

1973 Constitution

Law Justice, 9/10/01

Dawns

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THE judgment of the Supreme Court of Pakistan in the case of Syed Zafar Ali Shah versus General Pervez Musharraf and others, and several other identical petitions, filed under article 184(3), announced on May 12, 2000, validating the military takeover of October 12, 1999, and upholding the Proclamation of Emergency, has created more constitutional issues than it has resolved.

However, here I intend only to examine the rationale of the judgment with reference to the new oath of office given to the judges of the superior courts on January 26, 2000, and its effect on the appointment of those judges who continued in the office after taking the new oath and others who were either not invited or were invited but refused to take new oaths.

This has become necessary in order to clear some of the observations made by the Court in the above judgment which has created an impression that the oath of office is a mere ritual which affects neither the nature of the appointment of a judge of the superior court nor its jurisdiction.

The President appoints the Chief Justice and the judges of the High Courts under the Constitution on the recommendation of the respective Chief Justices of the High Courts and the Chief Justice of Pakistan in consultation with the provincial governors. Similarly, the president, in consultation with the Chief

official conduct or my official decision:

"That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan,

"And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will."

The operative parts of the oath administered to the judges of the High Court and the Supreme Court under Order I of 2000 reads as under:

"I... do solemnly swear... allegiance to Pakistan:

"That as Chief Justice of Pakistan or (a judge of Supreme Court of Pakistan or Chief Justice or a Judge of the High Court for the Province of...). I will discharge my duties and perform my functions honestly and to the best of my ability and faithfully in accordance with the Proclamation of Emergency of the fourteenth day of October 1999, the Provisional Constitution Order No. 1 of 1999

The Supreme Court, by declaring that the judges who either refused to take oath or were not invited to take oath under Order I of 2000, stood retired and their cases are to be treated as past and closed transactions, in effect accepted the PCO as a supra-constitutional document that provided a valid source of power to the military regime.

judgments delivered by the Supreme Court after January 25, 2000.

The learned judges, while dealing with the cases of the judges who either declined to take oath or were not invited to take oath under Order No. 1 of 2000, came to the conclusion that they ceased to be judges from January 26, 2000, and their cases are to be treated as closed. These observations of the court are open to many serious objections. Firstly, the effect of refusal by the judges of the Supreme Court to take the new oath or of the decision of the government not to invite some of the judges of the High Courts for fresh oath under Order I of 2000, was not a issue directly or indirectly in the cases heard by the court.

If at all, the judges were of the view that the new oath taken by them did not affect their appointment or jurisdiction, they should have confined their decision to this aspect only, leaving aside the question of those judges who either did not take

the oath or were not invited for fresh oath under Order I of 2000. It is a well settled proposition that superior "courts do not decide abstract, hypothetical or contingent questions or give mere declarations in the air. The determination of an abstract question of constitutional law, divorced from the concrete facts of a case, floats in the air of unreality; it is a determination in a vacuum and unless it amounts to a decision settling rights and obligations of the parties before the court it is not an instance of the exercise of judicial power.

Secondly, the judges who, according to the judgment, stood retired as a result of their refusal to take oath or not being

invited to take oath under Order

in consultation with provincial governors. Similarly, the president, in consultation with the Chief

military regime.

Justice of Pakistan, appoints the judges of the Supreme Court. The judges of the superior courts enter upon their office only after they take the oath of their office as prescribed in the fifth schedule to the Constitution. Taking of oath by the judges of the superior courts is, therefore, not a formality but a condition before they can assume their high office.

In the judgment delivered by the Supreme Court validating the military takeover of October 12, 1999, and the Proclamation of Emergency, dated October 14, 1999, the learned judges have, however, observed that taking of new oath by them under Order No. 1 of 2000 did not make any difference. They observed that they continue to be the judges under the Constitution and were entitled to exercise jurisdiction conferred by the Constitution. The first question which arises for consideration is: what is the effect of the new oath of office taken by the judges of the High Courts and the Supreme Court under Order 1 of 2000, on the validity of their appointment as such judges under the Constitution?

Before considering this question, it will be appropriate to examine the wordings of the two oaths, the one administered under the Constitution and the ones subsequently given to the judges of the High Courts and the Supreme Court under Order 1 of 2000. The oath administered to a judge of the superior court under the Constitution at the time he enters upon his high office reads as under:

"I... do solemnly swear... allegiance to Pakistan:

"That as Chief Justice of Pakistan (or a judge of the Supreme Court Pakistan, Chief Justice or a judge of the High Court for the province or provinces) I will discharge my duties, and perform my functions, honestly, to the best of my ability and faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law."

"That I will abide by the code of conduct issued by the Supreme Judicial Council

"That I will not allow my personal interest to influence my

as amended, this order and the law.

"That I will abide by the provisions of the Proclamation of Emergency..., the Provisional Constitution Order No. 1 of 1999... and the Code of Conduct issued by the Supreme Judicial Council.

The key words in the oath administered to the judges of the superior courts under Order I of 2000 are: "I will abide by the provisions of the Proclamation of Emergency..., the Provisional Constitution Order No. 1 of 1999 as amended, this Order and the law."

Contrary to the oath taken by the judges under the Constitution, the new oath requires the judges to perform their functions and discharge their duties in accordance with the provisions of Proclamation of Emergency of October 14, 1999, the PCO as amended from time to time and Order 1 of 2000. Reference is, however, made to the new oath of office administered to the Judges of the Supreme Court during the hearing of Begum Nusrat Bhutto's case (PLD 1977 SC 657). The oath prescribed for the judges of the Supreme Court under President's (post-Proclamation) Order 9 of 1977 promulgated on 22nd September 22, 1977, did not make any reference to any supra-constitutional or sub-constitutional orders. Instead, judges were to take oath in accordance with the law or the code of conduct laid down by the Supreme Judicial Council.

This oath does not come into conflict with the oath of office taken by the judges of the Supreme Court under the Constitution. Hence, no parallel can be drawn between this and the oath administered to the judges of the Supreme Court under Order I of 2000. By taking the new oath the judges accepted the office under the new dispensation and ceased to be judges under the Constitution. Thus after January 25, 2000, the Supreme Court and the High Courts as contemplated under the Constitution did not exist in the country. These courts existed only under the PCO. Article 189 of the Constitution, therefore, would not apply to the

result of their refusal to take oath or not being invited to take oath under Order I of 2000, were not before the court and as such the court should not have dealt with their cases. Thirdly, the tenure of a judge of a superior court is fully protected under the Constitution. The court, having reached the conclusion in the judgment that despite promulgation of the PCO 1 of 1999, Proclamation of Emergency on October 14, 1999, and the suspension of the Constitution, the Constitution continues to be the supreme law of the land, and superior courts enjoy the power of judicial review as laid down in the Constitution, accepted the position that the PCO and Order 1 of 2000 were sub-constitutional legislation. Fourthly, there is no estoppel against the law, much less a constitutional provision.

The PCO being a sub-constitutional legislation could not take away the protection afforded to the appointments of the judges of the superior courts under the Constitution. The Supreme Court, by declaring that the judges who either refused to take oath or were not invited to take oath under Order I of 2000, stood retired and their cases are to be treated as past and closed transactions, in effect accepted the PCO as a supra-constitutional document that provided a valid source of power to the military regime.

This conclusion is further supported by the fact that those confirmed judges of the High Courts who had rendered less than five years of service but were retired as they were not invited to take a fresh oath under Order I of 2000, were allowed to practise in the same High Court where they were serving as judges under the Chief Executive's Order 5 of 2000, in utter disregard of the provision of Article 207(3)(b) of the Constitution which reads as follows: Article 207(3) A person who has held office as a permanent judge (a)... (b) of a High Court shall not plead or act in any court or before any authority within its jurisdiction;

The judgment, therefore, suffers from obvious inconsistencies.

The writer is a former Chief Justice of Pakistan.