

Scenario 109

CJP CHAUDHRY'S JUDICIARY:

The judgment of the famous '*Judges Case*' was to be announced **on 20th March 1996** by the then Chief Justice Sajjad A Shah.

A day earlier, on 19th March, Benazir Bhutto's government announced the appointment of twenty judges to Lahore High Court and seven to Sindh High Court. Acting Chief Justices of both courts; Justice Irshad Hasan Khan of LHC and Justice Abdul Hafeez Memon of Sindh Court were the Supreme Court judges who were on deputation with the two High Courts, administered oaths to new judges without even informing their CJP. Both ACJs were appointees of Benazir Bhutto and they returned the favour by doing so while in the Supreme Court the draft of judgment in '*Judges Case*' was being finalized.

In Pakistan, indoor intrigues prevailed [even more] in higher judiciary in all times.

A SALUTE TO CJP CHAUDHRY:

See another page of Pakistan's cruel history and in between the lines one can smell the superior judiciary's behaviour for their own courts; an ***attack on SC in 1997*** is painfully referred:

Former President Farooq Leghari told later how on the night of 28th November 1997, Prime Minister Nawaz Sharif accompanied by COAS Jehangir Karamat, National Assembly Speaker Ilahi Bakhsh Soomro, Senate Chairman Wasim Sajjad, and Law Minister Khalid Anwer came to see him and advised him to de-notify Chief Justice Sajjad Ali Shah and appoint Justice Ajmal Mian in his place.

The cassette recording was forwarded to the Chief Justice of Pakistan while the case was still open. The reaction was evident.

At 0700 on the morning of **28th November 1997**, Lt Gen Naseem Rana, the then ISI Chief, informed his COAS Gen Jehangir Karamat that a mob had been organized to raid the SC whilst the contempt case against Prime Minister Nawaz Sharif, was being heard.

[Rest is a painful history – no use of repeating it here; ***Judges & Generals in Pakistan VOL-I (Scenario 21)*** is referred for details]

On 14th May 1999, over 500 days later, **SC** bench headed by Justice Nasir Aslam Zahid [Justice Munawar Mirza and Justice Abdur Rehman Khan were the other two] let the seven legislators off with observation below:

'Though flagrant contempt of court was committed but the accused cannot be convicted as the people had not given specific evidence against them.'

Even Senator Saifur Rehman, the mastermind of that attack was acquitted against whom oral as well as documentary evidence was in abundance. Even live videos of the event, three from BBC & CNN each, were discarded along with 53 eye-witnesses from media who had got recorded their statements. Hundreds of photographs plastered over main pages of the whole press, and the apex court's own CCTV camera footings were not able to convince the bench.

[In March 2013, **Justice ® Nasir Aslam Zahid** was named as PML(N)'s prime candidate for interim premiership because he had been the **'outstanding' pet judge of PML(N)** since at least ending 1997.]

On 28th October 1999, Shahid Orakzai filed an application "for immediate hearing of Cr Appeal No.162 of 1999" which was given weight only because the PML(N)'s government was no more there. **On 18th November 1999**, the hearing started and the then Attorney General Aziz Munshi was asked to plead that case to be heard de novo and the AG Mr Munshi delivered.

Ironically the CJP Saiduzzaman Siddiqui, more loyal to politicians than to the SC or its judges, tried to play saying that the said appeal was time barred as it could be filed within 60 days only. Justice Irshad Hasan Khan had to snub the former CJP reminding him that the apex court had the powers to enhance the period for filing of the appeal.

At last on **29th September 2000**, 5-members bench of the Supreme Court, headed by Chief Justice Irshad Hasan Khan, issued execution warrants for seven Muslim Leaguers who were sentenced to undergo one-month imprisonment and Rs: 5,000 fine each on the charges of contempt of court.

In December 2004 the appellants appealed the apex court to release them of all charges [*they had undergone the given imprisonment and had paid the fine*] entitling them to hold public offices. A larger bench consisting of Justice Sardar Muhammad Raza Khan was nominated to resume the said case but remained in cold room till March 2010, when the apex court dismissed it observing that ***"if such things were allowed, no one would respect this institution."***

The CJP Iftikhar M Chaudhry underlined the need to discourage such an attitude and observed that ***"an MNA attacked the Supreme Court and after six years he came for pardon. We have to respect the institutions as they cannot survive like this."***

Justice Tariq Parvez had remarked that:

"If we pardon four people now, four hundred would come tomorrow for relief on the basis of this verdict.

Insults are to be treated with disdain -...In the case of the Welsh students, the Court was invaded on February 4, they were sentenced on February 4, the appeal was heard on February 9 and decided on February 11; all within the space of one week."

When our present judiciary would feel courage to behave as that foreign Court had done on 4th February – make laws like that. The event of 4th February, as mentioned by Justice Tariq Parvez above, was never repeated again in that country till today at least.

An echo of the said episode was heard again after two years when **On 6th June 2012**; Interior Minister Rehman Malik was appreciated for reopening a much-awaited case of **storming of Supreme Court by Sharif Brothers [1997]** case. This time some one moved to hang culprit MNAs etc till death who had violated Article 6, of the Constitution of Pakistan.

This was a good development as the evidences including the CCTV footages, FIR registered with the Secretariat police and investigation reports prepared by then SSP HQ Taimour Ali Khan had been collected. SSP Khan's incomplete inquiry was called so because the statements of main culprits – PML(N) leaders – could not be recorded as they were in detention and later they made a secret deal with Gen Musharraf and fled for Jeddah.

The Capital Police had issued notices to 59 people including PML(N)'s Nawaz Sharif and Shahbaz Sharif, asking them to appear before the SSP within 10 days for interrogation in connection with the 1997 attack on the SC. Nawaz Sharif did all this out of ego, abused his powers and stormed the apex Court. SC had appointed five new judges; Nawaz Sharif harshly criticized the then CJP Sajjad Ali Shah. A contempt of court notice was issued; the court was about to hear the contempt case when Nawaz Sharif got attacked the court.

Most of the analysts believed that Mr Sharif's conflict with the CJP had reached the point of no return. The dispute between Mr Sharif and the Chief Justice had become personal, and that it was then impossible for them to reconcile their differences. *Just to refresh the memories of that drastic tussle – see the following paragraphs.*

During his second stint in power as PM Nawaz Sharif wished to rid himself of an awkward Chief Justice, Syed Sajjad Ali Shah who was not ready to toe his line. Sharif started consulting his confidantes as to how to get divested of the defiant CJP. In his book '***Glimpses into the Corridors of Power***' (OUP 2007), a former foreign minister of Sharif cabinet, **Gohar Ayub Khan**, writes:

"Nawaz Sharif wanted to summon the CJP (Sajjad Shah) before the privilege committee of National Assembly for having committed contempt of the parliament..... that he was first asked to provide guidance as to how Sajjad Ali Shah could be summoned before the privilege committee and later for sending him to jail. The tussle between the premier and chief justice was reaching its peak.

I got a call from the prime minister on November 5, 1997 asking me to come and see him in his chamber in the National Assembly. When I arrived, I found members of the privilege committee (Nawabzada Iqbal Mehdi and several others) present in the cabinet room. The PM asked the Chairman of the privilege committee to explain the situation to me. The chairman said that they wanted to summon the CJ before the privilege committee and all those present (including the PM) concurred.

I told them that the rules did not provide for such a drastic step... if you make the mistake of doing so, he will disregard your summons. The privilege committee and the PM will be insulted. With that, the discussion came to an end.

The PM asked me to accompany him to the PM House. In the car, the PM put his hands on my knee, and said: 'Gohar Sahib, show me the way to arrest the chief justice and keep him in jail for a night'. I was shocked and advised Sharif against even thinking about it."

Rest is the history you've already gone through in Volume-I of this title.

To recall, Chief Justice Sajjad Ali Shah was the lone dissenter in the 11-member bench of the apex court, whose decision had restored Nawaz Sharif to power in May 1993 as prime minister after he had been booted out by President Ghulam Ishaq Khan. Justice Shah had also ordered the release of some civil servants who had been arrested on the orders of Nawaz Sharif; Faisalabad's WASA Case is referred. These events became the starting point of a long tussle between the two.

The first confrontation by Nawaz Sharif was the establishment of special trial courts which were established in contravention of the advice of the chief justice. However, Sharif finally succeeded in dividing the superior court judges into two camps. The infamous Article 58(2)-b, Eighth Amendment to the Constitution of Pakistan (which empowered the President of Pakistan to dismiss the National Assembly) was restored and suspended within minutes by two separate benches of the apex court assembled against each other.

A 3-member bench headed by CJP Shah suspended the operation of the 13th Amendment to restore the powers of the president to dissolve the National Assembly; a verdict that was set aside within minutes by another 10-member bench of the apex court. The 10-member bench led by Justice Saeeduzzaman Siddiqui granted stay against the CJ Sajjad Shah's order minutes after it was passed, without receiving any formal petition, and the decision of the chief justice was set aside. All efforts to resolve the judicial crisis failed as both the groups of the superior court judges stuck to their stance and issued separate cause lists.

Thus; the critics held that how was it possible that MNAs of a ruling party and political Secretary of the sitting PM organize such unruly mob attack on SC without an approval of their boss? At least in Pakistan it was not possible because in fragile democratic setup personalities always shine and workers and legislators of political parties act according to the wishes of their leaders, especially when it is a ruling party.

SC ATTACKED AGAIN [this time] BY LAWYERS:

On 26th November 2013; exactly after 16 years, violence revisited the Supreme Court when a group of disgruntled lawyers attacked the hallowed building, smashing doors and windows in afternoon hours. About 200 young lawyers, who had come from the Sahiwal, Gujranwala, Sargodha, Faisalabad and D G Khan Divisions of Punjab, to vent their anger at non-establishment of the benches of the Lahore High Court at their Divisional Headquarters, created the ugly scenes and clashed with the police who pushed them out.

They then started a sit-in outside the Supreme Court building. Most of them quit the protest by nightfall but about 60 were staying till late night, unmoved by the local administration's pleas to go home. It was embarrassing for the ruling PML(N) because it was also in power when the apex court was attacked last time on 28th November 1997. Then the raiders were the supporters of PML(N) while this time they were the supporters of the judiciary in black coats. The protesters held that:

"We were promised and the provincial government even notified that high court benches would be established in these divisions sometimes in April or March [2013] to facilitate the poor litigants. But the matter is stuck up at the level of the top judiciary.

The decision to protest in front of the Supreme Court was reached during inter-division meetings held in different cities on rotation."

When they continued to be rowdy, pelting stones at the building, smashing windows, the police baton charged and fired tear gas shells. A number of lawyers and 25 policemen were injured in the scuffle, including DSP Zubair Shaikh, SHO Secretariat, Assistant Commissioner City Mohammad Ali. In reaction to the incident, Vice Chairman Pakistan Bar Council Qalbe Hassan announced a countrywide strike and boycott of the courts by the lawyers next day. There were meetings in the bar rooms all over the country to condemn "*inhuman and brutal police action*" against the lawyers.

"Not only the police beat up the lawyers severely and aggressively but also used tear gas tear, with the result that many of them were seriously injured, and the SC administration was not moved at all," PBC held.

It is always a tragedy in Pakistan – police was blamed for 'the inhuman behaviour' as if '**smashing of windows and pelting stones on SC building**' was quite a humanly behaviour displayed by the lawyer fraternity. The media had taken the photographs and videos of those 'some irresponsible lawyers' showing smashing windows and pelting over police contin-

gent and the building – the same were displayed on the TV channels whole night and next day but no license was cancelled, no lawyer was called in the dock for reprimand. What else is the statelessness?

The lawyers had gathered at the entrance reserved for judges and delivered fiery speeches against the judiciary as well as the chief justice, and abusing the judiciary. Before being formally invited in, the protesting lawyers had been going inside to use the court's toilets.

The court officials asked the capital administration and police to intercept them. This provoked the lawyers who entered the court building in force. Police tried but failed to stop them. The lawyers broke the barrier at parking lot and the gate at judge's entrance and started smashing things up. That brought the anti-riot unit of the police inside, which pushed the rioting lawyers out when they were about to enter the courtroom.

However, the lawyers again assembled at the parking lot and started pelting stones at the officials and the court building with stones available there. The police first fired a couple of tear gas shells and rubber bullets in the air to disperse them. Later the anti-riot police used batons which injured some of the lawyer.

Police had to do it because the judiciary and the judges sitting inside were coward and impotent. They didn't have the laws nor the courage to follow the CCTV footage, or media videos or print media photographs to take any of the lawyers to task. ***The event was more serious than of 28th November 1997.*** Thank God, this time no IGP Tariq Saleem Lone or SSP Altaf were made escape goats. It was CJP Chaudhry's Supreme Court.

INDEPENDENT JUDICIARY – CONFLICTS:

After the CJP Iftikhar Chaudhry was restored in July 2007, for the first time in the country's judicial history it had been able to exercise judicial power independent from the military and the civilian government. However, as the judiciary exercised its power as an independent institution, it started showing favouritism towards a particular political party [PML-N] and soon lost its effectiveness. Criticism in the live TV shows on the judiciary's behaviour left a bad taste in public's mouth for not coming upto the required mark.

During 2012 too, from February to June, the judiciary was in a direct confrontation with the Executive and the Legislative on the pretext of eradicating corruption when the judiciary ordered the reopening of the corruption cases against President Zardari whereas Sharif Brothers' cases were not called up. And when the former Prime Minister, Yousuf Raza Gilani, refused to implement the court's order citing presidential immunity under the Con-

stitution, he was indicted for contempt, convicted and disqualified to sit as the Parliamentarian even.

Aitzaz Ahsan, one of the leaders of the 2007 lawyer's movement, questioned the constitutionality of the judiciary's action to prosecute President Zardari; the judiciary has already acted beyond the ambit of its judicial power in the Constitution. When asked in an interview by the BBC's Hard Talk in August 2012, Aitzaz said:

'No criminal proceedings whatsoever can be instituted or continued against the President in any court during his tenure of office. As long as Zardari is the incumbent head of State, and constitutionally elected President of Pakistan - you may like him, dislike him, you may charge him with corruption or any other offence (but he) cannot be sent for trial...'

After Mr Gilani's ouster from office, his replacement Prime Minister Raja Pervaiz Ashraf had to appear in person in court proceedings in June 2012 to explain what actions were on cards regarding the court's order. Leaders of the lawyer's movement that helped restore the judiciary were concerned that, not only CJP Chaudhry was overstepping Legislature & Executive; he was acting 'too independently.'

The 'Ittefaq' brothers were being given all relaxations instead. Asma Jahangir, former President of the Supreme Court Bar Association, expressed concern that if the judiciary continued to nourish political thinking it would lead to unrecoverable loss. Ms Jahangir argued that when the courts show political bias, the common man loses confidence in the courts.

The court's failure to deal with the corruption charges against Arsalan Iftikhar, the son of CJP Chaudhry, had alarmingly demonstrated the court's bias and double standard in prosecution of corruption cases.

When it was revealed that Arsalan Iftikhar had been involved in corruption, the zealotry of the judiciary, and particularly of the Chief Justice, against the Executive and Legislative branches by issuing orders to investigate, prosecute and arrest on the pretext of eradicating corruption did not happen to his son's case. CJP Chaudhry had availed clear advantage of his position in the judiciary; he had known full well of the corrupt practices of his son and how he had made fortunes in CJP's name.

To suppress the attack on CJP Chaudhry's son, the SC's Divisional Bench stopped the investigation by giving a stay order for the proceedings. Also, to indirectly remind the media - who were exposing those allegations at the time in public, the judiciary imposed de facto censorship. In a petition concerning obscenity, the judiciary entrusted the Pakistan Electronic Media Regulatory Authority (PEMRA) with the role to compel the media to abide by the strict rules on '*guided freedom*' in ***keeping the Islamic identity of the country*** [as Arsalan Iftikhar had accomplished a sacred Islamic act by doing open corruption].

The clash between the Judiciary and PPP did not end with the ouster of PM Gilani from office for contempt of court, seven months after the new in-

cumbent PM Ashraf took and the 27 top officials of the government became the object of judiciary's attack.

On 15th January 2013, the judiciary gave orders to the National Accountability Bureau [NAB] to arrest PM Ashraf in the Rental Power Projects [RPPs]; case HRC No: 7734G of 2009 is referred. That was another explanation that the court neither had the power to give orders to the NAB nor to monitor the progress of their investigations.

The court's justification of its authority to supervise investigations raised serious questions. The court, in the case of *Jogindar Kumar v the State of UP* (1994 (4) SCC 260), also established a judicial precedent in this principle. The judiciary's order for arrest not only usurped Executive power, it was also abrogating its earlier precedents on protection of fundamental rights to fair trial and liberty:

At another stage; the CJP Chaudhry maintained that it can stop the Parliament from making amendments to the Constitution and that legitimizing Emergency Regulations in Balochistan by the military raised concerns for many. On the first concern, if the judiciary claimed its upper hand on the Legislative power, it did reflect that judiciary was superior to the Constitution but the CJP Chaudhry did it despite all reservations.

The position taken by CJP Chaudhry in his son's case had contradicted the court's own decision. The former President SC Bar Association Mr Ahsan held that *'the court can only review amendments of the Constitution made through simple majority for any discrepancy, but amendments passed with a two-third majority cannot be challenged in court.'*

Mr Ahsan once again drew attention as to how the judiciary failed to uphold judicial fairness in the corruption case against CJP Chaudhry's son, Arsalan Iftikhar. The court proceedings on the allegations of corruption against Mr Arsalan and the CJP's alleged complicity to it demonstrated that the judiciary was not impartial and was **"diverting from the prevailing principles of investigation."**

In nut-shell, the political frictions generated by the over-reach of the judiciary during CJP Chaudhry's era, brought more damages for the people of Pakistan. The ultimate goal of the judiciary was known to all but it preferred to be an isolated institution in quest for popular opinion – but till how long.

MIXED FEELINGS WENT ON:

On 13th January 2013, the CJP Iftikhar M Chaudhry, speaking at the annual dinner of the Lahore Bar Association, urged the people not to vote for the parties who were misguiding the people and promoting anarchy.

Clearly, it was unbecoming of a top judge to make statements of the political nature. This was not the first time he had done so. During the hearing of the cases and speaking on similar forums with unprecedented frequency, he had been hitting the headlines on political matters and making no bones about judiciary assuming the role of a saviour. The lawyers' movement that promised the emergence of a new dawn heralding independence of judiciary had only proved to be a transition from one disaster to another. The dream for an independent judiciary had vanished. The testimony to this fact came from a former and the most respected judge of the Supreme Court, Justice (rtd) Sardar Muhammad Raza, who in an article then published in the national dailies frankly admitted that:

'The present judiciary is not independent and the conduct of the judges giving disparaging remarks during the hearing of the cases are also contrary to their code of conduct.'

He impliedly expressed concerns about corrupt judges, talking judges, judges with bias, their bad temper, their prejudices and judges indulging in naked usurpation of the legislative function under the disguise of interpretation of Constitutional Amendments.

An independent judiciary functioning within the constitutional parameters, defined under the principle of tri-chotomy of powers, is universally accepted as a custodian of the constitution, a bulwark against the indiscretions and unconstitutional acts of other institutions of the state and the protector of the fundamental rights of the citizens.

Pakistan's judiciary during CJP Chaudhry's times was supposed to dispense justice according to the constitution and law ensuring that '***it does not transgress into the domain of other state institutions***'. The courts are not supposed to make laws or interpret them in breach of the recognised norms of interpretation or give them meaning to assuage the popular sentiments.

CJP Chaudhry's some judgments, unfortunately; were like the slaps on the face of judicial history. His bench had cast itself in the role of legislators, encroached upon the powers of the parliament in certain cases and shown an irresistible propensity to meddle into the affairs falling within the constitutional jurisdiction of the executive. Fixing the prices of commodities like sugar and petrol; interfering in the postings and transfers of the bureaucracy [*referring to the cases of Hussain Asghar and Sohail Ahmed in FIA and Establishment Division respectively*], restricting development expenditures and other budgetary allocations approved by the parliament and taking *suo motu* notice of everything under the sky had in fact paralysed the functioning of the executive and thus of the political government.

Justifying the intervention of judiciary on the ground that the executive had failed to solve the problems of the people and they look up to the court to redress their grievances, was leading to reincarnation of the doctrine of necessity which the CJP Chaudhry claimed to have buried forever. A celebrity lawyer, Babar Sattar, once said:

"There can be a legitimate debate on the need or scope of a 'political question doctrine' as part of our constitutional law that strikes the right balance between judicial activism and restraint. But to argue that the judiciary intrudes into the province of the executive out of necessity when people look up to the peoples' court in utter helplessness, is just that another doctrine of necessity".

Leaders of the bar associations, Human Rights Commission of Pakistan, eminent constitutional experts, international commission of jurists and some respectable justices from other countries had openly expressed their concern over the phenomenon of judicial activism in Pakistan and its aptitude for an over-reach. A former Judge of the Indian Supreme Court, Justice Karmandey Katju, in the wake of dismissal of PM Gilani, said:

*"How can a court remove a prime minister? This is unheard of in a democracy. **The prime minister holds the office as long as he has the confidence of the parliament and not the confidence of the Supreme Court.***

I regret to say that the Pakistani Supreme Court, particularly its CJ has been showing utter lack of restraint. This is not expected of superior courts. In fact, the court and its CJ have been playing to the galleries for long. It has clearly gone overboard and flouted canons of constitutional jurisprudence."

The constitutional lawyers in Pakistan had been highlighting the indiscretions of the SC conceding that **'the judiciary has indeed been trespassing into the area of responsibility of the other organs and it has also violated internationally recognised principles of jurisprudence and the limits set by the constitution'**.

Even the lawyers who were in the forefront of the lawyers' movement, like Ali Ahmed Kurd, Aitzaz Ahsan and Hamid Khan, had expressed their disappointment over the way the SC was conducting itself in breach of the constitutional provisions.

Not only the CJP Chaudhry, but also some members of his bench, had been enjoying the manifestation of hitting the headlines through their remarks during hearing of the cases having political connotations. The extraordinary interest shown by the media in the proceedings of the SC and expression of unqualified support to its decisions and the conduct of judges was also responsible for the escalating judicial activism. Similarly, the support to the controversial decisions of the SC by the opponents of the government without really bothering to judge the decisions at the touchstone of constitutional norms and principles of jurisprudence had also contributed to this phenomenon and scuttled the chances of seeing a really independent judiciary in Pakistan.

Pakistan's politicians, due to their sheer incompetence, greed, lack of scruples and hereditary succession have never been able to deliver. The vacuum of leadership has to be naturally filled by other institutions; mostly the military and judiciary with the help of media and the legal fraternity. Unfor-

Unfortunately, with the passage of time, the roles of the three institutions have been so corrupted that the concept of separation of powers given in the Constitution has become irrelevant and the lines drawn between the roles and functions of institutions have gone blurred.

The members of legislature are no more enthusiastic about making laws to improve the lot of common man. They are more interested in their share of development funds in hundreds of millions. Pakistan is probably the only country where the entire outlay on development is distributed amongst the legislators. Another role they perform is sitting on the standing committees, technically for legislative oversight of government departments. The only oversight they pursue vigorously, of course through blackmailing the senior bureaucracy, is recruitment of their kins by the ministries under their oversight in violation of all rules of merit. ***The first source of corrupt practices, thus, is the legislative bodies.***

The Executive branch is no better than the Legislature. It is the placement bureau for providing cushy jobs to cronies in government corporations and deciding on major contracts. This branch is headed by the prime minister and an army of cabinet ministers, and a bunch of parliamentary secretaries. Under the political dispensation, it has always failed in management of economy. The burden of debt that each successive government leaves behind is phenomenal. It utterly fails in delivering services, providing security and managing the foreign relations. Major reason behind the failure of political government is that there is no criterion for selecting the ministers. No minister has adequate knowledge of the affairs of a ministry he is supposed to guide and lead.

Historically, the corrective action was always taken by the establishment comprising armed forces, intelligence agencies, bureaucracy and the judiciary. With the advent of the era of terrorism, the armed forces went busy fighting the terrorists and fighting for their own image. The terrorists had somehow successfully divided the nation into pro and anti-terrorism factions depriving the country of any opportunity to form a consensus to fight the menace of terrorism.

The situation left the field open to some other institution to fill in the leadership vacuum. Pakistan's apex judiciary assumed the role of saviour of the last resort in 2009 but soon decided to take over the reign of civilian power themselves. The judiciary, particularly the subordinate judiciary in Pakistan is known for massive corruption. To correct the image, the apex judiciary picked up high-profile cases and ruled the roost with the help of the media. A new phenomenon during recent years; the lawyers ganged up on almost everything and turned into gangsters every time their interests, genuine or otherwise came under threat. An eye-opening report of the ***'Washington Post'*** of **11th November 2012**, told the world that how those self-proclaimed custodians of rule of law took law into their own hands. Their hooliganism conveniently escaped the 'judicial activism syndrome' of the

then CJP Chaudhry who was known to take notice of almost everything happening under the sky.

Hard luck prevailed over Pakistan when the courts and a large section of legal fraternity, persistently pronounced sympathies for the insurgents and terrorists. That was where the differences between the CJP Chaudhry's judiciary and Gen Musharraf started to grow. Every terrorist invariably got released by the courts, ***even those in the custody of intelligence agencies for interrogation.***

The higher court's insistence to follow the due process of law for separatists and terrorists had given it a commanding position over the establishment – by sheer accident. The assassin who killed Punjab's Governor Salman Taseer, ***Mumtaz Qadri, was garlanded by the legal fraternity including some of the senior pro-Taliban lawyers who were subsequently elevated to honourable judges.***

Misfortune over-whelmed; that while every institution of the State should be subjected to some sort of accountability, ***the apex courts had no effective mechanism in place to keep an eye on the judges.*** The accountability institution of superior judiciary – '**the Supreme Judicial Council**', as given in the Constitution, was made irrelevant or redundant by the apex court itself when its Chief Judge himself appeared before it in 2007. It was then made as a power tussle between the Executive and the Judiciary and the top judges ruled the Council to stop its proceedings. ***Since then it is lying as a dead horse in the book of Pakistani Constitution – with no case or proceeding whatsoever.***

In Pakistan, the power tussle amongst its organs started when the apex court tried to establish its supremacy through judicial activism [media called it 'gimmicks'] in cases like missing persons and privatization of Steel Mills in 2006-07. This was something which the governments were not used to. In order to assert its authority, the court started taking *suo moto* notices and in some cases gave land mark decisions which strengthened the confidence of citizens in the court.

The Supreme Court virtually took over the business of governance itself due to incompetent and greedy public representatives. It undoubtedly provided relief to countless but at the same time had challenged the hegemony of power centres - thus becoming a power centre itself. But without a defined scope of activism and a proper mechanism of accountability in the given situation, the CJP Chaudhry's apex court headed on a dangerous trajectory.

The lack of notice of lawyers' hooliganism and amusing conclusion of the case of Arsalan Iftikhar in a non-transparent manner suggested that Pakistan's highest court needed to step very carefully.

Simultaneously; the role of Pakistan's Supreme Court ***under CJP Chaudhry need to be appreciated in keeping a check on rampant corruption [minus his own son Arsalan Iftikhar's case file]***, abuses of power, target killings of citizens, appointment of cronies, role of land or

drug mafia, failure to prosecute extortion collectors and other excesses by elected political executive and civil bureaucracy, that ravaged this country and destroyed its economy. Most politicians who played the role of vultures, indulging in massive unchecked loot and plunder, fearing accountability, had embarked upon scandalizing their judiciary when felt needed.

The fact remains that there were no angels sitting on benches of Pakistan's superior judiciary, men with human weaknesses, but compared to other public officeholders, they were much better than others and enjoyed more credibility than any other organ of state. **When FBR failed** in performing its sole primary objective to collect taxes from all those who earned above a certain level, it was the Supreme Court which intervened to reprimand them, not the executive, or NAB.

When hundreds of containers, loaded with contraband smuggled goods and weapons, were off-loaded at KPT and **went missing**; it was not Customs, Coast Guard or KPT Security, but SC of Pakistan which took *suo motu* notice of that criminal act.

The superior judiciary had taken note of **fleeing of Hajj & Umra** passengers; the institutionalised vandalising of state corporations like OGDC, OEBI, PIA, PSO, NICL, CAA, PEPCO etc, it was none other but SC, which intervened in the national interest. The critics of judicial activism could first take note of plunder by those who were supposed to act as guardians of state assets, not to assume role of robbers. Had the executive and public servants performed their constitutional roles, there would have been no need for SC to intervene.

As per statistics appeared in **'The Express Tribune'** dated **16th October 2013**; there were over 20,000 cases awaiting adjudication in the Supreme Court of Pakistan since September 2012. As many as 45,040 complaints were filed with the Human Rights Cell of the SC between September 2012 and September 2013; around 17,577 were yet to be disposed of. Legal experts cited *suo motu* activity as the main reason for the huge backlog.

Justice (rtd) Tariq Mahmood suggested the cases be equally distributed among different benches of the top court to clear the backlog. Vice President of Pakistan Bar Council [PBC], Qalb e Hassan, insisted that the judiciary could have followed an equilibrium for *suo motu* to bring a balance in day to day routine working of the apex court.

The Supreme Court disposed of 18,927 cases pending since September 2012 shrinking the backlog to 20,911. Some 8,282 cases brought up before the bench in Islamabad; 7,823 cases were decided. **The Lahore registry** received 6,964 new cases, but 8,348 were adjudicated in total – indicating a little clearance of back log too. Around 1,132 cases were filed in **the Karachi registry** of which 972 were decided. **The Peshawar registry** received 1,299 new cases and 1,314 cases were decided including some old ones. Similarly, **the Balochistan registry** took up 438 new cases and decisions were handed down in 470 cases including some old ones. Some 11.75 million cases have been decided by different courts in Pakistan since

June 2009. Of these, 11.56 million were taken up by the courts post-2009, resulting in the backlog reduction of 184,142 cases.

The National Judicial (Policy Making) Committee sent formal requests to the government to increase the number of judicial officers and strengthening the court infrastructure. However, only the demand of Lahore High for 317 posts of ADJs and 696 posts of Civil Judge - Judicial Magistrates were adhered to by the government of Punjab and initially an amount of Rs: 1 billion was sanctioned for that purpose with future commitments. The other provinces went blank under this head.

J KHOSA'S DARING PRECEDENT:

There have been several attempts to infuse a sense of accountability into the functioning of Pakistan's judicial system. The most aggressive of such attempts was made during enactment of the 18th Constitutional Amendment, which proposed a change in the judicial appointment process. Through the said Amendment (insertion of Article 175A of the Constitution), all political parties agreed that the appointment of a judge to the superior Courts must go through a rigorous process of being approved by a Judicial Commission [JC] and a Parliamentary Committee [PC].

The expressed intention of the legislature was that through this procedure, a certain degree of transparency could be instilled in the judicial appointment process, and that review by the PC would allow the 'people' to have a say in choosing their superlative arbitrators.

The Amendment was challenged before the apex court [*or it was managed by the CJP & Registrar SC to be challenged*], on the ground that the insertion of this new method of judicial appointment could violate the sacred principle of 'independence of judiciary'. It was finally resolved that judicial accountability could only be entrusted to members of the judiciary itself.

Thus, any move of 'outside' accountability of judicial conduct was curbed through issuance of contempt notices to those 'rude' persons who dared to question the Court's conduct. Even the Parliamentary Accounts Committees [PACs] were barred to look into matters of **Court expenditures and material assets of the honourable Judges.**

It was CJP Chaudhry's assertive interpretation that '*all judicial accountability must rest with the judges alone*', and any attempt of outside interference in this regard would undermine the ***independence of judiciary.***

Since then, no one dared to point out any corrupt judge – so much that Dr Arsalan’s case has not been re-investigated after CJP Chaudhry’s departure.

The CJP Chaudhry’s person left legacy of unchecked judicial superiority, even beyond the boundaries of law and the Constitution. Later, it was courageous Justice Asif Saeed Khosa of the same Supreme Court, who authored in early days of 2014, a passionate and scholarly judgment that, inter alia, discussed and held a Judge of the Lahore High Court [LHC] accountable for the exercise of his judicial discretion - the misapplication of law concerning bail matters.

[The bail application of a person convicted for murder (pending appeal), was filed before the LHC and dismissed for non-availability of the Petitioner, or his counsel. Subsequently, another application was filed by the same convict, and was withdrawn prior to decision "after arguing the case at some length", apparently for the reason that the honourable Judge was not inclined to grant bail.

*Thereafter, within a few weeks, another bail application was moved before the same Judge, on exactly the same grounds as before, and bail was granted. In this last application **"the only difference... was a different learned counsel..."**. In appeal, Justice Khosa found this granting of bail to be **"somewhat colourable"**; because once a bail has been rejected on merits, a new bail could only be moved on "fresh grounds".]*

Against this observation [**colourful exercise**] of Justice Khosa, a review was filed by that Judge of the LHC, praying for expunction of the said remarks which was dismissed by another bench of the SC. He was the same Justice Khosa who was seen with a voice of reason in the 18th Amendment case.

During the CJP Chaudhry’s days, there was not even a remote possibility for intelligentsia to speak on the conduct of judges; later the SC was able to bring back its house in order. Without a tinge of accountability of judicial conduct, the affluence of a just social order goes bleak.