

## THE SUPREME COURT JUDGMENT ON GENERAL BAJWAS EXTENSION AS CHIEF OF THE ARMY STAFF

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The Supreme Court, today in its detailed, judgment announced, that Gen Qamar Javed Bajwa will remain the Chief of Army Staff (COAS) for another six months, during which the parliament will legislate on the extension/reappointment of an army chief. The Supreme Court, has expressed its shock that Pakistan does not have any law to regulate the “terms and conditions of service”, including extension and reappointment, of the army chief.

Earlier on November 27, a three-member bench comprising Chief Justice of Pakistan (CJP) Asif Saeed Khosa, Justice Mian Mazhar Alam Khan Miankhel and Justice Syed Mansoor Ali Shah announced the much-anticipated verdict after being assured by the government that parliament will pass legislation within six months in its short order held as under:

The Federal Government "has presented this court with a recent summary approved by the president on the advice of the prime minister along with a notification dated 28.11.2019 which shows that General Qamar Javed Bajwa has been appointed as COAS under Article 243(4)(b) of the Constitution with effect from 28.11.2019".

"The current appointment of General Qamar Javed Bajwa as COAS shall be subject to the said legislation and shall continue for a period of six months from today, whereafter the new legislation shall determine his tenure and other terms and conditions of service," read the court order.

Prior to the announcement of verdict, the court had asked the government to submit an undertaking that the parliament will pass legislation in this regard within six months, an amended notification. The amendments to the notification included the elimination of: the mention of the Supreme Court duration of the Army Chief's tenure. the description of army chief's salary and incentives. The top court's ruling comes in the nick of time as Gen Bajwa was set to retire at midnight. Prime Minister Imran Khan had extended Bajwa's tenure through a notification in August, but the top court due to irregularities in the manner of extension stayed it.

The court, while pronouncing the decision / short order, said that the government has been given six months to legislate on the duration of service of an army chief. It said that Attorney General Anwar Mansoor Khan has "categorically assured the Court" that the Federal Government "shall initiate the process to carry out the necessary legislation in this regard and seeks a period of six months for getting the needful done".

"We, while exercising judicial restraint, find it appropriate to leave the matter to the Parliament and the Federal Government to clearly specify the terms and conditions of service of the COAS through an Act of Parliament and to clarify the scope of Article 243 of the Constitution in this regard," read the court's short order.

The order observed that the matter of the army chief's reappointment or extension had been challenged before the court. It also observed that in the three days of proceedings that

followed, the government kept changing its stance, interchangeably "referring to it as reappointment, limiting of retirement or extension of tenure".

The SC observed that the government had been relying on Article 243(4)(b) of the 1973 Constitution and Regulation 255 of the Army Regulations (Rules), 1998. The court observed that when it asked questions pertaining to the army chief's appointment, duration of service and extension, the attorney general was unable to refer to any existing law.

"The learned Attorney-General has taken pains to explain that the answers to these questions are based on practice being followed in the Pakistan Army but the said practice has not been codified under the law," said the court order.

The court reviewed the laws contained within Article 243 of the Constitution while deciding on the matter. "The court has thoroughly examined Article 243(4)(b)," said Chief Justice Khosa.

The short order noted that according to Article 243, the authority to appoint an army chief lies with the president. However, there is no duration of appointment specified in the Article. (The legality) of Gen Bajwa's appointment will rest on the government's legislation, said the court, observing that prior to this occasion, the appointments had been made as per the existing practices.

"If legislation is not done within six months, the appointment will become illegal," he warned.

The chief justice observed that there was "ambiguity in the Army Act".

"Parliament has to remove that ambiguity," Justice Shah said and added: "There is no better forum than the parliament to fix the system."

Justice Miankhal said that it should also be clarified whether in the future the tenure would be extended or if there will be a reappointment.

"The legal complications that we are pointing out will cause you difficulties but do not consider this embarrassing," the chief justice said.

Justice Khosa also said to make sure that the court's mention is removed from the summary and that the summary should also make no mention of the duration of the extension.

"The parts about salary and incentives should also be removed from the summary," he said.

"We want all of this to be part of the record."

Addressing AG Khan, the top judge remarked: **"Put your house in order."**

### **Loophole in laws**

Justice Shah noted once again that the law does not mention that the duration of the tenure is three years.

The chief justice noted that the summary had mentioned that the army Chief's tenure will be three years. He said that Article 243 does not mention the three-year duration.

"If they find an extraordinary general tomorrow, will they grant him an extension of 30 years?" he remarked and stressed that there should be a clear system that everyone is aware of. He said that the three-year appointment will "become an example".

"The government may want to appoint the next Army Chief for one year," he commented.

The Chief Justice regretted that no one had examined the law while extensions were being granted all these years.

"There is no check on the activities that are going on in cantonment or under which law an action is being taken," he said.

"Now a constitutional institution is examining this matter."

He said that the process of appointment on a constitutional post should be clear and asked AG Khan how long it would take for the government to draft laws in this regard. The attorney general told the bench that the government will require three months, adding that a separate law will be drafted in relation to the army chief.

Justice Shah, in his remarks, said that yesterday the bench had said that generals retire but the attorney general had insisted that they don't.

"The summary neither mentions the army chief's salary nor the perks he is receiving," Justice Shah pointed out. "The attorney general too must have read the laws regarding the army for the first time."

"We are not telling you to pass legislation straight away," Justice Khosa said. "A law that has not been drafted in 72 years cannot be made in a hurry."

He added that the government had "reverted to the Constitution for the first time".

"When a decision is taken in accordance with the Constitution, our hands are tied," the CJP said.

The Supreme Court, in its detailed judgement, has expressed its shock that Pakistan does not have any law to regulate the "terms and conditions of service", including extension and reappointment, of the army chief.

"It has been a shocking revelation to us," reads the 39-page judgement authored by Justice Mansoor Ali Shah.

Prime Minister Imran Khan had appointed the current COAS for another term of three years on August 19, 2019. The president then granted him the extension. The Supreme Court, in its detailed judgement, has expressed its shock that Pakistan does not have any law to regulate the "terms and conditions of service", including extension and reappointment, of the army chief.

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Prime Minister Imran Khan had appointed the current COAS for another term of three years on August 19, 2019. The president then granted him the extension.

The extension was then challenged on the grounds that it is offensive to Article 243(4)(b) of the Constitution. The case was initially filed by the Jurists' Foundation but after it asked to withdraw the case, the court decided to take it up itself. During the hearing, the court explored the scope of Article 243 of the Constitution, and the Pakistan Army Act, 1952.

The court on November 28 extended Chief of Army Staff General Qamar Javed Bajwa's tenure by six months and ordered the government to make a law regulating such appointments. The detailed verdict was released on December 16.

"The history of our army has seen successive appointments, retirements and extensions of several army chiefs since Independence. However, for the first time, the matter has come to the highest court of the land questioning the legal framework under which these appointments, retirements and extensions take place," the judgement says.

The verdict pointed out that "the stated purpose for the proposed reappointment/extension in the term of office of the incumbent chief of the army staff is 'regional security environment'. The said words are quite vague and, if at all there is any regional security threat then, it is the gallant armed forces of the country as an institution which are to meet the said threat and an individual's role in that regard may be minimal. If the said reason is held to be correct and valid then every person serving in the armed forces would claim reappointment/extension in his service on the basis of the said reason".

It noted that the "terms of service of the rank of general regulates the tenure and other terms of service (except salary and allowances) of the post of the COAS". The salary and allowances of the army chief will be determined by the president under Clause (4) of Article 243 of the Constitution, the court said.

The verdict even says that there no age of retirement for the rank of General is provided under the law. The law only decides the tenure.

"The matter should be allowed to be regulated by law, made by the legislature, as mandated by the Constitution," the court says. "There is no provision in the law for extending service

of a General for another tenure; nor is there any consistent and continuous institutional practice of granting such extension, which could be enforced in absence of the law on the subject.”

The court has said that this matter should be decided by the “chosen representative of the people of Pakistan by making appropriate legislation.

“It is now for the people of Pakistan and their chosen representatives in the Parliament to come up with a law that will provide certainty and predictability to the post of COAS, remembering that in strengthening institutions, nations prosper,” the verdict adds.

What happens if no law is passed?

The court has said that if no law is passed in six months then the “post of COAS could not be left totally unregulated and to continue forever.” It said that such a thing would be “inconceivable and amount to constitutional absurdity”.

It has said that if no law is passed, the current army chief will be asked to retire on the completion of his tenure, adding that he took charge on November 29, 2016. The army chief’s tenure lasts for three years so his retirement will be counted from November 29, 2019 onwards.

The president will then, on the advice of the prime minister, appoint a new General as the new army chief.

### **Chief Justice’s remarks**

“In our peculiar historical context the chief of the army staff holds a powerful position in ways more than one,” says Chief Justice Asif Saeed Khosa in his additional note. “Unbridled power or position, like unstructured discretion, is dangerous.”

He adds, “I may observe with hope and optimism that framing of a law by the Parliament regulating the terms and conditions of the office of chief of the army staff may go a long way in rectifying multiple historical wrongs and in asserting sovereign authority of the chosen representatives of the people besides making exercise of judicial power of the Courts all-pervasive”.

Towards the end, he quotes Chief Justice Sir Edward Coke of England in the Commendam case in the year 1616 regarding the powers of King James I, “Howsoever high you may be; the law is above you”.

Why is this so important?

“The COAS is an officer commanding the Pakistan Army and is responsible for the command, discipline, training, administration, organisation and preparedness for war of the army,” the judgement notes.

“The army is perceived to play an intrinsic role in upholding constitutional values of sovereignty, freedom, democracy, and the fundamental rights relating to life, liberty and dignity”.

The appointment of the COAS is “inextricably linked with the life, security, and liberty of every citizen and is undoubtedly a question of grave and vital public importance”, the verdict adds.

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