approval of the federal cabinet.
- No action was however, directed against former **Attorney General Ch Farooq** who himself wrote letter to Swiss authorities for legal assistance in the same cases without any order or formal approval of the cabinet of Mian Nawaz Sharif. He **happened to be elder brother of Justice Ramday and this was the point of major favour or clash**.
- Subsequently the statements of Khwaja Sharif, other remarks of Justice Ramday and CJP, and other brother judges further fuelled the fire.
- The onslaught did not stop there. The apex court and Lahore High Court at a very high pace took certain cases against the federal government and adverse judgments were passed, but there was no follow up **in Punjab Bank case which was under hearing and an anti Shahbaz Sharif statement was recorded by Hamesh Khan**, the former president of the Bank.
- In these circumstances, Justice Ramday's appointment and pressure exerted for appointments of judges in High Courts on which PPP government had serious reservations had increased the tensions. The issue was resolved with the intervention of Ch Aitzaz, but later he was kept out of the circle close to CJP and Hamid Khan, Akram Ch and Qazi Anwar filled his place.
- Moreover, 18th amendment case was decided in a particular manner and then the decision of parliamentary committee on judges appointment was turned down.
- Certain contract appointments, extension in services etc were terminated by the Supreme Court while the same principle was not applied on Justice Ramday. CJP recommended his name again for appointment as adhoc judge, though Supreme Court Bar Association had strongly objected.
- This principle was also not applied on Registrar Supreme Court who was on a two years extension then.
-and in this scenario a decision against Syed Deedar Hussain Shah triggered volcano in Sindh and a complete strike was observed on PPP Sindh chapter's call. The court moved rapidly and contempt notices were issued while **no suo moto notice was taken against the reaction on court decision in Raymond Davis case**.
- Taj Haider and Sharjeel Memon were summoned to appear before the apex court on 1st April; PPP considered the court decision and all steps part of a game believing that **the superior judiciary sided with rival PML(N)**; this was an alarming situation.

What judicial norms Pakistan's SC built that way, only time would tell?

The apex court knew that Sharjeel Memon was just an MPA and was not holding any portfolio in Sindh but when contempt notice was issued to him, he was made Sindh's Information Minister.

[He was actually made the Information Minister only when the SC had issued him contempt of court notice.]

Admittedly the said gesture was posed on the orders of the Presidency just to place another note of confrontation on record muffled with utter humiliation. As earlier stated that when Sharjeel Memon attended the apex court after many weeks, the CJP Iftikhar M Chaudry remarked that:

'After fighting with the judiciary you have become minister in the Sindh – [good luck].'

OATH OF AGP AKHTAR B RANA:

On 27th August 2011, the Chief Justice Iftikhar M Chaudhry took oath from Akhtar Buland Rana, the new Auditor General of Pakistan [AGP] in his chambers in pursuance of notification dated 23rd August 2011 from the Presidency. The CJP, in performance of administrative functions under Article 168(2) of the Constitution, was required to administer the oath.

In the instant case, however, before administering oath, the CJP sent a letter to the President based on reports of the ISI, FIA and comments received from the former AGP in response to a notice issued on an anonymous application received in the Human Rights Cell of the apex court. The CJP wrote to the President Zardari:

"It is to be noted that once a person is appointed Auditor General and administered oath of office by the Chief Justice, he enjoys the status of holder of a constitutional office. His removal is only possible by adhering to the procedure prescribed for removal of Judges of the Superior Courts before the Supreme Judicial Council [SJC] in terms of Article 209 of the Constitution.

Being the Chief Justice and Chairman of the SJC, while discharging my duties and performing my functions, I honestly consider it necessary to bring it into the notice of the competent authority about the credentials of Mr M Akhtar Buland Rana, which, I believe, perhaps were not in the notice of the office, which processed his case.

However, if, on having taken into consideration the facts, the competent authority still desires that he should be administered the oath, I may be informed accordingly."

The response of the President was received along with communication from the Prime Minister's Secretariat. The president wrote back to the CJP, saying that:

'Mr Rana is appropriate for the post and accusations against him were never proven right. He is the senior most officer of the audit department and according to service rules, his dual nationality can not be considered a hamper while the accusation of holding fake national identity card was also proved wrong.'

President Zardari also rejected the sexual harassment allegation against Rana saying that the investigation into the matter proved it false.

While accepting the president's response, the chief justice decided to hold the oath taking ceremony on 27th August 2011 afternoon.

However, the appointment of the new AGP became a simmering point of contention for the government; being lambasted by National Assembly Opposition Leader Ch Nisar Ali Khan, who also was the Chief of the Public Accounts Committee (PAC). PM Gilani had appointed Mr Rana as new AGP replacing Tanvir Ali Agha, who had earlier resigned amidst a controversy.

Tanvir Ali Agha was forced to leave AGP's office prematurely due to multiple factors including upcoming audit reports on multi-billion scams of NICL and the Hajj Scandal in which AGP Agha's cooperation with the Public Accounts Committee [PAC] had embarrassed the government. Secondly, Agha was sworn in as the 16th AGP for five years on 20th July 2007. According to the Constitution, he could remain in office for five years or until he attained 65 years of age. His 5-year term was ending in July 2012 but on 14th November 2011 he was going 65; thus Agha had lost only three months, nothing else.

Mr Rana, reportedly a close friend of the premier's younger brother Mujtaba Gilani, was promoted to grade-22 a few weeks earlier along with other seven bureaucrats. The government insisted that the appointment of any person to the key post was the sole prerogative of the prime minister.

PM Gilani defended his decision over Akhtar Buland Rana's appointment, saying that the official was a "*person of integrity and the senior-most officer in the Auditor General's office.*" Nisar opposed Rana's appointment and dissolved the sub-committees of PAC in protest. The media had trumpeted against Mr Rana that he kept a Canadian nationality also without seeking prior permission from the government and travelled abroad on three Pakistani passports and two NI cards.

The CJP had written the letter to President Zardari after the ISI and the FIA had sent their reports on Rana's credentials. However, the fact remained that the CJP had no prerogative to ask for such reports at their own from the ISI or the FIA because there was no FORMAL petition before the SC challenging Mr Rana's promotion to grade 22 or his appointment as AGP.

The SC Registrar said the CJP had sought report on an anonymous application sent to the HR cell of the Supreme Court. The intelligentsia opined that the SC should not have done so; even though the SC or the CJP could take appropriate action in any matter simply by stretching their jurisdiction under 'human rights' or equality or fairness etc available in the Constitution. Where the state affairs would end then?