

## **Scenario 197**

### **WHO ELSE LOOTED PAKISTAN**

#### **Justice Jamshed Report on Loan Defaulters [1971-2009]:**

**On 16<sup>th</sup> December 2009;** CJP Iftikhar M Chaudhry announced Supreme Court's verdict about the NRO cases which was mainly aimed at catching the then President A A Zardari in Swiss banks tsunami. To counter the expected blows from the then PPP government, the CJP immediately called the bank defaulters' case and fixed its hearing on 22<sup>nd</sup> December 2009.

**On 12<sup>th</sup> March 2010;** the PPP government got published the statistics in all print media through the State Bank of Pakistan [SBP], saying that:

*"The loan write-offs in seven years [2000-06] of Gen Musharraf's rule crossed the figure of Rs:125 billion, whereas Rs:30.18 billion credits were waived during 1985-99 wherein about 74.5 percent part was by PML[N]'s two governments. During the two tenures of late Benazir Bhutto, a total of Rs:7.23 billion loan was written-off, constituting 24.2 percent".*

In fact, **CJP Iftikhar M Chaudhry had shown the partisanship** – a calculated grudge against the PPP. The list of Loan Defaulters compiled by the State Bank of Pakistan [SBP] was placed before the SC bench presided by him on 22<sup>nd</sup> December 2009. After usual gimmicks of shallow roars in the court room, the file was simply shelved away once again.

In 2011 MQM Chief Altaf Hussain wrote a letter to the CJP Chaudhry which was virtually short of abuses and curses in which he asked the CJP to stick to his words and to re-open that loan defaulters' case. Only then, **on 3<sup>rd</sup> June 2011:** a three member Commission, headed by Justice (Rtd) Syed Jamshed Ali, a former judge of SC, was constituted in respect of recovery of written off loans from 1971 onward and to compile a report.

**On 13<sup>th</sup> March 2013;** the Supreme Court of Pakistan made public report evolved by that 3-member judicial commission naming the persons who have got waived their loans since 1972. The report, in 3 volumes, not only recommended action against those who got their loans written off but also

against the bankers who helped in getting the loans waived off. Justice (rtd) Jamshed Ali wrote:

*"Unfortunately, despite best efforts of the commission, the banks and development finance institutions did not provide any information on loans sanctioned or written off on reasons 'other than business considerations'. There were reasons informally discussed; mostly the bankers were afraid of [either] politicians or the civil / military bureaucracy."*

A detailed reminder of this issue was mentioned in the book '**Judges & Generals in Pakistan' Vol-II**, Scenario 49, pps 573-77, published in UK in 2012 but **the SC was never seen serious** on that totally unconstitutional use of power by successive rulers.

With the opening of this report, several names of important figures were exposed and sword of disqualification was likely to hang over the heads of several politicians but the Election Commission of Pakistan [ECP] itself was corrupt enough - most members indulging in intellectual corruption and monetary gains, in the utter disregard of provisions of Articles 62 & 63 of the Pakistan's Constitution.

The State Bank had issued 33 circulars since 1972 to 2007 in that respect. According to Section 25 of the Banking Ordinance, a loan write off case should be sent to the Parliament but this section had continuously been ignored – not a single case was brought at the Parliamentary floor.

The total amount waived off as loans from 1972 to 1996 was over Rs:200 billion. Three lists of bad loans were published since 1993, the first by caretaker PM Moeen Qureshi, followed by two lists by Benazir Bhutto and caretaker government of Meraj Khalid in October 1996 and January 1997 respectively. The bad loans which were Rs:1,340 million when Z A Bhutto was removed in 1977 swelled to Rs:80 billion in August 1993, Rs:126 billion in November 1996 and Rs:130 billion in January 1997.

Justice Jamshed Commission had recommended that action should be taken against former **Prime Minister Yousaf Raza Gilani and his wife Fozia Gilani (Rs:45 million); Riaz Lal Jee, friend & allegedly a front-man of President Asif Ali Zardari**. Abbas Steel Industry of Riaz Lal Jee got (Rs:224.1 million), Riaz Lal Jee's another company Orient Rice Mills got Rs:261.8 million write off. Against Lal Jee's Petro - Commodities Company there was Rs:218 million. Riaz Lal Jee's Razik Engineering company got Rs:11 million written off. Ghulam Qadir's Khalil Jute Mills got Rs:405.6 million waived off.

Others included some former ministers and so-called gentlemen like Ghulam Dastagir Khan, Islamud-Din Sheikh's Kiran Enterprises (Rs:49.5 million), Younas Habib (Rs:2.47 billion). Zafar Sheikh and Farooq Sheikh's Adam Jee Industries owed Rs:448.8 million. Rana Tanvir Hussain's Batala Ghee Mill got Rs:140 million, while Jam Muhammad Yousaf's Bela Ghee Mills Rs:48.6 million. The Commission recommended that action should also be taken against the responsible bank officials, too.

Asma Jahangir, former President Supreme Court Bar Association, and her husband's Hala Spinning Mill got Rs:50 million written off. Arib Habib's Jet Air Textile Mills got Rs:415.7 million, PML[N]'s MNA Ramesh Kumhar and Chetan Das's Pak Absar Ban Industries got Rs:44.1 million loan written off. Kh Ghulam Ahmed's Rishi Textile Mill got Rs:859.1 million. Abdul Ghafar Adam Jee and Akbar Adam Jee got waived off Rs:239 million.

Sardar Jafar Khan Leghari, Umer Leghari, Yousaf Khan Leghari's Choti Textile Mills got written off Rs:304.6 million, Waqqar Azeem, Sajjad Azeem and Shaukat Azeem's Electro Information and Energy System got Rs:62.7 million, Abdul Qadir Tawakal's First Tawakal Mudarba got Rs:628.6 millions, Mirza Iftikhar Baig's Mumtaz Shahbaz Textile Mill got Rs:100 million, Maj Gen Farhat Ali Burki's Quality Steel Works got Rs:981.6m got written off.

The commission could only probe 740 different cases, but had proposed that another 222 cases should also be probed as Rs:35 billion were waived off in those cases.

During the proceedings in 2011 ***the apex court had observed that Circular BPD-29, which provided guidelines on write-off of irrecoverable loans and advances, though ended on 14<sup>th</sup> April 2003 but the banks still continue to write off loans.*** The bank officers, who had waived off loans as managers were partners to the criminal conspiracy - thus equally responsible in above cases of defaults.

The said report consisted of three volumes – Volume I (Report of the Commission), Volume-II (Parts I to VII, synopsis of individual cases), Volume-III (Annexures of Volume I) – and the supplementary paper book (containing different correspondence).

"The Commission had received 672 loan files for the period 1992-2009 but examined 620 files. Out of the remaining 52 files, 49 cases had been taken over by the Corporate Restructuring Corporation under an Ordinance of year 2000; one duplicate file of Larkana Woolen Mills was taken away by the concerned bank. One file contained the evaluation report of the proper-

ties, their evaluations and detailed subject matter of settlement between Younis Habib and the NAB.

The Commission had to hold bankers responsible for extending short-term or long-term loan facility to borrowers on inadequate securities and to recommend steps to be taken against them. It had to suggest measures to safeguard the amount of loans against arbitrary concessions extended in the past either on political or other corporate considerations.

The Supreme Court ordered the report to be made public but did not take any concrete step to make the financial recovery, did not make any special order and never opted to take step to establish additional special courts. ***Not a single bank employee or manager or officer was questioned in any case.***

The height of criminal intent on the part of Supreme Court be judged that the then CJP Iftikhar M Chaudhry did not conduct the said case seriously till his retirement in December 2013 nor any successive Chief Justice bothered to call that file before him. Justice Jamshed's all hard labour involved in formulating that Commission Report was simply thrown away in the bin.

Invariably all the political parties, including some factions of the ruling PML[N] hailed the COAS Gen Raheel Sharif's move and determination against corruption. PML[N]'s Zubair Umar said that the army chief's move was laudable. He called for holding "corrupt elements" within the PTI and PPP accountable as well while doing against the PML[N] leaders.

However, the fact remained that many big politicians used their front-men to get loans; of course, the troika of Bank Officer, front-man and politician worked in such schemes as equal partners.

*[To have a loan written off, one has first to be declared a defaulter. In case of politicians, this can lead to disqualification under Article 63 of the Constitution. Therefore, they prefer to have their loans restructured and keep the cycle on or use frontmen for this dirty game.]*

The fact remains that the shrewdest politicians like Sharifs availing loans got hefty amounts which were initially issued in the name of their companies but subsequently they changed the names of directors who could be their low tier employees. The commission stated in its report that influential groups did pressurize the banks.

The report also held that the bankers verbally admitted there was absolutely no doubt about influential groups interfered at the sanctioning

stage of loans as well as at the stage of writing them off – such concessions were granted in 232 cases.

The tragedy remained that once in every year since 2009, the top court used to repeat its roars to '**re-open or start the suo motu case**' on written off loans. Reports are still called afresh every year but then a deep slumber – mostly arguing that the banks were deliberately not pursuing these cases, forcing the matter into pending for the past nine years. The SC never asked the federal government to implement the recommendations of J Jamshed Commission.

In view of above, it was considered that the judicial commission proposals for investigating corruption in the wake of **Panama leaks** [in 2016] were unlikely to get any substantive support if previous efforts to dig up foul play were not attended seriously. The most glaring example was the above mentioned judicial inquiry into bank loans written off; the commission in its final report had itself expressed helplessness in getting the required information from financial institutions.

### **SC JUDGMENT ON 18<sup>th</sup> & 21<sup>st</sup> AMENDMENTS:**

**On 28<sup>th</sup> January 2015;** a 3-judges bench of the Supreme Court of Pakistan [SC] accepted pleas against 21st Constitutional amendment for regular hearing and sought concise statements from the Chief Law Officers of federal and provincial governments.

Later, a 17-judges full court bench, headed by CJP Nasirul Mulk, clubbed the 18th and 21st constitutional amendment cases and heard the arguments for several weeks. During lengthy legal battle, the SC examined petitions challenging the procedure of judge's appointment under the 18th Amendment and the establishment of military courts under the 21st Amendment.

*[On 15<sup>th</sup> April 2015; the SC ordered a stay on execution of those six militants, after a petition seeking a halt to the implementation of death sentences awarded by military courts was filed by the Supreme Court Bar Association (SCBA).]*

**On 26<sup>th</sup> June 2015,** the full court reserved its ruling on the case. A total of 35 constitutional petitions were before the court of which 20 challenged the 18th Amendment and 15 challenged the 21st Amendment. The main three questions before the court were:

- whether the Constitution has a basic structure or not;

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- if it has a basic structure then whether a constitutional amendment can be struck down on the basis of it; and
- whether the parliament has the power to alter the basic structure of the Constitution.

Military courts were empowered to try militant suspects until February 2017. The army announced the first verdicts and sentences from the new military courts in April 2015. Six militants were condemned to death and another jailed for life, all on terrorism charges.

**On 5<sup>th</sup> August 2015**, in a landmark judgment, the Supreme Court of Pakistan dismissed all the 35 petitions individually filed, some against the 18<sup>th</sup> Amendment and some against establishment of the military courts through 21<sup>st</sup> Amendment. The Chief Justice Nasirul Mulk announced the judgment laying foundations of balanced power structure amongst the three pillars of the state; Judiciary, the Parliament and Executive.

The 17-judge full bench dismissed petitions against the 18<sup>th</sup> Constitutional Amendment in a wide 14-3 decision. The apex court, in an 11-6 decision, also dismissed the petitions against the 21st Constitutional Amendment, wherein military courts were established to try militants but stated that all decisions of military courts would be subject to judicial review. The said Constitutional Amendment was passed in January 2015 as part of a crackdown on militancy following a Taliban massacre at the Peshawar Army Public school which left more than 153 people — mostly students — dead.

The ruling appeared as a major turning point in the political history of the country wherein the SC settled down some core issues once and for all; it determined answers to vital questions regarding powers of the three main organs of state detailed earlier. The military, which initiated action against terrorists; Parliament, whose resolution created space for establishment of military courts, and then the Supreme Court's decision proved that the military, Parliament and Supreme Court were all on the same page regarding terrorism.

It appeared that two things must have influenced the honourable judges: one that the military courts and the 21st amendment were only for two years. And that they were not under any individual's discretion but through a constitutional amendment which ensured they would cease to exist after two years. This time-framed strategy for achievement of quick justice was enough to satisfy the judges as well as the fact that this amendment was passed unanimously by the Parliament.

The said judgment of the SC was given by the full court of 17 judges; 11 judges agreed to the main context whereas the 6 judges added their dissenting notes based on different opinions. Major 25-page dissenting note was from the senior most justice Jawwad S Khawaja, who occupied the chair of Chief Justice of Pakistan **on 17<sup>th</sup> August 2015** because of retirement of CJP Nasirul Mulk.

It was in fact a reflection of the true spirit of judicial independence within the apex court that each judge had come up with his own opinion and analysis. A difference of opinion among judges is always present in such major legal cases in developed nations. It was a considered opinion that:

***'If we want to make unanimous decisions like in former CJP Iftikhar M Chaudhry's era, then we will have to differentiate between a military unit and the Supreme Court; difference of opinion was a +ive sign here.'***

Legal experts held the opinion that the apex court's decision proved that ***'it cannot interfere in laws passed unanimously by elected representatives'***, whereas CJP Iftikhar M Chaudhry had passed few judgments portraying that the Parliament could make laws but subject to certain limitations and not beyond the given structure of the Constitution. It meant that the Parliament should make laws which should have in-built approval of the apex court. Many fingers were raised over such decisions but went silent because of CJP's personal wishes.

During proceedings of the case, visible division was witnessed among judges regarding the basic structure theory and powers of parliament and the Supreme Court; therefore, dissenting voices were expected in the ruling. Referring to the media interviews of the day, a senior lawyer Babar Satter commented that:

***'When it has been written in the Constitution, then can a 17-judge bench second-guess the wisdom of an amendment passed unanimously by Parliament? This was the decision that the Supreme Court had to take. And they have decided that if Parliament passes something by two-thirds majority then we cannot interfere in their decision.'***

***'And it is a positive sign that there was a divided opinion, because if all 17 judges give the same opinion then it may appear as if they were being dictated by someone.'***

In detailed judgement, the CJP Nasirul Mulk declared that ***'the superior judiciary has the authority to review any ruling of military courts on***

**grounds of coram non iudice** [being without jurisdiction or suffering from *malafide*]. The superior judiciary had the authority to review the government's selection of cases and refer them for trial under the Pakistan Army Act 1952, however, any order passed, decision taken or sentence awarded would be subject to judicial review.

Hamid Khan, who represented the Lahore High Court Bar Association [LHCBA] and the Lahore Bar Association, used articles 2A, 8, 9 and 175(3) to build his case against the 21st amendment.

Members of the Government and Opposition and many in the legal community celebrated the Supreme Court's findings as a victory for parliamentary sovereignty, the Court's recognition of Parliament as the true embodiment of the will of the people. The challenge to the 18th Amendment was pending since 2010. The Supreme Court can review legislation on the touchstone of the Constitution is settled in practice; however, the preliminary issue confronting the 17-member full bench in this case was whether:

*(1) the Supreme Court has the jurisdiction to review, and if required, strike down amendments to the Constitution; and*

*(2) if yes, on what grounds? The Supreme Court raised these questions in multiple judgments in the past, but did not reach a definitive conclusion.*

The Pakistani Constitution appears quite clear on the issue: Article 239(5) and (6) expressly state that **"no amendment of the Constitution shall be called in question in any court on any ground whatsoever"**, and even more categorically, **"for the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution."**

A majority of 13 judges of the SC answered the question in the affirmative. They argued that **"the Parliament in Pakistan, unlike the British Parliament, is not completely sovereign"**, and its powers to amend the Constitution were limited. The honourable judges concluded that **"...the Supreme Court – is the guardian of the Constitution"** that would determine what those limitations could be, and if they are transgressed, they have the power to strike them down.

According to the majority opinion, authored by Justice Azmat Saeed and endorsed by seven other judges, there were implied restrictions on the Par-

liament's power to amend the Constitution **"so as not to substantially alter, repeal or abrogate the Salient Features of the Constitution."**

The majority opinion held that it was not necessary to conclusively determine the salient features of the Constitution at this point, however, **"democracy, parliamentary form of government and independence of the judiciary are certainly included in the prominent characteristics, forming the Salient Features"**.

The judges reasoned that all such questions were resolved through consensus in the 1973 Constitution. Any attempt by Parliament to reopen those debates and re-imagine Pakistan would risk **"unleashing political tempests of unparalleled fury which may be difficult to control, and the Supreme Court was duty-bound to guard against that."**

**Justice Jawwad S Khawaja and Justice Faez Isa** authored separate opinions, but both were by and large in agreement over their reasoning and conclusions.

Justice Khawaja argued that years of colonization had instilled the notion of **"parliamentary sovereignty"** into our collective thinking, and had **"dulled the significance of our own post independence aspirations."** Both judges argued that the post-independence governance model was closer to the **"will of the people of Pakistan"** as expressed in the Preamble of the Constitution.

The two judges rejected the **"basic structure doctrine"** which they considered an **alien theory** borne in a foreign land. They reasoned that given Pakistan's unique context, no Parliament had the power to alter the **nine principles enshrined the preamble**, including **"democracy, freedom, equality, tolerance and social justice, as enunciated by Islam and independence of the judiciary"**.

**Dissenting Notes:** Four judges including Chief Justice Nasirul-Mulk, Justice Rehman, Justice Khosa, and Justice Nisar rejected any limitations on Parliament's powers to amend the Constitution. They reasoned that matters of governance must be decided by the chosen representatives of the people, and should not be left at the **"mercy of the collective wisdom of unelected Judges who are the least accountable branch and in Pakistan.....a closed brotherhood"**.

Justice Nisar recognized Parliament's mistakes in the past, but also reminded of the judiciary's own follies. Justice Khosa raised another important concern and asked that even if the preamble and the salient features of the

Constitution expressed the will of a past generation, why should the Supreme Court hold future generations hostage to it?

**Military courts vs fair trial:**

The second question before the SC was whether the trial by military courts of individuals accused of terrorism-related offences who are known to, or claim to be, members of terrorist groups was compatible with Pakistan's Constitution, fundamental rights and the independence of the judiciary.

A majority of nine judges of the Supreme Court held they were compatible, six judges held that they were not compatible, and two judges did not give an opinion on the merits of the case. Justice Azmat Saeed authored the majority opinion, endorsed by seven other judges, and reasoned that:

*(1) trials before military courts meet principles of criminal justice;*

*(2) the constitutional scheme allows deviation from standard procedure in exceptional cases (one may call it the "sub-doctrine of judicial necessity"); and*

*(3) the amendments only authorized military trials for "terrorists", which was a valid classification allowing for differential treatment.*

Despite holding that the judges had the jurisdiction to invalidate the 21st amendment, a majority of eight judges decided that the salient features of the Constitution were not significantly altered by the trial of civilian terrorism suspects in military courts. Justice Saqib Nisar too endorsed the majority's opinion on this particular issue in his individual opinion.

**Dissenting Note for Military Courts:** Six judges differed in their conclusions. For them, the trial of civilians by military courts was an affront to principles of justice, fair trial and independence of the judiciary as military officers were a part of the executive and did not meet the requirements of independent and impartial courts.

Justice Faez Isa also pointed out the many flaws in the existing anti-terrorism courts and practices, including the Government's failure to ban known terrorist organizations and weak prosecution and delays in terrorism cases, which if corrected would allow the Government to lawfully combat the impunity for offences related to terrorism.

Military courts were not, therefore, a necessary measure for the struggle against terrorism. As Justice Khosa put it: ***"A suicidal measure on the part of the society to counter suicide bombers may not be the most rational legislative step to take."***

***Appointments in Superior Judiciary:*** The SC did not just respond to petitions challenging the 21st amendment, it also ruled on various pending challenges to the 18th amendment, out of which one of the major questions before the Court was the ***procedure of appointments of the superior judiciary.***

Through the 18th amendment, Parliament had amended the procedure for appointment for SC and High Court judges. Through a short order, the Supreme Court in 2010 had sent the amendment back to Parliament to review the procedure for appointments, giving recommendations to make it more compatible with independence of the judiciary. The Parliament promptly complied and passed the 19th amendment.

According to the new system of appointments, the Judicial Commission [JC], comprised largely of judges, nominates candidates for vacant positions to a Parliamentary Committee [PC], comprised of parliamentarians from both Houses with equal representation from the government and opposition. The PC can either accept the JC's recommendations, or reject them by three-fourth majority. The PC's powers were further read down by another SC judgment, where it held that the SC would have the final say on whether the PC's rejection of a nominee was reasonable.

Since the detailed judgment from the 2010 case was never issued, the SC also used this opportunity to finally give its reasoning. A majority of judges were in agreement that independence of judiciary means complete control over the judiciary's affairs, including appointments. The judiciary (namely the CJP) must initiate the nomination process and make the final decision on appointments – any substantial role by parliamentarians in the process would amount to outside influence and a breach of judicial independence. The judges therefore reaffirmed that the PC decisions are not binding on the JC and are also subject to review by the SC.

***Human Rights Commitments:*** In recent years, the SC in some landmark judgments relied heavily on international human rights standards. In judgments related to the rights of religious minorities and enforced disappearances, for example, judges even considered treaties not ratified by Pakistan as authoritative sources.

Expectations from the Supreme Court's judgment on the 18<sup>th</sup> and 21<sup>st</sup> constitutional amendments were varied. The optimists Maulana Fazlur Rehman, JI and MNA Achakzai like one-man parties expected that the SC would declare military courts incompatible with human rights and independence of the judiciary, even if it stopped short of invalidating the 21<sup>st</sup> amendment due to lack of review jurisdiction over constitutional amendments.

The **5<sup>th</sup> August 2015** judgement would be seen in history as one in which the Supreme Court further enhanced the judiciary's own powers – but didn't amend any procedures for the justice for the poor. Pakistan was still ranked at no: 192 in the list of 197 countries on issues of '**justice delayed**', repeated adjournments, stay order favours etc.

### **ANOTHER CJP RETIRED RUDELY:**

**On 9<sup>th</sup> September 2015;** the lawyers stood divided over the full court reference held in the honour of Chief Justice of Pakistan [CJP] Justice Jawwad S Khawaja on his retirement. Two Supreme Court judges, Justice Sh Azmat Saeed and Justice Iqbal Hameedur Rehman, did not participate in the ceremony while 13 others marked their presence.

Moreover, no lawyer from former Supreme Court Bar Association [SCBA] President Asma Jehangir group participated in the reference. The lawyers associations, including Pakistan Bar Council [PBC] and others from Rawalpindi and Islamabad, also boycotted the event. However, lawyers from Hamid Khan Group were there. Addressing the ceremony, the lawyers' community requested the court not to interfere in the powers of PBC and leave the matter of lawyers' licenses to the PBC.

Amidst reservations from some lawyers, the CJP addressed the reference:

*"Inexpensive and speedy justice is not being provided to anyone in the country. It is incumbent on the government, state institutions, every member of society, including lawyers and judges, to change such system which is not providing affordable and timely justice.*

*Brightness of Aiwan-e-Adl reflects from fearless faces. In order to polish this brightness it is imperative for every member of the society generally and for lawyers and judges particularly to get united and counter professional malpractice and degeneration.*

*Favour is highly hazardous for Judiciary as it prevents from giving courageous decisions and this way it can bring about decadence in system of justice. Practice of seeking adjournment in the cases by using dilatory tactics by lawyers and on different pretexts is very common in our courts."*

A bad precedent was set since CJ Jawwad S. Khawaja, who retired **on 9<sup>th</sup> September 2013** on reaching superannuation but not given a befitting farewell from the Pakistan Bar Council [PBC] and Supreme Court Bar Association [SCBA]. Traditional farewell dinners in honour of the outgoing chief justice has been in practice but this time the SCBA and the PBC both associations decided a day earlier even not to attend the dinner organised by Chief Justice designate Anwar Zaheer Jamali on the eve of Justice Khawaja's retirement.

The 23rd CJ remained in the office for 23 days! The out-going CJ paid *great tributes* [?] to the Judicial System of Pakistan. **"No improvement in the last four decades"** he observed - also said that **'there was no concept of Strikes in the Courts forty years before'**. Another CJP Chaudhry had accepted while reviewing Karachi L&O situation that the **'lower courts are corrupt and the Police Stations are for auction'**. What else poor Pakistanis needed.

In a meeting, both the bar associations also announced that no one would attend the reference being held in honour of the chief justice – it has been customary for the PBC's vice chairman and the SCBA president to deliver speeches along with the Attorney General for Pakistan eulogising services rendered by the outgoing chief justice.

The associations had also taken similar steps before for former CJP Iftikhar M Chaudhry where the bar associations did not organise any farewell dinner but they did attend a reference held for him. Bar leaders, however, reiterated their respect for the institution of the Supreme Court as they had always struggled for the independence of the judiciary but would not tolerate **judicial dictatorship**.

The bone of contention behind such measures was the verdict rendered by a three-judge Supreme Court [SC] bench headed by Justice Jawwad Khawaja a day earlier, **on 8<sup>th</sup> September 2013**, suspending the licences of senior counsel Ali Zafar and his associate Raja Zafar Khaliq to practise before the SC for one year. Legal observers, however, were not taking the order as a simple stand alone judgment but as something which had political undertones.

Ali Zafar was the joint candidate of a majority group popularly known as the Asma Group for the office of SCBA president scheduled to be held at the end of October 2015. His suspension eventually benefitted his opponent, Kareem Ahmed Khurshid – a candidate for the same post from the Hamid Khan Group.

*[Ali Zafar had written a letter to former CJP Nasirul Mulk requesting the transfer of one Bahria Town case to another bench while expressing apprehensions about Justice Khawaja. Mr Zafar, while representing Bahria Town Ltd, had regretted that despite an adjournment during his visit abroad which the CJP had allowed till 1<sup>st</sup> April, his case was fixed for 25<sup>th</sup> March and heard.]*

Asma Jehangir contended that it was a question of dignity and honour of the legal profession. She added:

*'.....the decision of not attending the dinner and reference would be in bad taste but lawyers have to register their protest in a peaceful manner. Lawyers are not that simple, they know exactly what has been happening around.'*

Former Attorney General Irfan Qadir had also sent a reference against Justice Khawaja before President Mamnoon Hussain with a request to proceed against the judge by invoking Article 209 of the Constitution – a provision that asks for removing a judge under misconduct. It was obligatory for the President to initiate the Supreme Judicial Council [SJC] proceedings against the judge. Mr Qadir claimed that the judge had repeatedly violated the Code of Conduct for judges through acts of playing to the gallery, creating sensationalism so as to remain ever present in news tickers and print media and making sweeping statements on a daily basis.

Referring to '**the News**' dated **12<sup>th</sup> September 2015**: CJP Jawwad S Khawaja, in his farewell address two days earlier, had pointed out certain deep seated causes of decay within Pakistan's justice system that he highlighted. He was in apposition to fix that broken system in his three week's tenure but he honestly admitted that country's justice system had failed for which the judges, lawyers and agencies associated with justice system were jointly responsible in their individual and collective capacities.

The fact remains that the general populace seldom perceived the judiciary 'as honourable'; because of not being part of a fair and equitable system of justice any more – rather considered them as a mafia to support, help and back up the power elites. More so, despite such admissions, as done by CJP Jawwad S Khawaja, there has been no planned or concerted effort from the

superior courts or superior bar associations to improve its functions or to repair the evils at least.

Justice Khawaja rightly pointed out towards negative norms of Pakistan's social as well as within - courts environment where fear of attracting displeasure or being judged by one's kin or peers or powerful vested interests has been the prime factor reflected in its judicial decisions. ***The top lawyers every time expected a preferential treatment because of being part of high profile cases of big politicians – not on the basis of the merit of the case.*** They try to manage favourable judgments and judges accommodate them triumphantly. The judges also accept their wrong standings shamelessly – a visible sign of a dying society where submission, flattery, hypocrisy, lack of conscience and *benefit-principles* prevail and flourish day by day.

To think about the throbbing institutional reform and reconstruction in Pakistan's judiciary, one needed to address the regressive behaviour of the legal fraternity deeply engulfed with self-perceptions of being professionals. In bar rooms the lawyers seldom talked about what was right and what was wrong – if done, largely to judge others, the lack of intent to apply high principles and ethics to their own practice.

In Pakistan; bar associations and judges are taken as elite clubs, membership of which comes along with a sense of entitlement. However, induction into that elite club is not inspired by the urge to institute reforms within the environment – and never as service oriented. The betterment of the general public as clients are never thought and discussed.

Referring to '**the News**' dated **12<sup>th</sup> September 2015**, Babar Sattar rightly pointed out that:

*'...while we can blame shoddy investigation and prosecution for delays and lack of convictions in criminal trials, what about civil disputes? The responsibility of failure to reform the justice system rests with the [superior] judiciary, not the legislature and not the executive. A judiciary that has zealously guarded (if not expanded) the boundaries of its province in the name of independence can hardly .... blame other pillars of the state for the existence of a moth-eaten court system.'*

Since the 18th and 19th amendments vested in the judiciary almost absolute powers to singularly determine its own composition. Article 209 also vests in the judiciary the exclusive power to undertake accountability of judges. While **judicial accountability is non-existent in Pakistan,**

Article 209's power should have been exercised in the contemporary era to curb judicial misconduct so widely being discussed in media.

The manner in which Article 175-A powers had been exercised to appoint judges in CJP Chaudhry's tenure, could have been revisited keeping in view the criticism and shortcomings discussed in the bar association meetings.

None of the high courts in Pakistan ever deemed it necessary to exercise its constitutional power to formulate rules to address the problem of inordinate delays in dispensation of justice or abuse of court process by litigating parties or their counsel. Article 202 of the Constitution is referred here under which high courts are to regulate their own practice and procedure as well as that of subordinate courts.

With the promulgation of the 21st Amendment, military courts were put to do justice; the general populace welcomed them because they want speedy justice. The same kind of courts, with summary trial powers, could be born under civil judiciary system through Law and Justice Commission of Pakistan. That Commission stands endowed with broad power and responsibility to guide the federal and provincial governments on how to improve, modernise and reform the legal system in view of changing societal needs. The superior judiciary never aspired to do its home work so why cursing the military courts in media.

**National Judicial Policy Making Committee**, created under a federal statute in 2002, is also there in Pakistan which comprises all chief justices – a sole domain of the judiciary. In 2009, this Committee had released a **National Judicial Policy**; containing unimaginative instructions largely for district judiciaries which were incapable of addressing the problems of masses thus failed miserably. After that day, no one has even heard about its meeting or functions as envisaged.

CJP Khawaja's had mentioned certain shortcomings but failed to refer about urgent institutional reconstruction required at the basic root level to begin dispensing justice to ordinary people. He did mention that **'a case takes 25 years on average to make its way to the Supreme Court and get disposed of'**. When a CJ admitted his inefficiency by saying so then the society's hope and faith in the ability of Pakistan's judicial system could easily be imagined. *Suo motu* cannot be taken as its short cut – elaborated home work is needed.

The needs of the complex society that Pakistan has developed during the last two decades should be re-written afresh; solutions though not easy but some one would have to start the journey. Till then the nation would con-

tinue cursing the judiciary and welcoming the army courts taking them as flag bearers of the justice, too.

### **JUDGES THEMSELVES IN THE DOCK**

#### **Ref Against Justice Siddiqui in SJC:**

A judge of the Islamabad High Court [IHC], known for his love for pigeon flying, landed himself in trouble after allegedly misusing his authority for personal gains; the '**Daily Times**' dated **26<sup>th</sup> April 2016** is referred.

A former director of the Capital Development Authority [CDA], M Anwar Gopang, filed a reference against Justice Shaukat Aziz Siddiqui in the Supreme Judicial Council [SJC]. The reference charged the judge for pressurising the CDA ***to construct a special cage for his pigeons on the rooftop of his official residence.***

The reference accused the honourable judge of shifting his residence thrice in search for a 'better' abode. He then compelled the CDA to renovate his existing residence despite the fact that the house was the property of the Public Works Department [PWD] and PWD was responsible for its renovation. ***The reference also revealed that the CDA spent Rs:12.1 million to renovate that [one] house.***

The complainant, Mr Gopang, claimed in the reference that on the instructions of Prime Minister Nawaz Sharif, the judge was allotted House No: 91-H in Sector F/6-3 of Islamabad. After sometime, the judge used his '**other connections**' to find a better place to live, and got allotted House No: 1-A, in Sector F/7-3 but the honourable judge was not satisfied even with that house.

For the third time, eventually, J Siddiqui got House No:2-A in Sector F/7-4, which was on the pool of the PWD. The house needed repair and renovation. On the insistence of J Siddiqui, the renovation work was carried out by the CDA, which cost the national exchequer more than Rs:12 million. The complainant also submitted documentary evidences in support of his application in the JSC. The reference said:

***"The Engineering Wing of the CDA had initially estimated a cost of Rs:8 million for the renovation work. However, it swelled to more than Rs:12 million in the end.***

***The documentary evidence showed that to conceal the total cost of renovation, the officers of CDA revised the tenders thrice.***

***Although the job was awarded to three different firms but actually the work was completed by one contractor.”***

According to the documents, Rs:372,000 were spent on the paint work of the house and electrical job was completed with the cost of Rs:1.7 million. The revamping of eight bathrooms cost Rs:0.9 million whereas the decoration of kitchen took Rs:163,000. Two main gates of the house were changed with the cost of Rs:126,000.

In addition to this, the old windows of the house were replaced with aluminium windows and Rs:770,000 were spent on this count. Likewise, a sum of Rs:275,000 was spent on the driveway of the house. In the parking porch, cement tiles were fixed with a sum of Rs:190,000.

The store room of the house was merged into kitchen on which Rs:250,000 were spent. Rs:555,000 were utilized on the tiles that were fixed on the roof of the house. The six doors of the house were covered with metal net on which Rs:226,000 were spent.

The height of walls of the house was increased and security wire was installed on it with a total cost of Rs:437,000. False ceiling and fixing of marble in drawing room was completed with the total cost of Rs:111,000.

***The CDA also constructed the cage for Justice Siddiqui's pigeons on the rooftop, but that amount was not shown in the bills.***

Justice Siddiqui himself had once given orders to the CDA for eliminating encroachments from inside the official residences provided to government servants, ***but he got constructed seven new rooms in the house that was allotted to him as IHC judge.*** As per rules, the CDA had to take a no-objection certificate from the PWD before starting the renovation work – which was probably condoned by the judge himself.

It is pertinent to mention that the CDA deducts a handsome amount from the salary of the employees in the name of renovation and repair but does not provide even a water tap or electricity bulb to its poor inhabitants or to the low paid staffers – but the CJ's house was converted into a mini palace. Pakistan's judiciary [and Islamic democracy] hurray.....

### **2nd Charge in the Reference:**

- ***..... that Justice Siddiqui had very close terms with CDA Director Manzoor Hussain Shah. The CDA allotted Plot No:1014 in Sector 1-8/4 to Mr Shah but he refused to accept it and demanded that either Plot No:395 or 396 in Sector I/8-2 be allotted to him.***

- ***Mr Shah took the matter in IHC, got it fixed before Justice Siddiqui – who issued the orders to CDA to allot Plot No: 396 to Mr Shah. The estimated market value of the first plot was Rs:10 million whereas the plot which the officer got on his choice was worth Rs:50 million.***

Justice in ISLAMIC state.....hurrey.

### **3<sup>rd</sup> Charge in the Reference:**

An Assistant Director of CDA, Shahid Singha, allegedly a close friend of Justice Siddiqui for many years, also took undue advantage of his relations.

- *The son of AD Shahid Singha was a temporary employee on a CDA's project. On the application of Singha, Justice Siddiqui first issued stay order and then issued the orders to confirm the services of Singha's son Nabeel Singha in (BPS-16) despite objections raised by the CDA admin.*
- ***Secondly: AD Shahid Singha's daughter-in-law was recruited as research associate in Islamabad High Court on a monthly salary of Rs:80,000 on the orders of Justice Siddiqui. He later transferred her to his own office.***
- *Thirdly: AD Shahid Singha fell ill and admitted to a private hospital. On the orders of Justice Siddiqui, the CDA had to pay for his medical treatment that cost the authority Rs:377,986.*
- *Fourthly: on the intervention of Justice Siddiqui, the CDA had to allot AD Shahid Singha a house from its pool and gave a Suzuki Cultus car to him which was not due for his posting.*

***Earlier, Justice Siddiqui had given the verdict that any government servant, who owned his / her house in Islamabad, would not be entitled to official residence but on the other hand he blew his orders in the air himself.***

**On 10<sup>th</sup> November 2016;** the Islamabad High Court Bar Association [IH-CBA] unanimously adopted a resolution demanding the Supreme Judicial Council [SJC] decide a reference against the ***incumbent chief justice of the IHC for making 'illegal' appointments.*** A resolution signed by 505 members of the IHCBBA was tabled during the general body meeting of the association by its Secretary General Mohammad Waqas Malik.

Surprisingly, when the lawyers were speaking on the resolution, IHC Justice Shaukat Aziz Siddiqui entered the barroom and sought permission to address the bar. The organisers accommodated their judge to address the

lawyers in his capacity as a former president of the Lahore High Court Bar Association Rawalpindi division.

Justice Siddiqui said after filing the reference against Justice Kasi, the complainant had done his job; then it was the SJC's decision to go on; also that the IHC CJ Kasi had the right to defend himself before the SJC and contest the allegations.

*[The IHCBA's resolution had asked the **IHC Chief Justice Anwar Kasi**, to follow the footsteps of his predecessor Justice Iqbal Hameedur Rehman who resigned from the Supreme Court after the apex court in its judgment of 26<sup>th</sup> September 2016 pointed out that the appointments made during the tenure of Justice Rehman and Justice Kasi in the IHC were illegal. J Rehman was the chief justice of the IHC till 2012 when he was elevated to the Supreme Court.*

*Following the 26<sup>th</sup> September judgment, the IHCBA Secretary General filed a reference against Justice Rehman and Justice Kasi with the SJC. The resolution demanded the SJC decide the reference at the earliest else the lawyers would start a series of protests creating a bad impression of the whole judiciary.*

*The incumbent CJ had also [amongst many others] had appointed one **Usman Mir, a son of his friend, in BPS-18**. He was working in a private bank and was appointed on deputation after the promulgation of the IHC Rules. The chief justice's power to relax the rules under Rule 16 was illegally applied to appoint a credit analyst from a bank to the post of Assistant Registrar of the IHC on deputation – having zero experience.*

*The Supreme Court had also declared the appointment of Mir's sister in BPS-17 as illegal; however, his brother-in-law was still working in the District & Sessions Court in BPS-17.]*

**On 29<sup>th</sup> December 2016;** a lawyer, Syed Javed Akbar, filed a reference before the SJC against IHC's Justice Siddiqui for the above interference in the BAR affairs. In the reference the petitioner maintained that the judge was on judicial duty at the time he '**interfered in the affairs of the bar**' and it was expected that he would preserve the dignity of his court and not involve himself in a public controversy.

In the reference, the petitioner has requested that an inquiry may be conducted in light of the allegations and report be sent to the President of Pakistan for removal of the judge.

**On 13<sup>th</sup> October 2017;** Chief Justice of Pakistan [CJP] Mian Saqib Nisar formed a special bench to hear the petition against serving IHC judge, accused of misconduct, seeking direction that he be given an open trial before the SJC. Headed by Justice Azmat Saeed Sheikh, the three-judge bench, comprising Justice Qazi Faez Isa and Justice Sajjad Ali Shah, was asked to take up the case five days later.

The SJC had already dismissed J Siddiqui's plea seeking an open trial on 18<sup>th</sup> May 2017 but the mighty justice was still in the saddles.

The development came a week after IHC judge Shaukat Aziz Siddiqui approached the apex court to request that he be given an open trial before the SJC. J Siddiqui had filed a constitutional petition in the apex court on **5<sup>th</sup> October 2017** under Article 184(3) of the Pakistan's Constitution, making the SJC and the federation respondents.

J Siddiqui's 14-page constitutional petition requested the SC to declare that SJC's 18<sup>th</sup> May verdict be declared null and void as it was passed without lawful authority. His petition stated that:

***'....by upholding paragraph 13 (1) of the SJC Procedure of Inquiry 2005, which permits the proceedings of the SJC in camera, violates Art 10-A of the Constitution'.***

**On 6<sup>th</sup> November 2017;** the Judicial Commission of Pakistan [JCP], in a meeting held under the chairmanship of CJP Mian Saqib Nisar formed a larger bench to hear IHC's Justice Siddiqui's petition, seeking open trial before the SJC. The larger bench headed by Justice Gulzar Ahmad took up the IHC judge's plea for the next day.

A week earlier, a two-member bench of the Supreme Court, comprising Justice Sh Azmat Saeed and Justice Qazi Faez Isa, referred the matter to the CJP to consider forming a larger bench for hearing the IHC judge's petition – one dozen more such petitions were in his pocket.

Earlier on that day, when the SJC was to resume hearing, the shrewd judge Mr Siddiqui prayed to stay the proceedings in the SJC till his petition under Art 184(3) is finally disposed off – a dirty trick to pull the time – it was mockery of justice in Pakistan. Since 1973 ONLY ONE judge had been proceeded under CORRUPTION by the SJC that too four decades before.

***Hats off to the judges' gimmicks in Pakistani judiciary.***

**On 7<sup>th</sup> November 2017;** the Supreme Court [SC] declined the request of the sitting Judge of IHC Shaukat Aziz Siddiqui, seeking suspension of proceedings of the SJC against him for his alleged misconduct. A five-member larger bench of the apex court, headed by Justice Gulzar Ahmed and comprising J Sh Azmat Saeed, J Dost Muhammad Khan, J Ijazul Ahsan and J Sajjad Ali Shah, heard the petition filed by J Siddiqui for an open trial instead of in-camera proceedings; as given in above paragraphs.

Appearing on notice, Hamid Khan, counsel for J Siddiqui, requested the apex court to stay the proceedings of the SJC against his client. The court, however, declined the request and observed that ***there were some 101 questions that needed to be thoroughly examined.*** Justice Gulzar Ahmed observed that the court did not want to hear the case in pieces but would hear it in detail, adding that this was not the kind of a case where a stay order could be issued to bury the whole case.

J Sh Azmat Saeed observed that they wanted to hear in depth, AND if Article 10-A could be applied in ensuring the rights of an office boy, then why should not be applicable in judges' matters.

However, till the last day of 2017, the SJC had done NO progress in their own brotherly JUDGE – and ultimately the reference will die its own death.

***Ref Against J Iqbal Hameed ur Rehman:***

**On 26<sup>th</sup> September 2016;** in a landmark judgment carrying implications for three existing members of the higher judiciary, the top court annulled 74 appointments in the Islamabad High Court [IHC], observing that the IHC's then top judge and administration panel had disregarded their mandate in filling the office-gaps.

A three-judge bench, headed by Justice Amir Hani Muslim, announced the long awaited verdict on a three-year-old petition of lawyer, Ch Mohammad Akram, who had challenged 74 appointments in the IHC, made in phases from 2010 to 2013.

Justice Amir Hani Muslim, who was continuously streamlining the civil service structure of the country for the last three years, authored the 51-page judgment, which was reserved on **16<sup>th</sup> May 2016** but announced that day – with all the minute details.

The judgment said the then IHC CJ and the Admin committee of two senior judges made appointments in the establishment in total disregard of

the mandate given by the rules framed under Article 208 of the Constitution. Their fellow SC judge, Justice Iqbal Hameedur Rehman, was the IHC Chief Justice during that period and the administration committee then comprised the incumbent IHC Chief Justice Anwar Kasi and the Federal Shariat Court's incumbent CJ Riaz Ahmad Khan.

The top court held that the then CJ IHC had lost sight of the scheme of rules by appointing respondents, the 74 employees, in the IHC. The provisions of rules that provide for a mandatory competitive test were not followed, nor were any advertisement made to invite applications of eligible candidates. The justification that the IHC was a new court was not considered sufficient to override the mandatory requirement for the appointments. The judgment held:

*"Such practices may lead to public distrust in the country's judicial institutions. We cannot allow denial of justice to those who merit appointment nor could we encourage anyone to bypass transparent process of recruitment provided under the Rules."*

The court declared that the appointments of 74 employees and other such staff of IHC were to be de-notified and repatriated to their parent departments, including the private sector, within 15 days with the mode given by this court in another landmark judgment of 2013. On repatriation, those employees were allowed to join their parent departments and made entitled to their seniority with their batch mates. The apex court said:

*"Fresh recruitment in place of the de-notified employees shall be initiated simultaneously in accordance with the rules and preferably completed in 45 days."*

**On 23<sup>rd</sup> October 2016;** days after he was accused of making illegal appointments in the above IHC Case, the SC judge Justice Iqbal Hameedur Rehman tendered his resignation from the post; the resignation was duly addressed to President Mamnoon Hussain.

Justice Iqbal opted to resign because a week earlier, a reference was filed in the SJC against him by IHC's Bar Secretary Waqas Malik; J Iqbal was appointed as SC judge in February 2013.