Scenario 17

Politicizing Judges in Pakistan:

A few lines from an essay of **Ardisher Cowasjee** appearing in the daily ***'Dawn' dated 15th February 2009*** describe the 'recruitment' of a Chief Justice as;

> *'Early in 1994, former chief justice of the Sindh High Court, Sajjad Ali Shah who had been elevated to the Supreme Court of Pakistan was sitting on the Lahore Bench. One day he received a message that the prime minister's house had telephoned asking for a convenient time for prime ministerial husband Asif Ali Zardari to call on him. A time was fixed and Asif Ali Zardari duly turned up, with Aitzaz Ahsan.*
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> *Sajjad was told that the prime minister was considering appointing him the chief justice of Pakistan. What was his reaction? Sajjad told his visitors that he would not care to leapfrog over three senior judges, but that he would be agreeable to go back to Sindh as its chief justice. This did not fit in with the then government plan.*
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> *Contacts between Zardari and Sajjad continued and they met thrice at Zardari's house in Islamabad when the offer of appointment as chief justice was raised again. On one occasion, Zardari, accompanied by Agha Rafiq Ahmad, "finally came out openly with the proposal that the prime minister was prepared to appoint me as the chief justice of Pakistan on the condition that I give my written resignation in advance, which would be used if I failed to oblige her. Obviously the letter was to be undated."* ***(Law Courts in a Glass House by Chief Justice (Retd) Sajjad Ali Shah - 2001).***

In 1994, there was seen a visible division amongst the judges of the Supreme Court. Then according to the seniority list Justice Saad Saood Jan was at number one; Justice Abdul Qadeer Chaudhry at number two; Justice Ajmal Mian was at number three and Justice Sajjad Ali Shah was at number four.

Justice Saad Saood Jan was simply ignored by the PM Benazir Bhutto because he had not agreed with a list of 20 names which was prepared by the PPP on the basis of their political affiliations. When Justice Jan was being considered for elevation to CJ's slot, the list was indirectly passed to him which he straightaway declined being political.

Justice Abdul Qadeer Ch was offered the slot but he had refused it saying that Justice Saad Saood Jan was senior thus it was his right. J Ajmal Mian was not touched at all and the negotiations mentioned in above paragraphs started taking place. When Justice Shah was given the position of Chief Justice, he had promptly accepted all those judges without raising any objection.

When Justice Sajjad Ali Shah was sworn in as the Chief Justice, a case was immediately filed against him by an advocate Akram Sheikh. Instead of dealing that case on merits, Mr Sheikh was proceeded against under Contempt of Court charges. Then another advocate Wahabul Khairi moved a similar petition against the CJ, he was also charged with Contempt of Court.

Then another advocate named Abdul Basit took the court on horns on the same issue but again the contempt of court proceedings were initiated against him also. That was enough protest against an injustice within the apex judiciary itself. Shameful days those were in the history of Pakistan.

Astonishing fact of the history is that the same CJP Sajjad Ali Shah had taken 180 angle view two years later. See the next paragraphs.

On 20th March 1996, under his dominion the Supreme Court announced judgment in the 'Judges Case' which was considered as a milestone in the judicial history of Pakistan. This judgment was announced by a larger bench. With that decision, the Supreme Court of Pakistan tried to stabilize country's constitutional framework on firm foundations that paved the way for future of democracy and supremacy of law. It was a full bench unanimous decision of the Supreme Court. The basis of the decision was:

> *'.....dictatorship, army or civil, is another name of centralization and monopoly of authority, whereas democracy stands on the basis of supremacy of constitution and rule of law. Therefore it is necessary in a modern state to achieve this end through proper checks and balances.'*

The observation was hailed by all sections of the society. Prof Khurshid Ahmed of *Jama'at Islami* (JI), in one of his releases on internet then, had rightly pointed out that:

> *'........limiting and encircling the powers of judiciary, appointment of favourites in judiciary by ignoring the principles of merit, wholesale appointment of favoured judges in the High Courts and in the Supreme Court, dismissal of trusted and experienced judges, transfer of not only senior judges but the Chief Justices of High Courts without due consultation and dumping them into Shariat Court ultimately forced the Supreme Court to announce its verdict to save the judicial system of the country - the verdict of 20th March.'* **(Translation of Isharaat from 'Tarjuman Al Quran' for 1st December, 1997)**

The said decision of 20th March 1996 enumerated:

> *'......Article 270 determines Qura'an and Sunnah as the basis for legislation and for the oath that is taken by the President, the Prime Minister, the Chief Justice, the Ministers, the judges and the members of the Parliament before they assume office.*
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> *In Pakistan the parliamentary democratic system should ensure distribution of powers to the three institutions with absolute balance. Parliament enjoys powers of legislation, running of the state is the responsibility of administration that consists of Prime Minister, his Cabinet and subordinate bureaucrats, and the judiciary has the authority to monitor the enforcement and implementation of law.*
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> *The judiciary should be completely independent and segregated from the administration and its system of appointments, demotions and transfers should be based on transparent principles to ensure merit and must be free from the intervention of political elements and self seekers.*
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> *It was resolved through this decision that two main fundamental rights of an ordinary person had been recognized; firstly that even if one is not directly an aggrieved party but on the basis of fundamental rights, one could knock at the door of law and secondly if in the lower courts, a case is lingering on (as was then the case of 'Jehad Trust' which had been unnecessarily kept pending for 3 years and hearing was not fixed), the apex Court could be approached provided it involved fundamental rights.*
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> *With the announcement of this decision, interpretation of the Constitution and law became the sole prerogative of the judiciary. In other words the judicial review was declared the constitutional right and responsibility of the higher courts'.*

With the announcement of this ruling it was for the first time in the history of Pakistan that *judiciary* had fortified itself in a way it could function as an independent and powerful institution and the fortification is the *sine quo non* for the protection of fundamental rights, supremacy of law and attainment of justice. But, unfortunately the then political leadership was not prepared to accept the essentiality of this ruling, which was not a good omen for democracy.

Nawaz Sharif, who was the leader of Opposition then, had branded the resistance of Benazir Bhutto's government as treason against the constitution and had paid tributes to the Courts.

But he turned around when he himself assumed power in February 1997. His party men challenged the right of the apex court to interpret the Constitution.

PML brought out an ordinance to reduce the number of judges of the Supreme Court (which had to be withdrawn later under enormous pressure from all corners). Appointment of judges was delayed till last hour. When the Chief Justice had advised President to take action under Article 190 and when the President and the Chief of Staff refused to support and ratify the unconstitutional attitude of the then government, they made appointments as per advice of Chief Justice in 'public interest'.

Prof Khurshid Ahmed had then rightly quoted a reference of three living legends of judicial history while commenting on the respective government's behaviour in this respect.

Leonard Jason L, in his book ***"The Constitution" (published: London, François 1996 pp 42)*** writes about the British parliamentary system:

> *'Though in our constitutional system parliament is the supreme institution for legislation; Courts, which are formed by judges, have the power to see that laws are properly implemented. It is courts who decide on the vires of laws and their legitimacy. Since parliament's legislation can neither address every human error and nor can it cover all unlawful deeds, it is, therefore, for courts to interpret a law or even give direction for necessary legislation where there is either no law or exists an ambiguity about its meaning in the given circumstances.'*

Thus, judges themselves perform the task of legislation. The British 'common law' is simply based on judge's legislation made on issues not found in Parliamentary Acts. Moreover, the exercise of Judicial Review is an important means with the help of which the British Courts keep government (and even legislation, to an extent) in control. It is the field of judicial review which is now making fast progress in the UK.

> *[Lord Diplock has described that there are three basics of judicial review i.e. to decide about a law whether there exists some element of illegality in it, whether there was irrationality in it, or there is procedural impropriety.]*

Secondly; in America, Chief Justice Marshal had settled this principle in a case known as ***'Marbury vs. Madison'.*** It was recognized as an absolute principle of constitutional law despite certain reservations of the justice prone governments of that time.

When the US President Roosevelt had tried to take revengeful action against the Supreme Court for declaring certain laws of his renowned *'new ideal'* as void and planned to increase the number of judges so as to appoint some of his liking, the Congress had refused to accept it. Thus collective support was attained for the supremacy of constitution, freedom of judiciary and its judicial review.

Thirdly; an important instance is India where the Supreme Court in a famous case *Kesavananda vs. Kerala* **(AIR 1973 SC 1461);** commonly known as fundamental rights case, settled this principle that:

> *' …. Parliament is not empowered to make any constitutional amendment that runs counter to the basic structure of the constitution. It is because the parliament is not constitution-making body. It can, however, exercise authority to amend the constitution formed by the constitution-making body. Therefore any amendment that distorts the constitution itself is not an amendment rather it is constitution-making, for which the legislature enjoys no authority.'*

It was further explained by the Supreme Court of India, in a case *Indra Gandhi vs. Raj Narain* **(AIR 1973 SC 2294)** and clearly decreed that:

> *'…. it can never be the purpose of constitution-makers that the Prime Minister should be made an oriental despot through a constitutional amendment. Parliament's*

authority for amending the constitution (Article 368) despite its overt phraseological expanse confers only limited authority - not absolute authority.'

In order to counter it, when Indra Gandhi added two amendments (clauses 4 and 5) to Article 368 through constitutional amendments, and thus ended the authority of the courts to declare any constitutional amendment being counter to constitution, the Supreme Court in 1980 in *Mai Nirwamal* case **(AIR 1980 SC 1989)** cancelled this amendment (42nd amendment) and through it not only frustrated the claim of the parliament that it enjoyed unlimited authority to amend the constitution but also refused to recognize its right that parliament can restrict the powers of judiciary. This is the position of judiciary in a democratic parliamentary system.

Contrarily, the attitude adopted in Pakistan once by Prime Minister Nawaz Sharif and his aides, through delay in appointment of five judges, amounted to disregarding the advice of the Chief Justice of Pakistan. They had deliberately avoided respecting verdict of ***the 'Judges Case'***, which was basically the settlement of certain principles and regulations with regard to the appointment of judges and the freedom of judiciary. It was unanimously ruled that:

- …… the appointment of judges should be on merit and transparent by way of 'mutual consultation' amongst the government and the higher courts. This consultation was declared as mandatory between President, Chief Justice, and Governor of the respective province as the case may be.
- …… this consultation should be meaningful and purposeful leading to consensus to eliminate any shade of irregularity, political considerations, influence or individual discretion. Mere linkage with a political party in the past should not necessarily be a disqualification but it should not be a political bribery in any way.
- …….. the administrative head, President or Governor, could render advice about the background and moral character of an individual but the person's legal capability and acumen would be verified by only those who possess legal experience and excellence. Therefore, the advice of the Chief Justice High Court and Chief Justice of Pakistan would be final.

  [In other words the final authority to appoint remained with the President but he would neither go against nor without the advice of the Chief Justice to suggest any other name. If the President would like to differ with the advice of the Chief Justice, he should record reasons for doing so and the Chief Justice would have a right to discuss dissenting reasons concerning legal capability, aptitude, capacity, standing and repute of the perspective candidate.]

- … after appointment, promotion should be on the basis of seniority and the same principle would be held for Chief Justices of all the four High Courts of Pakistan.
- ……the judges working as Additional judges would be given the first right for confirmed appointment unless there was something against them on their service record.
- …… the appointment as Acting Chief Justice should be purely temporary - in ordinary circumstances 30 days and in extraordinary circumstances (e.g. death) at the most 90 days. The Acting Chief Justice should dispose off day to day routine matters but his advice in regard to appointment of judges would not take effect.
- ……. the existing vacancies of judges should be filled up within one month. The question of filling posts that were likely to fall vacant must be considered ahead of time so that appointments are made within 30 days.
- ….. by no way such posts in the superior judiciary should remain vacant for more than 30 days, at the most 90 days.

- ……. the appointments of Supreme Court judges as Acting Chief Justices of High Courts or shifting Supreme Court judges or Chief Justices High Courts to Shariat Court disregarding their wishes would be taken against the Constitution and freedom of judiciary. There should be no transfer against their will by way of penalty as per Article 209 of the Constitution.
- …… the appointment of adhoc judges in the vacancies of permanent judges would be treated as incorrect.

A very interesting fact from our judicial history: when the judge's decision was announced on 20th March 1996, CJP Sajjad Ali shah was very happy and feeling proud. In the tea room the fellow judges congratulated him and at the same time two judges loudly said that:

> *'Mr Chief Justice you should follow your own judgment of today and by principle of seniority you should also set an example by stepping down voluntarily in favour of Justice Saad Saood Jan who still have five months till his retirement. If you'll do justice with your fellow judges also by keeping adhered to your own verdict, Pakistan's judiciary could be seen at sky and your name would become legendary, worth writing in gold for ever.'*

CJP Sajjad Ali Shah had gone angry on that suggestion; justice in Pakistan is what suits to the power player in whichever place he is, whether PM or the CJP or Army Chief.

Now an excerpt from a paper, presented by **Mr Khalid Anwar** - a close aide of the then Prime Minister Nawaz Sharif and the Law Minister - at a seminar held in the Institute of Policy Studies, Islamabad in Nawaz Sharif's era, is reproduced here:

> *"Judicial power is a fundamental aspect of secular as well as religious constitutions..... It operates to restrain parliament from transgressing their constitutional limits. There is nothing unusual in this exercise of judicial power and, instead of considering it as usurpation of the powers of the parliament; it is indeed the exact opposite. It is an attempt to prevent the parliamentary organs from usurping a power which does not vest in it".*

But when a moment for practical implementation came up, Mr Khalid Anwar stood with his PM Nawaz Sharif pushing back his own words. It is the routine ever prevailed in Pakistan; we are Muslims.

This judge's case was **revisited later in 2002** when the Supreme Court's judgment in Constitutional Petition No 1 (Supreme Court Bar Association through its President ***Hamid Khan vs Federation of Pakistan***) and Constitutional Petitions No 6 - 10 and 12 of 2002 dated 10th April 2002 surfaced on the arena of Pakistan's judicial history. In these petitions, the appointment to the Supreme Court of three LHC judges, namely Justice Khalilur Rehman Ramday, Justice Mohammad Nawaz Abbasi and Justice Faqir Mohammad Khokhar, who were at number 3, 4 and 13 on the seniority list respectively, was challenged.

A five-member SC bench headed by the then Chief Justice Sheikh Riaz Ahmad examined the Judge's Case (till then commonly known as **Al Jihad Trust Case** also) of 1996 and Malik Asad Ali case of 1998, setting guidelines for the elevation of a High Court judge to the Supreme Court. In para no: 23 of the verdict, the Supreme Court said:

> (i) The Chief Justice of Pakistan being the *pater familia* of the judiciary of the country is the best judge to ascertain and gauge the fitness and suitability of the judges working in the high courts for appointment as judge of the Supreme Court; and
>
> (ii) Neither the principle of seniority is applicable as a mandatory rule for appointment of judges in the Supreme Court nor has the said rule attained the status of convention.

Paras no: 24 - 28 further elaborated the role of the CJP and the status of his recommendation declaring that:

'If seniority is to be considered the sole criterion, the role of Chief Justice of Pakistan stands undermined and the process of elevation of the most senior judge of the High Court to the Supreme Court would become a mechanical process.'

It was also held that *'if a lawyer or a retired judge is to be appointed judge of the Supreme Court, as our Constitution does permit this* (and lately it was practised by CJP Abdul Hameed Dogar under the PCO while recommending some retired judges of the Sindh High Court and Lahore High Court to the Supreme Court soon after 3rd November 2007 emergency)*, then the principle of seniority stands vitiated, and only the recommendation of the Chief Justice of Pakistan regarding fitness of the candidate will hold field'*. Therefore, the CJP`s recommendations are almost imperative and binding on head of the executive of Pakistan. (**Ref: www.supremecourt.gov.pk**).

In Pakistan, the practical way of appointment of judges remained different and above the provisions given in the framework of 1996's decision or of 2002's re-interpretation. Most of the times the heads of political parties like Pakistan Peoples Party and Pakistan Muslim Leagues, whenever they come in Power, tried to bring their own party workers belonging to the lawyer community as judges of higher courts.

On one side they bribe, pay back or compensate their party workers while they jeopardize and compromise with the demands of justice by showing their sympathies with the political parties they belong secretly and sometimes quite openly.

As a practice in Pakistan, when a political government comes in power, the Governors of the provinces make out a list of perspective judges and hand over to their respective Chief Justices for on ward pass on to the President. The Chief Justices have little say in those names. What happens we all get a corps of political judges? When a military dictator takes over, he does not need any list from their governors even.

The ISI and MI make lists for them and the only qualification comes up as 'loyalty to the army' and the presence of germs of *'PCO-ship'* in the candidates. In Pakistan, it is because after taking oath, those judges have to complete uphill tasks of issuing green slips to crooked presidents, dishonest prime ministers, corrupt ministers and their deceiptful associates in cases presenting before them.

After reinstatement of CJ Iftikhar Chaudyry and his colleague judges in March 2009, the situation has suddenly changed. The first instance came up in May 2009, when a constitutional petition was moved by Sindh High Court Bar Association (SHCBA) against the appointment of judges on permanent basis and extension of their tenures. The said order of appointments was issued without consulting the Chief Justice of Sindh High Court.

The notification was issued for converting appointment of Justice Bin Yameen to permanent basis on his post as Justice of Sindh High Court, and the extension of the tenures of Justice Arshad Noor Khan and Justice Peer Ali Shah for further six months. The decision was given on the basis that in respect of three alleged justices there was no disagreement of opinion from the constitution. The said petition was dismissed by a full bench comprised of Justice Khilji Arif Hussain, Justice Maqbool Baqar, Justice Gulzar Ahmed and Justice Fasial Arab.

A misconception normally prevailed that there existed a controversy between the parliament and the judiciary and that judiciary was aiming at grabbing the powers of the Parliament. In democratic states each of them is independent in its respective sphere but none is supreme over the other. The real problem in Pakistan is that every government wished to establish its supremacy over the *Parliament and the judiciary both* and to make them totally subservient to the one ruling person and thus the state had always suffered.

In the past the judiciary herself, as the history witnessed, preferred to lie down in the lap of successive political and military masters, therefore, this misconception might be the natural outcome. That is why, it has become a popular voice of today that **'Ehtesab' is equally necessary in the judiciary and Army** so that it could put the nation to Ehtesab candidly

and carries it out in the most transparent manner (in Constitution Article 209 deals with the judiciary only).

Judiciary is the institution which the nation is prepared to accept on all times to come but as above board and blotless, despite the deteriorations whatsoever. It is their longing and their desire. It is essential for the survival of democracy as well. Therefore, judiciary should also take care of it within the prevailing system whatsoever.