

## Scenario 65

### **PCO JUDGES CASE (2009-11):**

After promulgation of Emergency and PCO Order on 3<sup>rd</sup> November 2007, Justice Abdul Hameed Dogar, a judge at no: 4 in the seniority list then, immediately took oath as Chief Justice of Pakistan along with three other judges of the Supreme Court on the same evening.

**On 23<sup>rd</sup> November 2007**, CJ Hameed Dogar and the newly constituted bench consisting of J Ijaz-ul-Hassan Khan, J Qaim Jan Khan, J Musa K. Leghari, J Ch. Ijaz Yousaf, J Akhtar Shab-bir and J Zia Pervez declared that all judges, including the defunct CJ Iftikhar M Chaudhry were deemed to have been removed from the bench. In a later development, **on 3<sup>rd</sup> December 2007** the federal government issued notification of removal of three judges named CJ Iftikhar M Chaudhry, J Rana Bhagwandas and J Khalil ur Rehman Ramday without any retirement privileges.

**On 21<sup>st</sup> March 2009** when Mr Justice Dogar retired as CJP, the Chief Justice Iftikhar Chaudhry was notified as restored to the bench as Chief Justice of Pakistan and Mr Dogar was considered as a De-facto Chief Justice rather than De-Jure.

In the whole scenario developed after '**Black Coat Long March**' of 15-16<sup>th</sup> March 2009, the Sharifs [who were once the mobilisers for attacking the same Supreme Court in November 1997] projected themselves as champions of independent judiciary because they had en-cashed the opportunity of joining the Lawyer's March from Lahore which went successful due to blatant blunders of the Federal government and Interior Minister Rehman Malik. The Sharifs were intelligent enough to brew their success to restore their reputation out of follies of the PPP's political elite running the state affairs who had managed to block the way of 14 judges aggrieved by Gen Musharraf.

**On 31<sup>st</sup> July 2009**, the Supreme Court of Pakistan declared the steps [*promulgating 'Emergency'*] taken on 3<sup>rd</sup> November 2007, by Gen Musharraf as illegal and unconstitutional under the Article 279 of the Constitution. The judgment came after the 14-judge larger bench headed by CJP Iftikhar Chaudhry completed hearing of the constitutional petitions regarding PCO judges and appointments of judges of higher judiciary after Emergency of November 2007.

The short judgment released also stated that the results of general elections held on 18<sup>th</sup> February 2008 would enjoy the judicial protection and that President Asif Ali Zardari would not take a fresh oath again. Lawyers and advocates celebrated the announcement made by the apex Court. Gen Musharraf was summoned by the court, but his lawyers did not appear on various pretexts.

Going into details: Article 62(f), inserted by the dictator Gen Ziaul Haq and Article 63(i)(p), inserted in the Constitution through the infamous LFO of Gen Musharraf, were considered the most disliked and undesirable provisions, which had defaced Pakistan's legislative history. However, these provisions could only be repealed by the parliament, and not by the courts.

The main theme of concluding paragraphs [**NOT VERBATIM**] of the short order penned down by the CJP Iftikhar M Chaudhry were:

#### **Paragraph 18:**

i) Gen Musharraf, in the garb of Emergency plus and the Provisional Constitution Order (PCO) made amendments in the Constitution by self acquired powers which all are unconstitutional, unauthorized, without any legal basis, hence, without any legal consequences;

ii) Mr Justice Abdul Hameed Dogar, took oath as CJP in violation of the order dated 3.11.2007 passed by a 7 member Bench headed by de-jure Chief Justice of Pakistan and in pursuance of unconstitutional instruments introduced by Gen Musharraf, additionally knowing well that the office of Chief Justice of Pakistan was not lying vacant;

iii) Also, the Judges who were either retired or were not holding any judicial office, beside those in High Courts took fresh oath on their appointment on and after 3.11.2007 till 15.12.2007 in Supreme Court where the full strength of Judges along with an Ad-hoc Judge appointed under the Constitution were already working and thus there was no vacancy. Similarly, many Judges took oath in Provincial High Courts. All of them did so in violation of order dated 3.11.2007 passed by 7 member Bench headed by de-jure CJP. Four incumbent Judges already functioning in the SC took fresh oath under unconstitutional steps of Gen Musharraf;

iv) The Petition 73/2007 filed by Justice (Rtd) Wajihuddin Ahmad challenging the eligibility of Gen Musharraf to contest for the office of President in uniform was dismissed purportedly on merits although the record maintained in the Supreme Court revealed otherwise;

v) The decisions in the cases of Tikka Iqbal Muhammad Khan granting validity to the actions of Gen Musharraf were without any legal basis hence, of no legal consequences;

vi) The amendments in the Supreme Court (Number of Judges) Act 1997 by way of Finance Act 2008 raising the strength of Judges in Supreme Court from 17 to 30 was unconstitutional because the strength of Judges of Supreme Court could be increased by Parliament as defined in Article 50 to be read with Article 260 of the Constitution;

vii) Powers to amend the Constitution were acquired by Gen Musharraf himself through the PCO and brought a host of unconstitutional amendments for his own benefits; and

viii) The present restoration of the CJP and the higher judiciary with effect from 3<sup>rd</sup> November 2007 implied that the government has denied the validity of the actions of Gen Musharraf taken from 3.11.2007 to 15.12.2007 during which the Constitution remained suspended.

19. Considering the above in the light of submissions of learned counsels and of material placed before us, the petitions are disposed as follows.

20. The judgment purported to have been delivered in Constitutional Petitions No: 87 & 88 of 2007 in TIKA IQBAL MUHAMMAD KHAN Case and the judgment dated 15.2.2008, purported to have been passed in C.R.P.No.7 of 2008 in the same case and other orders, if any, passed on the strength of the said two judgments are hereby declared to be void *ab initio*.

21. The Proclamation of Emergency issued by Gen Musharraf as the COAS (as he then was) on 3<sup>rd</sup> November 2007; the PCO Order No.1 of 2007 issued on the same date; the Oath of Office (Judges) Order of 2007 dated same; the PCO (Amendment) Order 2007 issued on 15.11.2007; the Constitution (Amendment) Order 2007 [President's Order No.5] dated 20<sup>th</sup> November 2007; the Constitution (Second Amendment) Order 2007 [President's Order No.6] dated 14<sup>th</sup> December, 2007; the Islamabad High Court (Establishment) Order 2007 dated

14th December 2007 [President's Order No.7]; the High Court Judges (Pensionary Benefits) Order 2007 [Presidents Order No.8]; the Supreme Court Judges (Pensionary Benefits) Order 2007 [President's Order No.9] dated 14th December 2007 are hereby declared to be unconstitutional, *ultra-vires* of the Constitution and consequently being illegal and of no legal effect.

22. As a consequence thereof:

i) The Chief Justice of Pakistan; the Judges of the Supreme Court; any Chief Justice of any of the High Courts and the Judges of the High Courts who were made dysfunctional in pursuance of above mentioned judgments or instruments mentioned in para 21, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration;

ii) It is declared that the office of the Chief Justice of Pakistan never fell vacant on 3<sup>rd</sup> November 2007 thus the appointment of Justice Abdul Hameed Dogar as the CJP was un-constitutional; void *ab initio* and of no legal effect; Provided that the said unconstitutional appointment of Justice Abdul Hameed Dogar as the CJP shall not affect the validity of any administrative or financial acts performed by him or of any oath made before him;

iii) Since Justice Dogar was never a constitutional CJP, therefore, all appointments of Judges of the Supreme Court, of the Chief Justices of the High Courts and of the Judges of the High Courts made, in consultation with him, during the period from 3.11.2007 to 22.3.2009 are hereby declared to be unconstitutional, void *ab initio* and of no legal effect and such appointees shall cease to hold office forthwith; Provided that the Judges so unconstitutionally appointed to the SC while holding the offices as Judges of any of the High Courts shall revert back as Judges of the respective High Courts subject to their age of superannuation and likewise, the Judges of the High Courts, who were District and Sessions Judges before their said un-constitutional elevation to the High Courts shall revert back as District and Sessions Judge;

iv) The Judges of the Supreme Court, if any, the Chief Justices of the High Court, if any, and the Judges of any of the High Courts, if any, who stood appointed to the said offices prior to 3.11.2007 but who made oath or took oath of their respective offices in dis-obedience to the order passed by a 7-Member Bench of the Supreme Court on 3.11.2007 in C.M.A.No.2869 of 2007 in Constitution Petition No.73 of 2007, shall be proceeded against under Article 209 of the Constitution.

The Secretary Law Division shall take steps in the matter accordingly; Provided that nothing hereinabove shall affect those Judges who though had been appointed as Judges / Chief Justices of any of the High Courts between 3.11.2007 to 22.3.2009 but had subsequently been appointed afresh to other offices in consultation with or with the approval of or with the consent of the Constitutional CJP;

v) Any judgments delivered or orders made or any decrees passed by any Bench of the Supreme Court or of any of the High Courts which comprised of or which included the afore-described Judges whose appointments had been declared void *ab initio*, are protected on the principle laid down in MALIK ASAD ALI'S CASE (PLD 1998 SC 161);

vi) Since the Constitution (Amendment) Order 2007 [President's Order No.5] and the Islamabad High Court (Establishment) Order [President's Order No.7] establishing IHC for the Federal Capital Territory, have been declared to be un-constitutional and of no legal effect, therefore, the said IHC shall cease to exist forthwith.

All judicial matters pending before the said High Court before the passing of this order shall revert / stand transferred to the courts which had jurisdiction in the said matters before the promulgation of said President's Orders No.5 & No: 7 of 14th December 2007.

The Judges, officers and employees of the said Court shall, as a consequence thereof, cease to be Judges, officers and employees except those who prior to their appointments in the IHC, were Judges, officers & employees of some other High Court who shall revert to the court of which they originally belonged. The officers and employees of the said Court shall, if they were freshly employed, also cease to hold their respective appointments, and shall become part of the Federal Government Surplus Pool for further appointments.

vii) The Ordinances promulgated by the President or a Governor of a Province before 3.11.2007 which were given permanence by the PCO No.1 of 2007 as also the Ordinances issued by the President or a Governor between 3.11.2007 and 15.12.2008 and were validated by the afore-mentioned judgment delivered in TIKA IQBAL CASE, stand shorn of their purported permanence.

However, since on account of the said judgment in TIKA IQBAL CASE purporting to be a judgment of this Court, the presumption that the said Ordinances were valid laws not requiring approval of the Parliament or the respective Provincial Assemblies in terms of Article 89 or 128 of the Constitution and since it is today that this Court has attributed invalidity to the said legislative instruments, therefore, the period of 120 days and 90 days would be deemed to commence to run from today and steps may be taken to place the said Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law;

viii) Since the Constitution, through its Article 176, authorises only the Parliament to determine the number of Judges of the Supreme Court of Pakistan, therefore, the number of Judges of the Supreme Court for purposes of the said Article 176 shall continue to remain sixteen.

ix) In the Code of Conduct prescribed for the Judges of the Superior Courts in terms of Article 209(8) of the Constitution, a new clause shall be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any unconstitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution;

x) In view of our findings above regarding Justice Abdul Hameed Dogar not being a constitutional and a valid consultee, the notifications dated 26.8.2008 and 15.9.2008 extending the term of office of Justice Abdur Rashid Kalwar and of Justice Zafar Kalwar Khan Sherwani as Additional Judges of the High Court of Sindh are declared to be un-constitutional and of no legal effect.

xi) Any declaration made in this judgment shall not in any manner affect the General Elections held and the Government formed as a result thereof i.e. the President, the Prime Minister, the Parliament, the Provincial Governments, anything done by these institutions in the discharge of their functions. These acts are fully protected in terms of the age old principle of *Salus Populi Est Suprema Lex* reflected in PLD 1972 SC 139.

xii) Before parting with the judgment, we would like to reiterate that to defend, protect, and uphold the Constitution is the sacred function of the Supreme Court. The principles of democracy, freedom, equality, tolerance, and social justice as enunciat-

ed by Islam shall be fully observed;.....Wherein the independence of judiciary shall be fully secured.

### **EFFECTS OF 31<sup>ST</sup> JULY JUDGMENT:**

In nutshell this judgment of 31<sup>st</sup> July 2009, generally known as ***Sindh High Court Bar Association Case (PLD 2009 SC 879)*** was thus taken as a monumental judgment because:

- (i) It declared PCO oath immoral, illegal, and unconstitutional.
- (ii) It had taken a stand in favour of the constitutional, democratic and civil set-up. None of the judges was in a position to take any PCO oath in case of a future military adventure. The entire court was made bound to resign in case of another PCO would be enforced.
- (iii) The effect of the above declarations was that emergency of 3<sup>rd</sup> November 2007 and all actions pursuant thereto were held illegal and void *ab-initio*. Accordingly, all constitutional amendments, actions and appointments, including that of Justice Dogar as the CJP, were declared void with following two exceptions:
  - a) Parliament could adopt all [the 34] affected ordinances after considering them afresh within 120 days from the date of that judgment.
  - b) The oath of office, administered by the [illegal] Chief Justice Dogar to President Asif Ali Zardari, was validated.

*Next day, CJ of the Lahore High Court (LHC) Kh Sharif referred the names of 12 judges who took oath under the PCO of Nov 2007 to the Supreme Judicial Council (SJC) for proceedings under Article 209 of the Constitution. The judges referred to the SJC were J Mian Najamuz-zaman, J Maulvi Anwarul Haq, J Naseem Sikandar, J Abdul Shakoor Parracha, J Khalid Alvi, J Fazal-e-Miran Chohan, J Syed Shabbar Raza Rizvi, J Hamid Ali Shah, J Sajjad Hussain Shah, J Tariq Shamim, J Syed Asghar Haider and J Hasnat Ahmad Khan. J Rizvi, J Shamim, J Haider and J Hasnat opted not to do judicial work. J Kazim Ali Malik, J Ali Hassan Rizvi and J Mazhar Hussain Minhas were reverted as Session Judges and were made officers on special duty (OSDs).*

*A deep legal crisis was seen in Baluchistan where all the five judges, including Chief Justice of the Balochistan High Court (BHC) had to resign. There was no one available to hear more than 5,000 cases and other legal issues. At that moment there were 11 vacancies of judges in the BHC but CJ Amanullah Yaseenzai, J Ahmad Khan Lashari, J Akhter Zaman Malghani, J Muhammad Nadir Khan and J Mehta Kailash Nath were serving since last several years.*

*All those judges of BHC were found guilty of taking their oaths on 4<sup>th</sup> November 2007 thus all of them resigned and left their seats on 4<sup>th</sup> of August 2009 with mutual consultation after Supreme Court's verdict of 31<sup>st</sup> July 2009.*

More than 12 **review petitions** were filed with the Supreme Court on various counts mostly that the judges were punished unheard. A 14-members bench heard those petitions. This time the judgment was written by Justice Javed Iqbal; two judges, J Sardar Raza Khan and J Rehmat H Jaffri, had dissented. Sardar Raza Khan's dissenting note was not approved for reporting.

As the high stature judges were affected so the most learned and scholarly lawyers like Sheikh Akram, Naeem Bokhari, Dr Khalid Ranjha and Wasim Sajjad argued at length before the bench but were unable to seek relief for even a single petitioner.

**On 13<sup>th</sup> October 2009**, the judgment [short order] was announced declaring the review petitions non-maintainable but with the following added remarks:

*'It is the first instance of the Supreme Court stating in a categorical, loud and abundantly clear manner **that military interventions are illegal and will hardly find any colluder in future within the judiciary.***

*The impugned judgment provides much needed redress as it will render considerable help in blocking the way of adventurers and dictators to creep in easily by taking **supra Constitutional steps** endorsed, supported and upheld **under the garb of the principle of necessity in the past which will never happen again.***

*The judgment impugned would encourage future justices to take the firm stand against usurpers.....**dated 13.10.2009.***

### **UPROAR AGAINST SC's VERDICT:**

At this moment one could recall another painting of 'doctrine of necessity' on validating the military coup [dated 12<sup>th</sup> October 1999] of Gen Musharraf for which Ayaz Amir had once written ( **'the News' of 7<sup>th</sup> August 2009** is referred) that:

*'Among this lot — the original lot, that is — was Justice Iftikhar M Chaudhry. And it was from this PCO crowd, which saw no evil in wearing the robes of the judiciary under [the same] usurping General.*

*Chief Justice Irshad Hasan Khan wrote the judgment and the other judges on the bench, including Justice Chaudhry, without adding a word of their own (which was slightly unusual) concurred with his sweeping validation. As PCO judges they were expected to toe the line dictated by the martial law masters and, in the museum dedicated to the doctrine of necessity this was another trophy.*

***Let him cast the first stone who hath not sinned, said Christ.** Their lordships of the 'historic' judgment are no doubt made of sterner stuff, preferring to interpret the past as a closed and shut transaction.*

*The nation .... is being asked to believe; that Musharraf's rule was legitimate until Nov 3, 2007, and it was only his proclamation of emergency that evening which put him outside the pale of the Constitution. This is a very selective rendering with which most Pakistanis are not likely to agree.'*

According to the above interpretation Gen Musharraf did nothing unconstitutional from 12<sup>th</sup> October 1999 to 2<sup>nd</sup> November 2007, and it was only the period of emergency [from 3<sup>rd</sup> November to 15<sup>th</sup> December] which was considered for judicial cognizance. In other words, as per SC's version, it was OK for nine years, which most people in Pakistan believed, but culpable for mere 40 days; astonishing judicial observation it was.

If Article Six is to be invoked against Gen Musharraf then what about Gen Yahya & Gen Ziaul Haq. In that case it is not he alone who should be brought into the dock but all his collaborators; the Generals who ordered troop movements on 12<sup>th</sup> October 1999 [*realistically speaking those Generals deserved more severe trials because Gen Musharraf was in the air then*], the judges who were effectively his collaborators later and all those who chose to serve under him in various capacities; in the judiciary, top bureaucracy and elsewhere.

Referring to **'the News' of 1<sup>st</sup> January 2010:**

*'Talking of Musharraf's military rule; what was the role of Triple One Brigade on the take over day and few judges [barring Chief Justice Saïduzzaman Siddiqui and some more] who had taken oath under the PCO issued two months later. All of their present lordships took oath under the PCO.*

*Not only were that some of them on the bench which validated Musharraf's takeover, a few, including the Chief Justice, were on the bench which approved him for the second time in another case (in April 2005).*

*But then the principle should be for everyone. We should not be raising monuments to selective memory or selective condemnation. And if in this Turkish bath all are like the emperor without his clothes, the least this should inculcate is a sense of humility.'*

During the first week of August 2009, two Supreme Court judges J Faqir Muhammad Khokhar and J Javed Buttar had tendered their resignations because their cases were referred to the Supreme Judicial Council (SJC) for disciplinary action. The SJC meeting was to be convened three days after to review the matter.

During the same days Barrister Qazi Faiz Esa was appointed as the Chief Justice of Balochistan High Court, a notification for the purpose was issued on emergency basis and on the same evening the acting Balochistan Governor had administered oath on him.

For some from intelligentsia belonging to other school of thought, the SC's decision of 31<sup>st</sup> July 2009 was the biggest fraud in judicial history of Pakistan when it said that PCO judges would go home. In their opinion, ***PCO Judges continued working and non PCO judges were sacked, packed and sent away.***

The beneficiaries of the said judgment were CJ Iftikhar M Chaudhry himself and seven of the member judges of the sitting bench. All the said judges had violated the constitutional oath and took oath under the PCO of 1999 coined by the same Gen Musharaf. That PCO of 1999 and decision subsequently made on the basis of that PCO, were given constitutional protection by 17th Amendment by another puppet Parliament of Pakistan of 2002-2007.

Justice Faqir M Khokhar and J Javed Buttar etc including other judges in High Courts who had taken oath under the PCO on 3rd November 1999 were sitting judges on that day of 31<sup>st</sup> July 2009. Interestingly, one lot of ***42 judges who were sent home had never taken oath under any PCO***; most of them were not even appointed in Gen Musharaf's time; they were appointed after the restoration of democracy in the country.

In short, the fight between post 3<sup>rd</sup> November [2007] PCO judges and post 12<sup>th</sup> October [1999] PCO judges had resulted in ouster of judges who took oath only under the Constitution of Pakistan and never ever under the PCO. The media, PML(N), the lawyers and other political forces were mixed up and were rejoicing the ouster of constitutionally appointed judges and PPP went ignorant of this fact. Such things could only happen in Pakistan.

The confirmed judges who were sacked after the SC's decision of 31<sup>st</sup> July 2009 [because they were not recommended by CJ Iftikhar M Chaudhry] included J Mazhar Minhas, J Ashraf Bhatti, J Rana Zahid Mehmood, J Kazim Ali Malik, J Hafiz Tariq Nasim, J Khalil Ahmad, Justice M A Zafar, J Malik Saeed Ejaz, J Syed Shaheen Masud Rizvi, J Ali Akbar Qureshi and J Ahsan Bhoon.

In the 2<sup>nd</sup> week of December 2010, the Supreme Court continued the hearing of contempt of court notices to certain PCO judges in continuation of dismissing further objections filed against the bench hearing it. The apex court held that the matter relating to PCO judges was not personal in nature but relates to the sanctity of an institution. The SC bench heard contempt charges against former CJP Abdul Hameed Dogar and other judges for taking oath under the PCO in defiance of a restraining order issued by a seven-judge bench on the evening of 3<sup>rd</sup> November 2007.

The Supreme Court said that if needed, notices would be issued to army Generals and bureaucrats [*but it never materialized*] who did not comply with the apex court's judgement against the 'Emergency & 2007's PCO'.

A four-member bench, headed by Justice M A Shahid Siddiqui and comprising J Jawwad S Khawaja, J Tariq Pervaz and J Khilji Arif Hussain was made to hear the contempt of court cases against the PCO judges linked with Dogar court. Inclusion of certain judges on the bench was pointed out but dismissed. The court had also rejected the plea of two PCO judges' counsel to stop contempt of court cases until the decision of their intra-court appeal.

### **SC'S JUDGMENT NOT JUSTIFIED?**

In fact, the decision of the apex court had summarily removed all those judges of higher judiciary who were not part of it as on 2<sup>nd</sup> November 2007. Their removal was ordered on ground that advice of *de-jure* (between the period of 3<sup>rd</sup> November 2007 and 22<sup>nd</sup> March 2009) Chief Justice of Pakistan Iftikhar M Chaudhry, was not obtained in those cases. There were three groups of those removed judges.

- Those who were elevated to higher courts and initially took oath on PCO of Nov 2007.
- Those who were elevated to higher courts after restoration of constitution [on 15<sup>th</sup> December 2007] but were appointed by President Gen Musharraf till August 2008.
- Those who were elevated to higher courts after restoration of constitution [on 15<sup>th</sup> December 2007] but were appointed by President Asif Ali Zardari after August 2008.

This decision of 31<sup>st</sup> July 2009 gave rise to an interesting situation where firstly the newly appointed judges who never took any sort of oath on PCO were removed. Secondly, the sitting judges who took oath on PCO 2007 were still acting as justices, though their cases were sent to Supreme Judicial Council. Thirdly, some of the sitting judges who accepted reappointments and took oath from Chief Justice Dogar were still acting as justices of court with no action. Lastly, the Judges who took oath on PCO of 1999 were still functioning as justices of higher judiciary.

A group of removed ad hoc judges of LHC filed several petitions in the Supreme Court for review of 31<sup>st</sup> July's unfair judgment, which had sent 76 judges of the Supreme Courts and High Courts home immediately.

They contended that they were qualified to be appointed as judges of the high court in accordance with the requirements of Article 193(2) of the 1973 Constitution and were offered to serve as ad hoc judges in consequence of consultation required under the Constitution. They accepted the offer and took oath after when emergency was lifted. They never took oath under any PCO and continued performing the functions as judges of the high court till the passing of the said judgment.

Further in LHC the selection of above petitioners judges was made by the Chief Justice (LHC) Zahid Hussain, who was till then serving judge of the Supreme Court and interestingly his case was also not referred to the Supreme Judicial Council. It was also contended in the petitions that neither the sacked judges were made party in the said proceedings nor had the court called for the comments of the sacked judges; concerned Judges were not even aware about the decision passed by the Supreme Court.

Moreover, no copy of the decision was either sent to the high court or to the judges concerned. The judges had taken oath according to the Article 189 of the Constitution. They argued that the said judgment had been passed in violation of the universally accepted principle of *audi altram paltrem* and they were condemned unheard.

In nut shell, the judgment of 31<sup>st</sup> July 2009 was being applied with retrospective effect from 3<sup>rd</sup> November 2007 and not from October 1999. The 14-member SC bench applied the sanction to all the judges who had taken oath under the PCO but excluding their own persons. By some it was considered contrary to the principles laid down in **Malik Asad Ali's case** wherein it had been held that the chief justice himself and the members of the bench as the case may be, were also bound by the said judgement thus Chief Justice Sajjad Ali Shah was removed from office and sent home in 1997 on the same principle.

In that way the members of the SC's bench themselves should have been affected too, because their holding of office was not constitutional and lawful. It was purely a **self-serving judgement**. J Abdul Hameed Dogar's holding of the CJP office was declared as unconstitutional till 24<sup>th</sup> March 2009 then how some of the SC judges, who performed their duties under Justice Dogar, were made members of the SC bench that gave the 31<sup>st</sup> July 2009's verdict.



Some pointed out that 31<sup>st</sup> July judgement had made exception by declaring the oath administered to President Zardari by Justice Dogar as an 'administrative act' of a CJP, but if it was so then how could such administration of oath to judges by him be treated unconstitutional?

Moreover, the CJ of LHC Syed Zahid Hussain had also taken oath under the PCO and was appointed as the CJ of LHC in consultation with Justice Dogar, who had continued to act as such even after assumption of the office by CJP Iftikhar M Chaudhry. He was elevated as the judge of the Supreme Court but the 31<sup>st</sup> July's judgement was not applied to him.

*[J Syed Zahid Hussain was appointed as judge of the LHC on 21st May 1998 and was confirmed on 19<sup>th</sup> May 1999. J Hussain was made Chief Justice of the LHC on retirement of CJ Iftikhar Hussain Chaudhry, who retired on 31<sup>st</sup> December 2007. He was elevated to the Supreme Court on 12<sup>th</sup> April 2009. He had taken oath on the PCO of 1999 as a sitting judge of LHC like other judges including CJP Iftikhar M Chaudhry.*

*J Zahid Hussain also took oath on the PCO of 2007 (like Justice Dogar and some others) as a sitting judge of LHC again; being amongst 13 out of 31 sitting judges of LHC. Along with him justices Nasim Sikandar, M Khalid Alvi, Sakhi Hussain Bokhari, M Bilal Khan, M Muzammal Khan, Syed Shabbar Raza Rizvi, Hamid Ali Shah, Tariq Shamim, Syed Asghar Haider, Hasnat Ahmad Khan and Fazl-e-Miran Chohan as well as the then CJ of LHC Iftikhar Hussain Chaudhry took oath on PCO 2007.*

*The jurists would be able to opine if 31<sup>st</sup> July's judgement was to be implemented on him or not.]*

Similar was the case of appointment of the then CJ of the Federal Shariat Court (FSC) as a judge of the Sindh High Court (SHC) in 2007. He, Agha Rafiq Ahmed Khan, was appointed as the Federal Law Secretary with the consent of Justice Dogar and later elevated as the CJ of FSC with the consent of CJP Iftikhar M Chaudhry.

*[The logic behind his retention might be that J Agha Rafiq Ahmed Khan was coming up as District and Sessions Judge in various districts of Sindh from year 1997 to 2007. He was elevated as Additional Judge of the Sindh High Court on 14<sup>th</sup> December 2007.*

*After a few months, he was appointed as Federal Secretary Law and Justice Division in 2008. He was then confirmed as a permanent Judge of the SHC during December 2008 retaining his original seniority from 1995. On 8<sup>th</sup> June 2009, he was elevated as Chief Justice of the Federal Shariat Court of Pakistan.]*

J Sardar M Raza Khan, J Tassadaq Hussain Jilani, J Shakirullah Jan, J Nasirul Mulk and J Sarmad Jalal Osmani, who were members of the 14-member Supreme Court Full Bench to give the 31<sup>st</sup> July 2009's judgement were also appointed with the consultation of Chief Justice Dogar.

Similarly, four LHC judges, eight Sindh High Court judges and three Peshawar High Court judges were appointed in consultation with 'unconstitutional' CJP Abdul Hameed Dogar but were given protection in the said judgement.

Leaving aside the criticism, let us move forward with actual proceedings.

### **JUDGES PRAYING FOR JUSTICE:**

After the judgment of 31<sup>st</sup> July 2009, amidst disapprovals, appreciations and analysis, most of the affected judges preferred to put review petitions against their dismissals before the same Supreme Court. Objections raised in the review petitions against the 31<sup>st</sup> July's judgment and numerous miscellaneous applications in the same context were heard and decided by a four member Bench of SC.

In the last week of January 2011, the bench concluded the proceedings and reserved its verdict in the contempt charges against superior court judges for taking oath under the PCO of 2007 and for defying SC's [evening] order dated 3<sup>rd</sup> November 2007.

**On 13<sup>th</sup> October 2009**, while passing judgment against their own fellow judges on review petition no: 2745/2009 and in Constitutional Petition No: 08/2009, a bench of 14 judges of the Supreme Court of Pakistan had passed orders but the same were given finality **on 2<sup>nd</sup> February 2011** while observing that:

*(1) The notices issued under Article 204 of the Constitution read with sections 3 and 4 of the Contempt of Court Act, 1976 or any other enabling provisions of the relevant law, to the Judges who have expressed their regrets and repentance; by tendering unconditional apologies and affirming their remorse through withdrawal of the petitions filed by them and tendering of resignations, are discharged.*

*(2) The Judges who have already retired and have tendered unconditional apologies and have expressed their repentance and remorse, the notices issued to them are discharged.*

*(3) The Judges, who are contesting notices, they shall be proceeded against separately along with the cases of those Judges, who have not filed replies and/or have prayed for grant of time.*

*(4) The Judges of the Supreme Court and the High Courts, who tendered resignations after pronouncement of the judgment dated 31.7.2009 in deference thereto shall not be proceeded against.*

*(5) The Judges who have tendered resignations, but have not filed replies to the notices, the process shall be repeated to them so as to file the replies within two weeks.*

*(6) The Judges, who have neither tendered resignations nor have filed replies, are required to file replies within two weeks.*

*(7) Mr. Ahmed Raza Kasuri Advocate has prayed for grant of four weeks' time to submit reply on behalf of Justice (Retd) Abdul Hameed Dogar. Let the reply be filed within two weeks.*

*(8) Justice (Retd) Muhammad Nawaz Abbasi has filed reply, which is not unconditional apology; therefore, his matter shall be proceeded along with other cases.*

*(9) Syed Zulfiqar Ali Bokhari has tendered unconditional apology and has thrown himself at the mercy of the Court, the notice issued to him is also discharged.'*

Justice Sardar Muhammad Raza, while giving a dissenting note to the main judgment had observed that the Supreme Court has unlimited powers under Article 188 of the Constitution, to review any matter relating to justice, through its own *suo moto* powers or on someone's application.

The words "the Supreme Court shall have power" or "the Court may review its Judgment or Order" makes it abundantly clear that the Supreme Court has wide; rather, *suo moto* powers to review its judgments or orders provided the grounds for such review are available. In order to do complete justice under Articles 4, 25, 187 and 188, the Supreme Court should rather assume jurisdiction instead of refusing to do justice [*as had been given in Malik Asad Ali's case (PLD 1998 SC 161)*].

Justice Rahmat H Jafferri had given a dissenting note disagreeing with the main review decision on the issue '*whether any person could file a review petition on behalf of other affected judge or only the interested / affected persons could do so*'.

Certain respondents from above and 61 others were issued notices to explain as to why proceedings should not be initiated against them for committing contempt of court. 72 persons

either submitted their respective replies to the said notices or tendered unconditional apologies. Some of them resigned from office.

There were 10 respondents who had contested the notices issued to them. Mainly, the left over judges were J (ret'd) Abdul Hameed Dogar, the former CJP; Iftikhar Hussain Chaudhry, the former CJ of the LHC; and eight sitting judges named J Syed Zahid Hussain of the Supreme Court and Justices Khurshid Anwar Bhinder, Hamid Ali Shah, Zafar Iqbal Chaudhry, Hasnat Ahmed Khan, Syed Shabbar Raza Rizvi, Yasmin Abbasey and Jehanzeb Rahim hailing from various high courts.

The extensive arguments of learned counsels of the above named judges raised the following primary questions:

- *'Is it constitutionally permissible for the SC to proceed under Article 204 of the Constitution against Judges of the superior courts, for contempt charges?*
- *If yes; then as a matter of propriety, should the SC proceed against the said Judges or should it, bearing in mind the status of the respondents as Judges of the superior courts, discontinue these proceedings and discharge the notices issued to them?*
- *If it is decided that the Constitution does not place restrictions on contempt proceedings against Judges and if it is also found that questions of propriety do not stop the SC from proceeding against the respondents under Article 204 of the Constitution, then is there sufficient material available before the Court to charge the respondents for committing contempt of the SC on account of disobedience of its order dated 3<sup>rd</sup> November 2007?'*

The SC's four judge's bench, comprising Justice M A Shahid Siddiqui, J Jawwad S Khwaja, J Khilji Arif Hussain and J Tariq Parvez, considered the arguments of the counsels and came up with contentions that:

- *'In the given circumstances, the Constitution and law does not prohibit proceedings under its Article 204 against the respondents even though they may be Judges of the higher courts.*
- *Having considered the arguments as to the propriety of initiating contempt proceedings against the respondents and being fully conscious of the status of the respondents, the SC held that proceedings should be taken against them, with the exception of Mr Zafar Iqbal Chaudhry and Khurshid Anwar Bhindar.*
- *Having considered the record, facts, replies and the arguments advanced on behalf of respondents, the SC found sufficient material available to justify charging them, except the two mentioned above, for committing contempt of the apex court on account of disobeying an order dated 3<sup>rd</sup> November 2007 passed by a seven member Bench of the SC.*
- *Having considered the replies and submissions made by the two respondents, Mr Chaudhry and Mr Bhindar mentioned above, the apex court observed that as they took oath under the PCO on 14<sup>th</sup> December 2007 [and since they were not judges of the LHC on 3<sup>rd</sup> November 2007], they did not violate the said SC's order dated 3<sup>rd</sup> November 2007; though they may have violated its spirit. Thus their conduct in taking oath under the PCO is denounced in terms of Section 18 (2) of the Contempt of Court Ordinance 2003. The court held that they would not be charged to face trial.'*

### **KEEP THE SC RECORD STRAIGHT PL:**

It is also available on Pakistan's contemporary history that once in May 2010 Barrister Jehanzeb Rahim [a former Judge of the Peshawar High Court] had asked the Supreme Court to

recall contempt notices issued to various judges of the Supreme Court and high courts to avoid further damage to the institution of the superior judiciary.

Barrister Rahim had raised 28 questions challenging the validity of the orders passed on 3<sup>rd</sup> November 2007 by the 7-member bench of the SC, headed by the CJP Iftikhar M Chaudhry, against the proclamation of Emergency in the country.

Former Justice J Rahim raised questions in his reply in Cr Original Petition No 104/2009 submitted in the SC in compliance with orders of its 5-members bench dated 4<sup>th</sup> May 2010. He was also facing charges of contempt for taking oath on 3<sup>rd</sup> November 2007, along with many other judges under the 2<sup>nd</sup> PCO of Gen Musharraf.

Following were the questions raised in his reply:

1. Whether a 7-member bench of available judges was actually constituted in the evening of 3<sup>rd</sup> Nov 2007?
2. Whether this 7-member bench so constituted, actually assembled in the evening of 3<sup>rd</sup> Nov 2007 in the SC building?
3. Whether this bench actually passed an order in the evening of 3<sup>rd</sup> Nov 2007 and signed the same in the SC building?
4. Whether J Rana Bhagwandas was in Islamabad during the working week of 29<sup>th</sup> October till 2<sup>nd</sup> Nov 2007?
5. Whether J Rana Bhagwandas did not sign the order dated 3<sup>rd</sup> Nov 2007 on 5<sup>th</sup> Nov 2007?
6. Whether judges junior to J Rana Bhagwandas in seniority, signed the order dated 3<sup>rd</sup> Nov 2007 after 5<sup>th</sup> Nov 2007?
7. Whether J Rana Bhagwandas phoned Justice Sair Ali in Lahore on the evening of 3<sup>rd</sup> Nov 2007 from Karachi to inform him that an order had been passed by some judges in Islamabad and judges of the Lahore High Court [who had gathered at the residence of J Sair Ali] should refrain from passing any other order in respect of the Proclamation of Emergency issued by Gen Musharraf earlier that day?
8. Whether J Ghulam Rabbani was in Islamabad on 3<sup>rd</sup> Nov 2007?
9. Whether the signatures of J Ghulam Rabbani tally with his usual signatures on judicial orders?
10. Whether the order dated 3<sup>rd</sup> Nov 2007 was signed at one place in the SC on 3<sup>rd</sup> Nov 2007 or later by circulation?
11. Whether the names of J Rana Bhagwandas and J Javed Iqbal were written in Urdu to indicate the place where they were required to affix their signatures and what was the necessity of so indicating was their absence from the SC?
12. Whether the order dated 3<sup>rd</sup> Nov 2007 was actually faxed from the office of the registrar SC or from some other place and whether the order so faxed, contained the signatures of seven judges of the SC?
13. Whether the copy of order issued to press contained the signatures of any judge?

14. Whether J Javed Butter and J Nawaz Abbasi were part of the 7-member Bench constituted on 3<sup>rd</sup> Nov 2007 and are, therefore, witnesses to the presence or absence of seven judges (members of the bench) and whether their evidence is not absolutely essential at this preliminary stage?

15. Whether the order dated 3<sup>rd</sup> Nov 2007 was faxed to the phone numbers of the registrars of the Sindh, Lahore and Peshawar High Courts or to some others?

16. Whether any of the judges who signed the order dated 3<sup>rd</sup> Nov 2007, ever examined the same in original after 3<sup>rd</sup> Nov 2007?

17. Whether eight judges namely J Sardar Mohammad Raza Khan, J Khalilur Rehman Ramday, J Tassadaq Hussain Jilani, J Ch Ijaz Ahmed, J Sarmad Jalal Osmany, J Mohammad Sair Ali, J Shahid Siddiqui and J Jawwad S Khawaja saw the order dated 3<sup>rd</sup> Nov 2007 in original before signing the judgment dated 31<sup>st</sup> July 2009 in the constitution petition No: 08 & 09 of 2009 or since then, to satisfy themselves individually that a 7-member bench was constituted, convened, passed and signed the order dated 3<sup>rd</sup> Nov 2007 on 3<sup>rd</sup> Nov 2007?

18. Whether the order dated 3<sup>rd</sup> Nov 2007 passed in the said constitution petition was available in original in the record of the SC from 3<sup>rd</sup> Nov 2007 till 22<sup>nd</sup> March 2009?

19. Whether J Abdul Hameed Dogar had taken oath as Chief Justice of Pakistan on 3<sup>rd</sup> Nov 2007 at 19:00 hours before the [above mentioned] order dated 3<sup>rd</sup> Nov 2007 was passed?

20. Whether copies of order dated 3<sup>rd</sup> Nov 2007 were or could be delivered to all judges of the SC at their residences "no sooner it was passed"?

21. Whether the CJP was not barred by Article IV of Code of Conduct to sit on any Bench to hear any application moved on 2<sup>nd</sup> November 2007 by Barrister Aitzaz Ahsan?

22. Whether the prohibition in Article IV of the Code of Conduct did not apply equally to the presence of the CJP with respect of Hamid Khan and Rasheed Rizvi, senior advocates of the SC, in that or any subsequent petition?

23. Whether the CJP Iftikhar M Chaudhry having decided on 17<sup>th</sup> October 2007 not to sit on any Bench hearing the petition filed by J Wajihuddin did not violate his own order on 3<sup>rd</sup> Nov 2007?

24. Whether the order of 3<sup>rd</sup> Nov 2007 can be said to be a judicial order on the touchstone of the findings, parameters and conclusions in Asad Ali's case?

25. Whether the undersigned [former J Jehanzeb Rahim], not having been heard in Review Petition No: Nil filed in the SC has not been condemned unheard and whether in the light of formulations No: 4.1 to 4.70 in that review petition, the judgment dated 31<sup>st</sup> July 2009 is to be recalled, varied and modified?

26. Whether the show cause notice issued and being responded to should also be issued to J Nasirul Mulk, J Shakir Ullah Jan (signatories to that order), J Tassadaq Hussain Jilani and J Sarmad Jalal Osmany who took fresh oath from Abdul Hameed Dogar, 'the CJP' after 3<sup>rd</sup> Nov 2007 and before 22<sup>nd</sup> March 2009 in violation of the said order dated 3<sup>rd</sup> Nov 2007?

27. Whether J Nasirul Mulk should sit on a Bench in judgment over fellow judges in contempt proceeding for violating the order dated 3<sup>rd</sup> Nov 2007, when he himself had done the same and accepted Abdul Hameed Dogar as the Chief Justice of Pakistan?

28. Whether J Tariq Pervez, having been re-appointed as Chief Justice of Peshawar High Court and taken fresh oath in violation of the order dated 3<sup>rd</sup> Nov 2007 on the recommendation of [CJP] A Hameed Dogar, can sit on a Bench constituted to look into the same violation by other judges and [CJP] A Hameed Dogar himself.

Former J Jehanzeb Rahim had requested the SC to decide the above propositions, some of which required evidence, in preliminary proceedings but the honourable Bench simply shelved them aside with sarcastic smiles. In fact the judicial minds were of the view that whether proceedings under contempt laws could be initiated against judges of the high courts and the Supreme Court of Pakistan under such circumstances.

However, the allegations of a former Justice [Jehanzeb Rahim] should have been probed and answered, especially if J Bhagwandas had signed the order on the 5<sup>th</sup> Nov 2007 instead of 3<sup>rd</sup> Nov 2007, to keep the pillars of justice upright.

The fact remains that after Barrister J Rahim's reply, next day two SC judges [J Nasirul Mulk and J Raja Fayyaz Ahmed] had disassociated themselves from that 5-member bench hearing contempt of court cases against PCO judges, and referred the matter to the Chief Justice Iftikhar M Chaudhry back for reconstitution of the bench.

Naeem Bukhari advocate was representing Barrister J Rahim. The three remaining members of the bench were J Jawwad S Khawaja, J Rahmat Hussain Jafferi and J Tariq Parvez.

*[Justice Nasirul Mulk and Justice Raja Fayyaz Ahmed in the bench, were also members of the SC bench that ruled against the PCO and the emergency of November 2007. Justice Tariq Pervez had taken oath as a Peshawar High Court judge on former CJP Abdul Hameed Dogar's recommendation.*

*Some experts kept the view that, according to the code of conduct, the three judges could hear the contempt of court case against PCO judges. Former Justice Jehanzeb Rahim was one of 10 judges who had decided to contest the contempt of court charges.]*

### **TEXT OF SC ORDER OF 3<sup>RD</sup> NOV 2007:**

Going into the details of judgment of 31<sup>st</sup> July 2009, it was generally felt that most of the judges were shunted out on the 'charge' of contempt that why they had taken PCO oath **'while defying Supreme Court's order of 3<sup>rd</sup> November 2007'**. The above 28 points of Barrister J Rahim basically pointed towards the same order of 3<sup>rd</sup> November 2007.

The said order of 3<sup>rd</sup> November 2007 was passed by the SC bench [*if it was so*] headed by CJ Iftikhar M Chaudhry on an informal petition of Barrister Aitzaz Ahsan. The SC bench hurriedly passed orders **'after knowing that the Emergency has been proclaimed'** by Gen Musharraf. See the text of the SC order **verbatim**:

*This application was filed in court on 2<sup>nd</sup> November 2007 praying that respondent / Government may change the composition of bench by adopting extra Constitutional measures, which could mean either by placing Martial Law or bringing PCO or by imposing emergency.*

*Application could not be taken up as it was not numbered. However, now it has been marked to Bench. In the meantime, electronic and print media news appeared that PCO been promulgated to enable Government to administer fresh oath to the Chief*

*Justice as well as to the judges of the Supreme Court so that favourable judges could be appointed.*

*Be that as it may, we feel that Government has no ground / reason to take extra Constitutional steps, particularly for the reasons being published in the news papers that high profile case is pending and is not likely to be decided in favour of the Government, although matter is still pending.*

*Therefore, a special Bench has been constituted and on considering present situation and news which have published in news papers, we direct as follows:*

- 1. Government of Pakistan i.e. President and Prime Minister of Pakistan are restrained from undertaking any such action which is contrary to Independence of Judiciary.*
- 2. No Judge of the Supreme Court or the High Courts Chief Justice(s) shall take oath. Under PCO or any other extra constitutional step.*
- 3. Chief of Army Staff, Corps Commanders, Staff Officers and all concerned of the Civil and Military Authorities are hereby restrained from acting on PCO storming which has been issued or from administering fresh oath to Chief Justice of Pakistan or Judges of Supreme Court and Chief Justice or Judges of the Provincial High Courts. They are also restrained to undertake any such actions, which is contrary to independence of Judiciary. Any further appointment of the Chief Justice of Pakistan and Judges of Supreme Court and Chief Justices of High Court or Judges of Provinces under new development shall be unlawful and without jurisdiction.*

*Put up before full court on 5<sup>th</sup> November 2007.*

*Islamabad  
03.11.2007*

The senior lawyers had cogent points to ponder that:

- If the petition was filed by Aitzaz Ahsan on 2<sup>nd</sup> November 2007, why it was not given importance to be numbered at least.
- Why the petition could not be heard during the whole day of 3<sup>rd</sup> November 2007 when the '*Emergency was not there*'. [Emergency was announced in the evening hours]
- Who had written that order in haste; there were numerous grammatical errors in that half page order. Senior judges of the SC might not have written it.
- Why the SC order was not in usual order format.
- How the copies of that order were communicated to the concerned including GHQ, Presidency & PM House AND at what time.

There were many other questions about that order but who bothers in Pakistan – it was independent judiciary.

Astonishingly, media totally ignored the significance of those 28 points of former J Jehanzeb Rahim and the above BIG lapse except Najam Sethi. All the roaring live talk shows on TV and press conferences sponsored by the Federal Law Ministry went blank in that respect otherwise the whole judicial edifice could collapse and the moral authority of the then sitting justices would be shaken.

***[The judicial decisions announced since CJP Iftikhar M Chaudhry was restored would have gone void, including the 16<sup>th</sup> December 2009 & 12<sup>th</sup>***

***January 2010 judgments invalidating the NRO for which the government had suffered later.]***

The order of the SC dated 3<sup>rd</sup> Nov 2007 was invoked about 20 times and made it a fundamental pillar of all major future judgements of the apex court.

In nut shell, the hearings to those review petitions had commenced on 3<sup>rd</sup> November 2009 and continued till 21<sup>st</sup> February 2011 when charges against the respondents were framed. Numerous eminent and senior Advocates including Mr Wasim Sajjad, Dr Khalid Ranjha, Mr Raza Kazim, Mr S.M. Zafar, Dr A Basit, Mr Ibrahim Satti, Mr Naeem Bokhari and Sh Zameer Hussain had addressed the apex court with exhaustive arguments on the arising issues.

The final verdict came on **18<sup>th</sup> May 2011** in that regard. A five judge's bench of the SC, comprising CJP Iftikhar M Chaudhry, J Mian Shakirullah Jan, J Tassaduq Hussain Jilani, J Sarmad Jalal Osmany and J Amir Hani Muslim, gave time to the government till 9<sup>th</sup> August 2011 to de-notify the judges. On that day, the apex court declared that seven high court judges, who had taken oaths under the PCO, were never validated as judges.

**LAWYER'S & GOVERNMENT BOTH REACTED:**

Referring to the '**Dawn**' of **19<sup>th</sup> May 2011** Asma Jahangir, president of the Supreme Court Bar Association (SCBA), opined while referring to the SC's judgment on PCO judges that:

*'Police use third degree treatment but some people are doing it in the judiciary with their pen. This pen embodies the trust of the nation and **it should not be used for settling personal scores and rivalries.***

*I don't want to see justice stifled. Although he [referring to the CJP Iftikhar M Chaudhry] was a PCO judge, yet we supported him when he was sacked. We believed that if a dictator [Gen Musharraf] was allowed to ride roughshod over the judiciary this time, he [Gen Musharraf] would just bury the institution next time.*

*The decisions based on a feudal and 'panchayati' mindset would not work any more; strategy of 'jalao & gherao' (protests by burning) appeared to be working for induction of judges.'*

Asma Jahangir commented on the SC's verdict of a day earlier in which intra-court appeals of judges who had taken oath under the PCO were rejected and the government was asked to issue a notification of their dismissal. She alleged that judges [of higher judiciary] were interested in 'big cases' that led to a 'mela' (human crowd) in courtroom saying that '*we are not interested in fanfare. Lawyers have to take care of their clients, practice and offices.*'

**On 5<sup>th</sup> August 2011**, the Supreme Court granted two days more to the federation to issue de-notification of those former judges. A five member bench of the apex court, headed by the CJP Iftikhar M Chaudhry, expressed its displeasure in delay over issuance of required notification in pursuance of its 18<sup>th</sup> May order. Next day, PM Mr Gilani cancelled the appointments of Justice Syed Shabbar Raza Rizvi, Justice Syed Hamid Ali Shah, Justice Hasnat Ahmad Khan and Justice Syed Sajjad Hussain Shah as judges of the Lahore High Court (LHC) and Justice Yasmin Abbasey of the Sindh High Court (SHC). These judges were made entitled to service and pension benefits up to 10<sup>th</sup> April 2010, when the 18th Constitutional amendment was passed.

Meanwhile, legal experts and bar representatives once more termed the SC's orders unconstitutional and in violation of its own earlier orders; that in its 31<sup>st</sup> July 2009's judgment, the SC had declared that no judge would be removed or made dysfunctional through a notification by the executive and only the Supreme Judicial Council would initiate proceedings against judges under Article 209 of the Constitution.

A former law minister Khalid Ranjha and Azam Nazeer Tarar of SCBA told the media loudly that:



*'The court's directive is confused. It [the apex court] has allowed for a way to get rid of any judge that it dislikes. I have no sympathies with PCO judges but only the SJC can remove judges through a reference. They cannot be removed through a Supreme Court judgment.'*

*Through this order, the court has made the executive abide by its judgment, but it has itself ignored legal provisions by penalizing judges by this act.*

***The court's orders are based on personal likes and dislikes and is tantamount to subversion of the Constitution.'***

Ahsan Bhoon, President of Lahore High Court Bar Association (LHCBA) said that:

***'The government has taken a constitutional step while **the Supreme Court's judgment was totally unconstitutional.*****

*It [the Supreme Court] had itself ruled that only the Supreme Judicial Council is the proper forum to decide the fate of judges. The government had no option but to act upon court orders.'*

The de-notification of the PCO judges took more than two years, a period during which a tussle between the two institutions of the state over their powers kept emerging off and on. On several occasions, the executive defied the implementation of the apex court's orders on one excuse or another. Not only the PCO judges' case, the famous Hajj arrangements corruption case and the National Insurance Company Limited (NICL) case intensified the tussle between the two institutions to an extent that threatened to derail democracy.

Due to the executive's invariable disregard towards the superior court's orders in numerous important cases, the CJP might have thought to call the army by invoking Article 190 of the constitution. Rightly it was not considered correct because:

*'The judiciary is bound to demand army through the executive in case implementation on any of its orders is desired. The army in turn cannot act constitutionally without directions from the government.'*

During CJP Sajjad Ali Shah's row with the PM Nawaz Sharif in November 1997, the CJP had asked the then Army Chief Gen Jehangir Karamat, to send army for SC's help and protection but was flatly refused in writing on the pretext that the permissions of both PM and President were required.

Many constitutional experts criticised the SC judgement on the PCO judge's appeals as discriminatory. Declaring the November 2007 PCO judges as unconstitutional while clearing those judges who took oath under previous PCOs, like twice taken by the sitting CJP Iftikhar M Chaudhry, could not find unanimous acceptance.

In this judicial cleansing process, about 104 judges were ousted, of whom 45 belonged to Punjab. The PPP government however tried to compensate some of them and assigned certain key posts in government institutions. One of those was Maluvi Anwarul Haq, who had not taken the oath under PCO but was ousted in 2009, served as Attorney General from April 2010 to April 2012, and later appointed by the government as an adviser to the president.

His successor, Irfan Qadir was appointed as the Prosecutor General of NAB by President Zardari. The SC found this illegal because Mr Qadir was the Prosecutor General during Gen Musharraf's era for three years and was ousted on SC's order. He was swiftly appointed as the Federal Secretary of the Law; later PM Yousaf Raza Gilani appointed him as the Attorney General of Pakistan during his trial in the infamous contempt case.

Known for his hard stance, Irfan Qadir often irked the SC by not lending legal assistance in many cases, most notably the contempt case. The apex court has expressed its displeasure over his conduct.

Yasmin Abbasi, was made Secretary of the Law Ministry and one Karim Khan Agha made NAB's Prosecutor General; both were amongst the ousted judges. In 2012, the government appointed Abdul Shakoor Paracha, who served as a Lahore High Court (LHC) and Islamabad High Court (IHC) judge, as its counsel in the pending Contempt of Court Act 2012 hearing in the SC. Similarly, the government selected Munir Paracha, who was also a judge of the IHC, as its counsel in the case regarding the Balochistan law and order situation.

Ramzan Chaudhry, who is the chief legal adviser of Islamabad's Capital Development Authority [CDA], was also an IHC judge, and Shafqat Abbasi, an ex-PPP MPA, was given the slot of the Chairman of the Pakistan Press Council,

Unfortunately, it is Pakistan's judiciary where tens of pages can be written on 'selective justice'. Here the judicial norms develop on the whims and personal liking of the Chief Justices; see the history.