

Scenario 27

Military Coup Again Upheld 2000:

On 25th January 2000 Gen Musharraf, in the capacity of Army Chief and the Chief Executive of Pakistan, issued the Oath of Office (Judges) Order 2000. The main features of the text were:

- In pursuance of the Proclamation of Emergency of 14th October 1999 declared by Gen Musharraf, the Constitution of Pakistan was declared as 'held in abeyance'.
- Pakistan would be governed 'as nearly as may be in accordance with the Constitution' and the Chief Executive 'shall be deemed always to have the power to amend it'.
- All courts in existence were allowed to continue to function and to exercise their respective powers and jurisdiction, (but) subject to the Provisional Constitution Order (PCO) No.1 of 1999 as amended and the Chief Justices and judges of Superior Courts, would be able to discharge their functions only after taking fresh oath of their office.
- For the said oath, the Judges were asked to administer it within certain time schedule determined by the Chief Executive.

Reproduction of the relevant provisions of this order would make it clearer how a policy to weed out undesirable judges was set in place by the military government in vogue:

3. Oath of Judges -- (1) A person holding office immediately before the commencement of this Order as a Judge of the superior Court shall not continue to hold that office if he is not given, or does not make, oath in the form set out in the Schedule, before the expiration of such time from such commencement as the Chief Executive may determine or within such further time as may be allowed by the Chief Executive [Gen Musharraf].

(2) A Judge of the Superior Court appointed after the commencement of the order shall, before entering upon office, make oath in the form set out in the Schedule.

(3) A person referred to in clause (1) and (2) who has made oath as required by these clauses shall be bound by the provision of this Order, the Proclamation of Emergency of the fourteenth day of October, 1999 and the Provisional Constitution Order No. 1 of 1999 as amended and, notwithstanding any judgement of any Court, shall not call in question or permit to be called in question the validity of any of the provisions thereof.

The new official form set out for the oath of office was of course framed for obedience and allegiance to the instruments referred to in clause 3 above. Many members of the judiciary naturally became apprehensive about the designs of the new rulers. The result was a sudden revolt and mass departure of judges, especially from the Supreme Court. Six of its judges, including the Chief Justice, refused to take the oath. Some of the Judges of the high courts also did not make the oath, notably those of the LHC, Sindh HC and Peshawar HC.

The outgoing CJP Saeeduzzaman Siddiqui told that when, during a meeting on 25th January 2000, Gen Musharraf told him that they are feeling difficulties in running the state business so they had decided to go for a new oath. Justice Siddiqui told the General that on 12th October 1999's meeting we had worked out a mutual understanding with each other that judiciary would continue working as such.

Gen Musharraf told about some of his apprehensions which were not based on facts. When he insisted on the new oath and fresh PCO then Justice Siddiqui flatly declined to take fresh oath. Justice Siddiqui told:

'Three serving Generals came to my residence at 9PM, continued with their arguments and requests for my oath till 1.30 that night but I did not agree'. [Rumour was that he was not called for]

The advice of fresh PCO was probably given by Sharifuddin Pirzada because hearing of the petitions against coup was coming up.

Later the uneasiness of military government surfaced that perhaps the SC was going to give verdict against the coup. There were also rumours that PML had again sent 'briefcases' for some of the judges like in 1997 but Justice Siddiqui had expelled the fears saying that up till that moment there was no such development nor had he personally thought over that possibility because the proceedings had not yet started for the petitions.

Justice Malik Qayyum, in an interview published in daily '**Jang**' dated **5th February 2006**, opined that:

'I had taken oath under the said PCO after considering that one could fight with opposing winds in a better way while remaining in the system. There are judgments available from the superior courts that 'an oath under PCO does not detract you from your original commitments under your oath taken under the constitutional provisions.' [But who honoured his original commitment]

'The tragedy of 2000's Pakistan was that the nicest lot of judiciary then available went home while declining to take oath under the PCO. CJP Saeeduzzaman Siddiqui should have taken oath under the PCO but then opted the way what he liked in the best interests of justice. Had the judges like him and Justice Wajeehuddin Ahmed been there in judiciary, the judgment regarding Gen Musharraf's take over would have been entirely different.'

In a way Justice Malik Qayyum was right to opine so. If the subsequent decision of Gen Musharraf's take over had to be there in place, the order could be conveyed to hold elections within 90 days. Giving three years to a military ruler was neither asked for in the petition nor was it mandated through any provision of the constitution. This time there was not any Martial Law in vogue then why the then sitting judiciary was feeling pressure in giving such decision.

The matter itself came before the Supreme Court in Zafar Ali Shah's Case, by which time the judges in question had left from office. The apex court had refused to consider the specific cases, declaring the matter closed, and stated that:

'Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal. They can be removed only by following the procedure laid down in Article 209 of the Pakistan's Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise [save military ruler's PCOs].

The validity of the action of the Chief Executive was open to question on the touchstone of Article 209 of the Constitution. But none of the Judges took any remedial steps and accepted pension as also the right to practice law and thereby acquiesced in action.

Furthermore, the appropriate course of action for Supreme Court in these proceedings would be to declare the law to avoid the recurrence in future, but not to upset earlier actions or decisions taken in this behalf by the Chief Executive, these being past and closed transactions.'

Unquestionably, the superior judiciary of the country was in this instance intimidated and ridiculed by the military. Those who refused to succumb to the pressure from the military regime acted courageously and bravely.

At least 13 judges of the superior judiciary either refused to take a fresh oath under the PCO or they were not called up to take oath. Justice Peter Cory of the Supreme Court of Canada explains 'Oath' in one of his judgments given in 1997:

"Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge.

The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, the Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult venture is high and always goes appreciable [in most situations]."

However, 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 inconformity with these rights provisions. Rather, some of the foundational principles of the 1973 Constitution, including federalism and judicial independence, have been compromised by the weakness of the judiciary, the primacy of federal law over provincial legislation, the dominance of rural and urban elites in political parties, and the subservience of political parties to their leading figures like chairmen and the presidents etc.

After a decision by the Supreme Court challenging the jurisdiction of military courts, Gen Ziaul Haq also sought to undermine the independence of the judiciary by requiring judges to take a fresh oath under the PCO **on 24th March 1981**. In practice, these dynamics have led to numerous amendments to the 1973 Constitution and the oscillation between parliamentary and presidential models of government.

At this moment, one should not forget the judicial heroes of Pakistan like Justice Dorab Patel, who had refused to take a fresh oath under the Provisional Constitutional Order (PCO) promulgated by Gen Ziaul Haq. As a signatory to the judgment against the army General and following the voice of his strict conscience, no body could expect such a derogatory oath from a high esteemed judge like Dorab Patel.

'A lesser man might have succumbed. The temptation certainly would have been great; for due to seniority, he was set to become the chief justice of Pakistan as soon as the incumbent retired the following year and would have headed the apex court for seven years.'

Justice Dorab Patel did not think twice about rejecting [maliciously sincere] offer of Gen Ziaul Haq.

As was the custom, the then chief justice had asked the question first to the most junior judge, which at that time was Justice Ebrahim.

'Not without apprehension, he said, 'Sir, I am going home.'

The same question was put to other colleagues in the reverse order of seniority, and most of them were willing to take the oath.

"I walked up to Dorab Patel, who was seated close to me, and asked him in Gujrati, '**What is your decision? Promptly and without the least hesitation, he said, 'How can I take such an oath!**' the then Chief Justice Anwarul Haq told with pride.

The CJP Anwarul Haq then went to the next seniors. J Shafiur Rehman and J Molvi Mushtaq both said they would take oath. When the CJP was moving to the next J Dr Javed Iqbal, he received a phone call on hot line. The CJP attended the call; straightaway came to J Molvi Mushtaq and told him with sorrow that he had been dropped from the list.

Of course, J Molvi Mushtaq had felt embarrassed before the whole team of 14 judges. In the President House next day, J Molvi Mushtaq's chair was removed at the last moment because it was unexpected news for the Presidency staff even.

Just to pay a tribute to those Honourable Judges like Ebrahim and Dorab Patel, their characters can be assessed in a significant case to quote. It was that of *Yusuf Ali Khan* in which Justice Patel liberalized the law of Contempt of Court and departed from several precedents, including judgments of the House of Lords, to hold that:

'An allegation of bias against a judge, if expressed in temperate language and without attempting to scandalize him or alleging ulterior motives, does not constitute contempt.'

Justice Dorab Patel was a judge, the nation wait for generations to rise up. He was one of the three Supreme Court judges, out of seven, who had not agreed with that controversial decision of LHC, written by Justice Molvi Mushtaq Hussain, to hang Bhutto in 1979. He did not become a party to that 'judicial murder'.

The taking over of Nawaz Sharif's government by Gen Musharraf on 12th October 1999, Proclamation of Emergency of the 14th October and Provisional Constitution Order No. 1 of 1999 as amended, were challenged before the Supreme Court under Article 184 (3) of the Constitution through several petitions, which were disposed of by means of a Short Order in the case reported as: *Zafar Ali Shah vs Gen Musharraf (PLD 2000 SC 869)*.

After that fourth military coup, the intelligentsia of Pakistan again started looking towards the Supreme Court of Pakistan for remedy. In the first week of March 2000, the then CJP, Justice Irshad Hassan Khan asked the then Attorney General, Aziz A Munshi, to provide a list of those suspended parliamentarians against whom corruption cases were initiated by the National Accountability Bureau (NAB).

The CJP had also asked him to place the report of the State Bank on the court's record. He had observed that when the politicians are in power, they try to become dictators but when they are out of power, they become champions of the rule of law.

The Chief Justice Irshad Hasan Khan issued these orders when the advocate Zafar Ali Shah and Chaudhry Farooq claimed that there was no charge against their client. It was prayed before the apex court that:

- Send the military back to the barracks as the concept of military government was alien to the civilized world.
- The army should not be allowed to take over power after every 10 years and start blaming the politicians for all crimes (quoting that the military takeover could be compared to the situation when a hired bodyguard would enter the house of his employer, occupy it and justify his entry on the grounds that he was not treating his family well).
- The Prime Minister should not be held for removing the Army Chief as he was empowered by the Constitution to do so.

It is said that the former CAOS Gen Jehangir Karamat was rightly shown the outer door (claiming that he did not know why it was done by his client Nawaz Sharif), but the Prime Minister was justified in doing so.

12th May 2000: Presiding over a 12-member bench seized of the seven petitions challenging the military takeover, the chief justice of Pakistan directed the Attorney General to provide details of the expenditure on holding elections, including the expenses made by the candidates on their election campaigns. The Court announced to decide the issue of maintainability and merits of the case simultaneously and finally, on 12th May 2000, validated the military take over by Gen Musharraf while again putting their guns on the shoulders of 'doctrine of necessity', like his first champion Justice M Munir of 1955-58.

[The honourable bench, which had given approval of military action consisted of 12 judges; the Chief Justice Irshad Hasan Khan, Justice Mohammad Bashir Jehangiri, Justice Sheikh Ijaz Nisar, Justice Abdur Rehman Khan, Justice Sheikh Riaz Ahmad, Justice Chaudhry Mohammad Arif, Justice Munir A. Sheikh, Justice Rashid Aziz Khan, Justice Nazim Hussain Siddiqui, Justice Iftikhar Mohammad Chaudhry, Justice Qazi Mohammad Farooq and Justice Rana Bhagwandas; hats off to all of them.]

It was held by the Supreme Court that on 12th October 1999 a situation arose for which the Constitution provided no solution and intervention by the Armed Forces through an extra-Constitutional measure became inevitable and the said act was validated on the basis of the doctrine of state necessity and the principle *salus populi suprema lex* as embodied in *Begum Nusrat Bhutto's case (PLD 1977 SC 657)*.

It was further held that the 1973 Constitution would remain supreme law of the land subject to the condition that certain parts thereof would be held in abeyance on account of state necessity. The operative part of the Short Order given in **PLD 2000 SC 869** was:

'We accordingly hold as under:-

"6. (i) That Gen Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff through Proclamation of Emergency dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he has been described as Chief Executive, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:

All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

All acts which tend to advance or promote the good of the people;

All acts required to be done for the ordinary orderly running of the State;

And all such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive of Pakistan.

*(ii) That constitutional amendments by the Chief Executive can be resorted to only if the Constitution fails to provide a solution for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause 6 sub-clause (i) (a) *ibid* is controlled by sub-clauses (b)(c) and (d) in the same clause.*

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions.

iv) That Fundamental Rights provided in Part II, Chapter I of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17,

18, 19 and 24 as contemplated by Article 233 (1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.

(v) That these acts, or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;

(vi) That the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

(vii) That the courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior courts [of Pakistan]."

The Court went on to describe the military take over as an extra-constitutional step taken by the Armed Forces for a transitional period to prevent any further destabilisation, to create a corruption-free atmosphere at the national level through transparent accountability and to revive the economy before the restoration of democratic institutions under the Constitutional provisions.

Upholding the Military Government's legitimization arguments, the Supreme Court added that as the Constitution did not offer any solution for the political crisis under the previous regime, the military intervention was quite inevitable.

Further, the apex Court ignored the Oath of Office Judges' Order 2000 and the March 2000 ban on public rallies in concluding that there was "an implied consent of the governed". Thus, the people of Pakistan in general, including politicians and parliamentarians, were deemed to have consented to the coup, as no protests had been launched against the army take-over.

In addition to endorsing the coup, *the Supreme Court granted extensive powers to the new Government, empowering it to unilaterally amend the 1973 Constitution and enact new laws without the approval of Parliament. Gen Musharraf was also allowed to hold his chair for three years and this was a gift of the Superior Judiciary for the military dictator because this facility was never prayed by the government representatives during the whole hearing.*

In nut shell, the CJ Irshad Hassan Khan in his judgment of 12th May 2000 had declared Gen Musharraf's dismissal as void and of no legal effect but gave him three more years to rule Pakistan. Besides, the court also announced for the military ruler that he would have powers to amend the constitution of Pakistan. It was amazing on two counts:

- Firstly, the judgment was being given on the constitutional petitions emanated from Nawaz Sharif's party against reaction of 12th Oct 1999's episode in which it was prayed to declare the military coup void. The judgment was required only to set aside and reject the said petitions and nothing more activism was required.

Giving Gen Musharraf three more years to rule and powers to amend the constitution were extra facilities the bench announced. These facilities were not demanded by the respondent party nor were the subject of discussion which reflected utter cowardice of the bench and speaking for their corrupt minds.

- Secondly, while doing so the judges sitting in the bench had purposefully ignored the fact that they were giving such powers to amend the Constitution to a single handed military ruler which mandate even the the superior courts do not possess to exercise.

But it has been happening in Pakistan since its early age.

Justice Cornelius had once said that:

'The justice should be done at all costs and upheld even if heavens fall, let them fall [showing utter respect for justice].'

With the passage of time the values changed. In May 1993, while writing judgment in Nawaz Sharif's case, the Chief Justice Nasim Hasan Shah held that:

'Justice should be done in a manner that heavens should not be allowed to fall [showing a compromising attitude in justice].'

Feel the difference. True that when the judiciary would resort to deliver justice in an arena of political compromises or general public's will, the decline occurs and the history starts going distorted.

Coming back; when the Supreme Court again resorted to this *Doctrine*, contrary to the last ruling (of 1972) of Chief Justice Yaqoob Ali Khan on the subject and legitimized the illegal takeover, it became a partner of the military regime enjoying a *quid pro quo*, including the controversial three years' extension in the judges' retirement age.

In this litmus test when the military takeover by Gen Musharraf was challenged, the Supreme Court not only justified it but also granted three years to the military regime to implement its program, in addition to granting the right to make amendments to the Constitution, a right the Court did not possess itself.

It is noteworthy that though the Court did not stipulate the removal of the then President Rafiq Tarrar in its judgment, but the latter was removed and Gen Musharraf was administered oath as President by the CJP. The act was considered by many jurists as patently unconstitutional.

Most observers noticed that the then Chief Justice Irshad Hasan Khan was rewarded for this big-heartedness and generosity by Gen Musharraf when he made him Chief Election Commissioner after his retirement. Since this came up partially through concerted efforts of the then Federal Law Secretary Mr Khokhar, who was also given an out-of-turn appointment as a Supreme Court judge, even though he was a junior judge of the Lahore High Court.

This was in clear violation of the principle laid down in the 1996 Judges' Case which stipulated the seniority rule in the matter of appointment of judges. This and other appointments of junior judges were challenged but were turned down by a special bench presided over by Chief Justice Sh Riaz Ahmed.

By granting extension, Gen Musharraf violated his commitment to the nation that no amendment in the Constitution would be introduced unless it was circulated in advance for soliciting public comments. Interestingly, the extension period corresponds with the period granted by the judges to Gen Musharraf as the Chief Executive. It was not the extension granted by the military but the manner and method in which it was granted.

This was so because it clearly smacked of a bribe for 'services' rendered by judges. If this was not the case why was the extension granted in such a hushed manner in the stealth of a night as if it was a commando action? Similarly, why was the bar and parliament not involved in the process.

Other important events of that year can be summarized that on **13th February 2000**: National Accountability Bureau (NAB) filed reference No. 7/2000 against Faisal Saleh Hayat a PPP politician from Jhang and on **6th April 2000**, former Prime Minister Nawaz Sharif was sentenced to two life terms, 25 years imprisonment each.

On **20th September 2000** Aftab Ahmad Sherpao, a politician of NWFP was convicted by Accountability Court No.3. On **18th November 2000** Nusrat Bhutto was convicted in absentia. On **30th November 2000**: Anwar Saifullah, a politician of NWFP was convicted in an Accountability (Ehtesab) reference. On **10th December 2000**: Nawaz Sharif left Pakistan under a clandestine deal with Gen Musharraf and no court was seriously agitated over the scam negotiations.

Afterwards, the 17th Constitutional Amendment, which later conferred absolute power in Gen Musharraf, was opposed to the spirit of parliamentary governance enshrined in the constitution. Gen Musharraf vigorously presented his case inside and outside Pakistan, asserting that he was indispensable for the state and the people on the premises of security and for the reforms he had brought about for the good of the country; but he was not believed by anyone.

The irony of fate was that when Gen Musharraf was dethroned and pushed out from Pakistan, he started canvassing his 'would be' political party in Pakistan, moved some of his old political buddies to prepare ground for his landing. But alas! He could not move forward because the PML(N) and one sizable faction of PPP cogently surfaced up with charges of murders of Nawab Bughti and then of Benazir Bhutto. More issues like Lal Mosques are still haunting him and would continue to make him restless.