

Scenario 33

DECLINE IN JUDICIAL VALUES:

At the outset one can say that major causes of decline in judicial respect have been the personal rifts and aversions among the judges coupled with tendencies of staying in judiciary for long times. External factors were never been as responsible as widely pre-empted.

If one can afford to sit in any High Court Bar for instance, he would find tens of remarks emanating from all the corners describing alleged stories about corrupt judges. They themselves feel embarrassed some times when a nexus between a particular judge and a specific law chamber is openly discussed, may not be true, but at least speaks about minds of the bar members. Those bar members are mostly the perspective candidates for being a judge of the same high court in near future.

Political affiliations of bar members are always open and make their way to the possible slots in higher judiciary when their parties come in power but seldom they discuss about the positive virtues their colleagues possess being the bar members; the stories, however, travel along.

Due to political affiliations referred above, the petitions and cases carrying political issues decided in the superior courts have always been considered controversial because the opponent bar members normally do not accept the judgments whole heartedly. A case about a judge's alleged corruption can be referred to the Supreme Judicial Council but till today only four cases could be sent there; one against J Fazal Ghani of Peshawar High Court; one against J Shaukat Ali of Lahore HC and the other two against J Ghulam Safdar & J Iftikhar M Chaudhry were referred to on political grounds.

It has been a topic of high debate that if a senior civil servant can be tried for 'living beyond means' then why a judge or General cannot be taken through the same mill on same like charges.

In the past, the practical way of appointment of judges remained varied and above the provisions given in the framework of Judge's Decision of 1996 or a change adopted in SC's decision of 2002. Most of the times the heads of political parties especially the Pakistan Peoples Party (PPP) and both Pakistan Muslim Leagues, [PML(N) & PML(Q)], whenever they came in power, tried to bring their own party supporters belonging to the lawyer community as judges of higher courts. [*When these key parties were out of government, the military rulers also did the same.*] They used to bribe, pay back or compensate their associated party workers and on the other side, mostly jeopardized and compromised with the demands of justice by showing their sympathies with the political parties they belong secretly and sometimes quite openly.

In Pakistan, whenever the political governments changed hands, the Governors of the provinces made out a list of perspective judges and handed over to their respective chief justices for inclusion in their lists. The chief justices used to express a little say in acceptance of those names. What happened; we all got a corps of political judges.

Whenever a military dictator took over, he never bothered to get any list from their governors even. The ISI and MI made lists for them and the only quality considered was their 'loyalty to the army' and the presence of germs of 'PCOship behaviour' in the candidates. In our country, it was because after taking oath, those judges had to complete uphill tasks of issuing green slips to the CMLAs cum Presidents for acceptance, their nominated Prime Ministers and

their teams in corruption cases placed before them. Our history is jam-packed of tens of such examples if we start counting.

For instance; the name of Maulvi Mushtaq Hussain cannot be scrapped from the judicial history of Pakistan for being accused of 'judicial murder' of PPP's founder Z A Bhutto. The grudge was that during Z A Bhutto's rule, he was not considered for the slot of Chief Justice Lahore High Court due to certain reasons. When Gen Ziaul Haq took over in July 1977 he picked him as his main representative in Judiciary by awarding him the top slot in the name of compensation. Mr Maulvi repatriated the blessings of Gen Ziaul Haq by taking his 'rival' through a shabby judicial process putting all judicial norms at stake.

The next stage of Bhutto's case was in the Supreme Court. J Yaqub Ali was the Chief Justice of Pakistan since 1st November 1975, He was a great believer in democracy and the then military dictator Gen Ziaul Haq knew it well. Thus the CJP Yaqoob Ali was forced to retire by the General on 22nd July 1977. Justice Yaqub Ali had held a previous martial law by a usurping General *ultra-vires* to the Constitution of Pakistan declaring that '*martial law undermines concept of the rule of law which is the basis for a Constitution*'.

The usurping Gen Ziaul Haq had realised that his illegal actions would be overturned in the superior court of law headed by a Judge who believed in democracy so he proposed certain amendments to force the Chief Justice of the Supreme Court to retire. In fact, Gen Ziaul Haq did not just stop there but went further on to remove his like minded judges, too.

Gen Ziaul Haq then brought Justice Anwarul Haq as the CJP who later headed a bench to hear the appeal of Z A Bhutto. One Justice Nasim Hassan Shah was a member of that bench of seven judges who had upheld the decision of Bhutto's death sentence. When Justice Shah became Chief justice, his favourable tilt towards Nawaz Sharif's Muslim League and his antipathy towards Pakistan Peoples Party (PPP) were well known. He had exchanged harsh words with his CJ Afzal Zullah when the later had once received Benazir Bhutto at a function being an opposition leader. J Nasim Hassan Shah had headed the bench which restored Nawaz Sharif's government in May 1993.

Why Justice Nasim Hassan Shah was against the PPP could be traced back; he had been humiliated during Benazir Bhutto's first tenure when she had refused to sit on the same table with him. The reason was that Nasim H Shah was one of the justices who had upheld the death sentence of Benazir's father Zulfikar Ali Bhutto in 1979. Benazir Bhutto could be condoned for being in her very young age dominated by her father's tragic treatment at the hands of judiciary whereas J Nasim Hassan was a mature member of the superior court; should have been above bias and prejudices.

Thus the military guided judicial process which was given start by Maulvi Mushtaq, CJ of the Lahore High Court and upheld by another stooge CJP Anwarul Haq ended at gallows of Rawalpindi Central Jail. However, the history remembers all the three characters with different connotations. The echo will continue to sound all the hails & praises for Z A Bhutto and curses for the two judges for all times to come.

Going deep into the decline of judicial values, one can say that first visible dent was seen on 5th July 1977 when Gen Ziaul Haq had toppled Mr Bhutto's government. **Justice Fakhruddin Ebrahim** told during an interview, published in daily '**Jang**' of 16th May 1999, that:

'Immediately after promulgation of Martial Law, Gen Ziaul Haq got worried about the possible reaction of judiciary. At 3 AM Gen Ziaul Haq got the then Federal Law Secretary, Abdul Haye Qureshi, on phone line and asked him that how the judiciary would react as he was going to abrogate the Constitution. Gen Zia also told Mr Qureshi that he wanted to elevate all the four chief justices as governors of the respective provinces. At about 5.30 AM, Mr Qureshi had confirmed back to Gen Ziaul Haq that all the four CJs had agreed to go for Acting Governors – well done, the General had replied.'

Thus when the custodians of law had become Acting Governors, who was there to take care of the Constitution of 1973 under which a General could be challenged.

In early 1993, relations between Prime Minister Nawaz Sharif and president Ghulam Ishaq Khan deteriorated quite rapidly and Khan was planning to ouster Sharif. Some statements attributed to the then CJP Afzal Zullah indicated that judiciary may act to counter president's move. President waited till 18th April 1993; the day of retirement of the chief justice. In a very curious development, chief justice on the very day of his retirement was on a plane heading out of the country. Justice Nasim Hassan Shah was sworn in as Acting CJP; the President took decision at the same moment sending Nawaz Sharif home & ordering the National Assembly to pack up and to vacate the chambers.

The judicial crisis of 1997 severely damaged country's image and judiciary's reputation. A reckless civilian prime minister and his cronies clashed head on with an equally reckless chief justice of the Supreme Court. The trouble between judges of the Supreme Court had been brewing over a long time. The enmity had taken start in 1993, when Justice Sajjad Ali Shah had given the lone dissenting opinion in the judgment in which the Supreme Court had restored Sharif's government by a majority decision. Two judges; Muhammad Rafiq Tarar and Saeeduzzaman Siddiqui had asked the Chief Justice Nasim Hassan Shah to take disciplinary action against J Sajjad Ali Shah for the language he used in his dissenting note.

Referring to '*Judicial Jitters in Pakistan*' by Hamid Hussain published in the ***Defence Journal of June 2007*** issue; the row between the Chief Justice Sajjad Ali Shah and Justice Saeeduzzaman Siddiqui [*for calling the Supreme Court proceedings in all its registries to halt on the point that the CJP had gone abroad and there was no Acting CJ in the country*] was quite an odd instance and uncalled for. The event has been mentioned in detail earlier which nurtured a rift between the two judges for a long time because on his return from foreign tour the CJP Sajjad Ali Shah had conveyed his disapproval in writing. The same Justice Saeeduzzaman Siddiqui became the champion of democracy when in 2000 he was not called to take oath as Chief Justice of Pakistan or he had declined to take oath under Gen Musharraf's PCO; the result was the same – going home.

It had been a tradition in the Supreme Court that whenever there was some internal problem or grave disagreement, the court used to call a full court meeting to find out solution. In those days the CJP Sajjad Ali Shah had developed a habit of issuing press statements, holding media meetings and seeing the senior executives wherever he went. When in Lahore, the CJP Sajjad Ali Shah used to have dinner with the Chief Minister Shahbaz Sharif and paying visit to Raiwind Palace to see (late) Mian Sharif but those dinners could not save him from disaster of November 1997 when the Supreme Court was attacked and he was sent home in an un-ceremonial way.

Similarly the CJP Sajjad Ali Shah used to keep constant liaison with Mr Jatoi and Gaus Ali Shah etc when on Sindh or Karachi's tour, whereas all the other judges were upset. The judges wanted to call a meeting for discussion on such issues. The CJP Sajjad Ali Shah never called or encouraged any such meeting because of expected humiliation on account of lack of support.

When in 1997, the Chief Justice Sajjad Ali Shah had gone to Saudi Arabia for *Umra* and J Saeeduzzaman was in London, Justice Ajmal Mian being the senior most in country had called that full court meeting. The CJP Shah came to know of it in Saudia, he immediately rushed back without performing *Umra*.

During the same days, when the CJP had developed some differences with the Chief Justice Lahore HC Sh Riaz Ahmed, he simply promoted him to join the Supreme Court where he had to work as a junior judge.

It is on record also that CJP Sajjad Ali Shah had moved for change in his date of birth when he was just near retirement. Later it transpired that the 'date of birth issue' was only orchestrated to keep the official residence of the CJP in Rawalpindi under use which otherwise should have been vacated within three months. What a way to earn respect from the junior colleague judges.

Sometimes people occupying high offices act in a childish manner embarrassing not only the high office but also the country. In August 1997, the CJP Sajjad Ali Shah recommended elevation of five judges to the Supreme Court without consulting with the executive. Nawaz Sharif's government in return issued an order duly signed by the President of Pakistan reducing the strength of the Supreme Court from seventeen to twelve. Few days later the Chief Justice, while presiding a three member's bench, had suspended the notification and the government withdrew the same.

Once the Supreme Court's judges, rather than brainstorming about legal issues, were found clashing with each other about the colour of the Supreme Court flag. One Chief Justice had arranged for the inauguration of the incomplete building of the new Supreme Court because he wanted to be in the limelight before his retirement.

J BHAGWANDAS CALLED IN DOCK:

Sometimes the judges themselves have provided good material to the general populace for stunning jokes. Even if their appointments were made on merits but they were not ready to tolerate each other. One episode from the judicial history of Pakistan was the appointment of Rana Bhagwandas, a judge of the Sindh High Court, which has another kind of story behind it. A petition was filed before a Division Bench of the Sindh High Court challenging an order of the Income Tax Appellate Tribunal in Karachi. The Division Bench which heard the case was presided over by Justice Rana Bhagwandas and Justice Sabihuddin Ahmed, and the appeal was dismissed.

The petitioner then filed a constitutional petition (No: 1069/1999) against the Government of Pakistan to declare the bench unconstitutional as Justice Bhagwandas was Hindu and only Muslims could be appointed to the superior judiciary. On 1st September 1999, the Chief Justice of the Sindh High Court ordered a full bench to hear that petition challenging the appointment of a non-Muslim judge. The bench, comprising Justice Dr Ghous Mohammad, Justice Abdul Hameed Dogar and Justice Roshan Essani, on the first instance, directed the petitioner to amend the title of the petition by incorporating the name of Justice Rana Bhagwandas as another respondent. It was because the petitioner, Shafi Mohammadi, himself a former judge of the Sindh High Court and Federal Shariat Court, had made the state, through secretary of Ministry of Law and Parliamentary Affairs, the sole respondent.

The petitioner, inter alia, had also prayed to the court to restrain Rana Bhagwandas from working as a judge of the high court till disposal of the case. He had also prayed to the court to hold back the then high court judge, Justice Ms Majida Rizvi, from sitting over the cases involving Hudood and Qisas matters because she was a lady.

United Nation's representative on human rights in Pakistan Asma Jehangir regretted the petition against appointment of Justice Bhagwandas on account of his faith. In a Press statement, she said religion and patriotism had time and again been used to advance mischief in the country. She said Sindh High Court's decision to issue a notice to the sitting judge had eroded the image of Pakistani judiciary. The decision to constitute a full Bench to determine the constitutionality of the judge's appointment on the basis of his belief or religion was unwise as it had implications for the independence of judiciary and the rights of minorities. She was hailed for pointing out the mischief caused to Pakistan in the name of faith.

Challenging Justice Bhagwandas's appointment was another step towards intimidating individuals and institutions into subjugation. Religious minorities and women's rights groups had much to lose from such acts. The case was heard on 22nd September then on 19th October 1999 but the irony of fate was that the judgment was kept reserved till the judge Bhagwandas, who was in fact next in line to be the chief justice of that High Court, was transferred to the Supreme Court.

SC JUDGE'S SENIORITY ISSUE:

Second episode came in the first week of February 2002, when the Pakistan media published reports regarding a dispute over seniority, which had arisen among the Supreme Court judg-

es. Justice Iftikhar M Chaudhry had questioned the seniority of Justice Nazim Hussain Siddiqui in writing. Justice Chaudhry, who expected to become Chief Justice of Pakistan from July 2005 for about eight years, had made a representation to the CJP asking him to correct the seniority list.

According to his viewpoint, Justice Chaudhry would have assumed the charge two years earlier, from July 2003, and his tenure would end on 12th December 2013. The compulsory retirement of Justice Rashid Aziz Khan had given rise to that seniority dispute. Had Justice Aziz remained on the bench, Justice Nazim Siddiqui had no chance to become the chief justice. Justice Siddiqui was part of the seven-member bench which declared Justice Rashid Aziz Khan and Justice Malik Qayyum biased against former Prime Minister Benazir Bhutto in famous Cotecna case in which *Saif ur Rehman Ehtesab* used to convey them explicit directions.

Un-ceremonial removal of Justice Rashid Aziz had paved the way for Justice Siddiqui to become aspiring expectant for the post of chief justice. He had contended that he and Justice Chaudhry were elevated as SC judges on 4th February 2000. Their date of appointment as chief justices of Sindh and Balochistan high courts respectively was the same, 22nd April 1999. Justice Chaudhry was of the view that under Section 8(4) of the Civil Servants Act 1974, seniority had to be reckoned from the date of elevation as judges in the respective high courts.

Justice Chaudhry contended that Justice Siddiqui was junior to him, as he {J Iftikhar Chaudhry} was elevated as Balochistan High Court judge on 6th November 1990, whereas Justice Siddiqui was elevated as Sindh High Court judge on 22nd March 1992. After two years as ad hoc judge, Justice Siddiqui was not confirmed. However, after the lapse of two months, Justice Siddiqui was reappointed as SHC judge on 5th June 1994. Justice Chaudhry contended that Justice Siddiqui was elevated as judge of SHC on 5th June 1994, and was junior to him. Justice Chaudhry had also cited certain case laws on the subject to support his contention that seniority in such situations would be determined on the basis of original date of induction in service.

As a result, Justice Iftikhar Chaudhry got his seniority as he deserved.

Another row for CJP's slot: Justice Falak Sher was appointed a judge of Lahore High Court on 11th March 1987 and elevated to Supreme Court on 6th July 2002. After retirement of Chief Justice Nazim Hussain Siddiqui, by virtue of being the **longest serving justice on the Supreme Court bench** at the time, Justice Iftikhar M Chaudhry was appointed as next Chief Justice. Justice Iftikhar was appointed a justice of Balochistan High Court in 1999 and was elevated to Supreme Court on 4th February 2000.

Justice Falak Sher maintained that he was senior to Justice Chaudhry based on their respective elevation to High Courts and should be appointed as Chief Justice of Pakistan. On appointment of Justice Chaudhry as Chief Justice, he petitioned the President of Pakistan on that account for which no decision was made.

During the hearing of the Presidential reference against Justice Iftikhar M Chaudhry in March 2007, Justice Falak Sher declined to sit on the full bench hearing the case. He stated that *'on account of seniority and being the senior-most judge in the country, it would be improper for me to hear a case in which the chief justice is a party, who like other judges of the Supreme Court is junior to me from four to nine years'*.

Another fact from the recent history of Pakistan's judiciary: A constitutional petition was moved by Sindh High Court Bar Association (SHCBA) against the appointment of judges on permanent basis and extension of their tenures by terming that the said order was issued without consulting the Chief Justice of Sindh HC. The notification was issued for converting appointment of Justice Bin Yameen to permanent basis on his post as Justice of Sindh High Court, and the extension of the tenures of Justice Arshad Noor Khan and Justice Peer Ali Shah for further six months.

While expressing his satisfaction over such order, President of Sindh High Court Bar Association Rasheed A Rizvi, told the media representatives that after the success of lawyer's move-

ment, they would not fight on roads for the independence of judiciary, however, if the state challenges the Sindh HC order in Supreme Court, they will go against them. The decision was given on the basis that in respect of three alleged justices there was no disagreement of opinion.

Old stories lost with the time. After reinstatement of CJ Iftikhar Chaudhry and his colleague judges on 16th March 2009, the situation changed suddenly. The first instance came up in the first week of May 2009, when a petition against Justice Arshad Noor Khan of the Sindh High Court was dismissed by a full bench comprising of Justice Khilji Arif Hussain, Justice Maqbool Baqar, Justice Gulzar Ahmed and Justice Faisal Arab.

But these are the tales from most of the third world countries. Take an example from India where on 28th November 2009, the Supreme Court of India, stayed the Central Information Commission's (CIC) direction asking it to make public an information pertaining to appointment of three junior judges to the apex court by superseding senior judges.

Not only this, in a separate petition the Indian Supreme Court also issued a stay in another CIC's order which had directed disclosure of a talk between the Chief Justice of India and Justice R Raghupathy of Madras High Court (MHC) on an alleged interference by a union minister in a subjudice matter. Interestingly, deviating from the normal practice which was adopted by the SC in an earlier case on the assets declaration issue, the apex court this time reflected differently sidelining the Delhi High Court where appeals against the CIC's order were filed.

The background was that on 25th November 2009 the CIC had said that appointment of judges is a 'public activity' which cannot be withheld from disclosure and asked the apex court registry to make public the records relating to appointment of three apex court judges who had superseded their seniors. CIC had passed these orders on Subhash Chandra Agrawal's petition seeking complete correspondence between authorities concerned relating to appointment of Justices H L Dattu, A K Ganguly and R M Lodha superseding seniority of Judges A P Shah, A K Patnaik and V K Gupta. The petition had said that the whole process was allegedly objected to by the Prime Minister's Office.

*[It is on record that one Justice Raghupathy of MHC, a few weeks back, had alleged in an open court that a Union Minister's lawyer spoke to him on telephone seeking favours in a case being probed by CBI. The CIC in a separate order had directed the apex court to reveal the name of that Union Minister and secondly, the complete correspondence with Chief Justice of India concerning that issue.] (Ref: **Indian Express dated 4th December 2009**)*

Coming back to Pakistan; the sitting CJP Iftikhar M Chaudhry when rejoined the Supreme Court in March 2009, started with good intentions with all his colleague chief justices in provinces. Soon he felt that his name sake CJ LHC Ch Iftikhar Hussain was not giving him 'due respect' whereas the CJ LHC held opinion that the CJP Iftikhar M Chaudhry had allegedly 'interfered' in LHC's affairs.

[The CJ LHC Ch Iftikhar Hussain had somewhere negatively mentioned about the protocol issue which was interalia included in the judicial reference made to the Supreme Judicial Council by Gen Musharraf against the CJP Iftikhar M Chaudhry in March 2007]

CJP Iftikhar M Chaudhry was also blamed for rejecting some names of would be judges recommended by the CJ LHC. The cold war between the two CJs went so high that once the CJP had to summon two judges of the LHC named Justice Akhtar Shabbir and Justice Sh Rasheed and asked them to show 'judge like' behaviour. That was the breaking point after which the two CJs did not like to communicate each other directly.

The same kind of cold relationship was also seen between CJP Iftikhar M Chaudhry and the CJ Baluchistan High Court (BHC) Justice Amanullah Yaseenzai because the later had manoeuvred to call the examination papers of CJP's son Arsalan Iftikhar against an alleged complaint.

Justice Jehanzeb Rahim of Peshawar High Court was also angry with the CJP Iftikhar M Chaudhry because the later had once given a verdict against Justice Jehanzeb Rahim in a case in which he had row with his own mother in connection with their ancestral property.

All these judges were approached by Gen Musharraf's secret team to bring and manage their complaints against the CJP Iftikhar M Chaudhry; that was why Justice Jehanzeb Rahim's name was also mentioned in Gen Musharraf's reference of 9th March 2007 against the CJP.

During hearing of the same judicial reference of March 2007, affidavits submitted by Gen Hamid and Gen Nadeem Ejaz of MI had categorically mentioned that **'the CJP wanted certain judges of LHC and Sindh HC to be sent home'**; but not considered worth by the SJC being without any mention of evidence.

It was also mentioned in affidavits that the CJP Iftikhar M Chaudhry used to get secret reports about their colleague judges through the civil and military intelligence agencies; also given therein that the CJP was fond of protocol of high stature. He always expected to be received by the SP / SSP of each district at the boundary of his jurisdiction if and when the CJP travelled. Practically it was not possible nor it is anywhere written in the 'blue book of protocol' under which the SP / SSP sets his protocol plans.

There were many more flimsy charges like above in the reference sent by Gen Musharraf to the SJC; nothing was believed or taken seriously but the whole game was being supervised to create rift amongst the judges of the superior judiciary, to which extent they went successful.