

Thursday, August 06, 2009

Pakistan Supreme Court response to petition against former officials

[Law editor's Note. The decision of the Supreme Court of Pakistan responds to a constitutional petition presented against former officials, including military dictator Pervez Musharraf, who refused to take notice and is said to have fled into exile in London. It was decided on July 31 by 14 judges of the Supreme Court, with Chief Justice Iftikhar Chaudhry writing the opinion of the unanimous court.]

IN THE SUPREME COURT OF PAKISTAN [Excerpts] (Original Jurisdiction).

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ. [writing for 13 judges]

CONSTITUTION PETITIONS NO. 09 [AND NO. 08] OF 2009

Dates of hearing: July 20-24, 27-31, 2009.

JUDGEMENT

IFTIKHAR MUHAMMAD CHAUDHRY, CJ [Chief Justice]- The above Constitutional Petitions bearing Nos. 9 of 2009 and 8 of 2009 involve common questions of facts and law and are disposed of by this single judgment.

5. The petitioner has, among others, sought a declaration that all those persons, both in the Supreme Court and high courts, regardless of whether they have taken oath under PCO [Provisional Constitutional Order] or the Constitution, who have been appointed without "consultation" of honorable chief justice of Pakistan as not judges and therefore, not entitled to function as such.

6. On July 22, 2009, a notice was issued to Musharraf (Rtd) on his available address intimating him about the proceedings in this case and July 29, 2009, as the date fixed therein before this court. The process serving officer reported on the same day he had gone to the residential place viz: C-1, B Park Road, Chak Shahzad, Islamabad where a person identifying himself as Muhammad Hussain son of Amir and that on the former's offer the latter refused to receive the notice. The factum of issuance of the afore-referred notice was widely televised through national and international TV channels. Also, it was widely published in national and international print media, but, on the date so fixed no one appeared.

9. In our country, during 60 years of its independence after partition, to the misfortune of people, several times, the Constitutions framed by legislative bodies were desecrated. Sovereignty of people was not allowed to flourish and get deep-rooted in the polity of our country. Prior to November 3, 2007, the constitutions were either abrogated or put in abeyance and the democratic system of governance was put to an end. For the first time, the Constitution of 1956 was abrogated on October 7, 1958, and martial law was imposed by the then- president, Sikandar Mirza, who dismissed the central and provincial governments; dissolved the Parliament and provincial assemblies and abolished all political parties and appointed General Muhammad Ayub Khan, the then commander in chief, as martial law administrator. Mirza was, within a few days, replaced by the latter. On March, 25, 1969, again the then-head of army, General Agha Muhammad Yahya Khan, abrogated the Constitution of 1962 and by proclamation (PLD 1969 Central Statutes 42) promulgated martial law followed by Provisional Constitution Order (Gazette of Pakistan, Extraordinary April 4, 1969). On July 5, 1977, once again martial law was imposed throughout the country by the then head of army viz. former General Muhammad Zia-ul-Haq, who, [see] Proclamation of Martial Law (PLD 1969 Federal Statutes 326), dissolved the National Assembly, the Senate, the provincial assemblies etc. and put the Constitution of 1973 in abeyance followed by Laws (Continuance in Force) Order, 1977. When the Constitution was revived, it was undeniably, in a mutilated form by the notorious Eighth Amendment.

10. Later, there was another onslaught on the ongoing democratic system of governance. On October 12, 1999, the then chief of army staff, Musharraf, now retired, once more, put the Constitution in abeyance and the whole of Pakistan was brought under the control of armed forces ... Later, he, unceremoniously, occupied the office of president and in the coming years revived the Constitution with Seventeenth Amendment.

11. Again, on November 3, 2007 Musharraf, (Rtd), in his capacity as chief of army staff, in the garb of declaration of emergency, put the Constitution in abeyance, issued Provisional Constitution Order No. 1 of 2007 followed by the Oath of Office (Judges) Order, 2007, making as many as 61 judges of superior judiciary including chief justice of Pakistan and chief justices of three provinces dysfunctional, for many of them either did not agree to take or were not given the oath ...

12. An independent and strong judiciary is a backbone of viable democratic system all over the world. The time-tested experience has proved that independent and strong judiciary provides strength to the institutions running government particularly, those who roll on the wheels of democracy. Equally the independent and strong judiciary acts as an arbiter striking balance among various segments of democratic system. It helps state organs such as legislature, executive and the judiciary itself to function smoothly maintaining balance inter se. The constitution of Pakistan, of 1973, too, provides the judiciary guarantees enshrined in it and states that the judiciary shall be fully secured, but, unfortunately, to its great dismay, this organ of state has, all along been under the wrath of adventurers imposing their dictatorial terms obviously for their ulterior designs...

13. Musharraf (Rtd) through his 1999/2000 action, declared that the National Assembly, the provincial assemblies, Senate, chairman and deputy chairman of Senate, speaker of National Assembly and the provincial assemblies were suspended and the prime minister, federal ministers, parliamentary secretaries, the provincial governors and the provincial chief ministers and the advisers to the chief ministers, to have ceased to hold offices. However, his November 2007 action was a singular in nature, in that, the onslaught was on judiciary alone. All other institutions were intact. The independence of judiciary was given a serious blow. In order to save the judiciary from being destroyed, for the first time in the history of this country, a seven-member bench of this court headed by the de jure chief justice of Pakistan, passed an order, inter-alia, restraining the president and premier of Pakistan from undertaking any such action, which was contrary to the independence of judiciary. So also the judges of this court and that of the high courts including chief justice(s) were required not to take oath under the Provisional Constitution Order or any other extra constitutional step and on the same day viz: November 3, 2007, the order was served on the members of superior judiciary through the respective registrars of the courts by way of fax. It was also sent to all the relevant executive functionaries.

21. The Proclamation of Emergency issued by Musharraf as then-chief of army Staff on November 3, 2007; the Provisional Constitution Order No.1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (judges) Order of 2007 issued by him also on the same date though as the president of Pakistan but in exercise of powers under the aforesaid Proclamation of Emergency and the Provisional Constitution Order No.1 of 2007; The Provisional Constitution (Amendment) Order, 2007 issued by him likewise on November 15, 2007; the Constitution (Amendment) Order, 2007 being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second Amendment) Order, 2007 being the President's Order No.6 of 2007 issued on December 14, 2007; the Islamabad High Court (Establishment) Order 2007 dated December 14, 2007, being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being Presidents Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.9 of 2007 dated December 14, 2007, are hereby declared to be unconstitutional, ultra-vires [beyond the authorized powers] of the Constitution and consequently being illegal and of no legal effect.

22. As a consequence thereof:

i) the chief justice of Pakistan; the judges of the Supreme Court of Pakistan; any chief justice of any of the high courts and the judges of the high courts who were declared to have ceased to hold their respective offices in pursuance of the afore mentioned alleged judgments or any other such judgment and on account of the instruments mentioned in para 21 above, shall be deemed never to have ceased to be such judges, irrespective of any notification issued regarding their reappointment or restoration;

ii) it is declared that the office of the chief justice of Pakistan never fell vacant on November 3, 2007 and as a consequence thereof it is further declared that the appointment of Mr. Justice Abdul Hameed Dogar as the chief justice of Pakistan was un-constitutional; void ab initio [from the outset] and of no legal effect; provided that subject to whatever is contained hereinafter, the said unconstitutional appointment of Dogar as the chief justice of Pakistan shall not affect the validity of any administrative or financial acts performed by him or of any oath made before him in the ordinary course of the affairs of the said office;

(xi) that the court acknowledges and respects the mandate given by the sovereign authority i.e. electorate to the democratically elected government on February 18, 2008, and would continue to jealously guard the principle of tricotomy of powers enshrined in the Constitution, which is the essence of the rule of law. Any declaration made in this judgment shall not in any manner affect the general elections held and the government formed as a result thereof i.e. the president, the prime minister, the Parliament, the provincial governments, anything done by these institutions in the discharge of their functions. These acts are fully protected in terms of the age old principle of *Salus Populi Est Suprema Lex* [The safety of the people is the supreme law] reflected in PLD [Pakistan Legal Decisions, a Pakistan law reporter] 1972 SC [Supreme Court] 139.

(xii) Before parting with the judgment, we would like to reiterate that to defend, protect and uphold the Constitution is the sacred function of the Supreme Court. The Constitution in its preamble, inter alia, mandates that there shall be democratic governance in the country, "wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; ... wherein the independence of judiciary shall be fully

secured." While rendering this judgment, these abiding values have weighed with us. We are sanguine that the current democratic dispensation comprising of the president, prime minister and the Parliament shall equally uphold these values and the mandate of their oaths.