

ISAS Brief

No. 147 – Date: 22 December 2009

469A Bukit Timah Road
#07-01, Tower Block, Singapore 259770
Tel: 6516 6179 / 6516 4239
Fax: 6776 7505 / 6314 5447
Email: isassecc@nus.edu.sg
Website: www.isas.nus.edu.sg



Pakistan's Supreme Court and the National Reconciliation Ordinance: What Now for Pakistan?

Rajshree Jetly¹

Abstract

This brief looks at the potential implications of the Supreme Court's decision on rendering null and void the National Reconciliation Ordinance promulgated by General Pervez Musharraf in 2007, which stopped investigations and prosecutions against over 8,000 individuals for corruption and other wrongdoings. The brief suggests that, while the judgment in itself is a welcome decision, its political repercussions need to be carefully managed and that Pakistan's goal of returning to a vibrant democracy not be derailed in the process.

Introduction

On 16 December 2009, the Supreme Court of Pakistan passed a historic judgment declaring the National Reconciliation Ordinance (NRO), which was promulgated by General Pervez Musharraf in October 2007, unconstitutional. This has once again thrown Pakistan into another state of constitutional crisis as the judgment removes the immunity from prosecution enjoyed by a slew of senior political and senior administrative officials. The NRO was part of a deal between Musharraf and the late Benazir Bhutto whereby Musharraf would remain President while Benazir Bhutto would be allowed to return to Pakistan and participate in politics without facing criminal charges. The NRO put an end to corruption investigations and prosecutions against almost 8,000 individuals – ministers, bureaucrats and politicians, including President Asif Ali Zardari. Apart from Pakistan's President Zardari, other notable serving politicians who were beneficiaries of the NRO include federal ministers Rehman Malik (Interior Minister) and Chaudhry Ahmed Mukhtar (Defence Minister).

The NRO was highly controversial and severely criticised by civil libertarians, who argued that the NRO condoned corruption and protected powerful elites by allowing them to avoid accountability for their actions. The Supreme Court, in delivering its judgment viewed the NRO not as an instrument of national reconciliation but as an unlawful order against the national interests of Pakistan. The 17 member bench of the Supreme Court headed by Chief

¹ Dr Rajshree Jetly is a Research Fellow at the Institute of South Asian Studies, an autonomous research institute at the National University of Singapore. She can be contacted at isasrj@nus.edu.sg.

Justice Ifthikhar Chaudhry, ruled that the NRO was unconstitutional and held that none of the actions and orders taken pursuant to the NRO was valid. The Supreme Court further stated that “all cases in which the accused were either discharged or acquitted under Section 2 of the NRO or where proceedings pending against the holders of public office had got terminated in view of Section 7 thereof...shall stand revived and relegated to the status of pre 5th of October 2007 position.”

Implications for Pakistan’s Politics

It would not be an understatement to say that this judgment of the Supreme Court could have far-reaching implications on the course of Pakistani politics. This brief will consider the judgment’s impact on President Zardari and the Pakistan Peoples Party (PPP), and the politics of democracy in Pakistan. Even though this judgement potentially reopens cases against more than 8,000 people, the question that is uppermost is how the incumbent President Zardari may be affected. President Zardari arguably has immunity from prosecution for as long as he remains in office. There are already calls for petitions to challenge the legality of his Presidency although Article 41(6) of the Constitution categorically states that the “validity of the election of the President shall not be called in question by or before any court or other authority.” In hindsight, it would appear that this fear of prosecution must have been a major factor that motivated President Zardari to stand for President, and then as President, to delay the reinstatement of Chief Justice Ifthikhar Chaudhry for as long as possible.

Regardless of his Presidential immunity, President Zardari is on a sticky wicket at the moment. He suffers from very low popularity ratings (32%), as against Nawaz Sharif (79%) and Prime Minister Yousaf Raza Gilani (67%), remains tainted by corruption allegations and is caught between the devil and the deep blue sea in balancing US’ interests in the waging war against the *Taliban* as well as domestic opposition to foreign interference in Pakistani affairs, especially the US drone attacks on Pakistani territory. President Zardari has also lost much of his moral authority by failing to repeal Article 58(2)b, the constitutional provision that allows the President to dismiss an elected national assembly, elect governors of various provinces and appoint the Chief of the Armed Forces. President Zardari’s options are limited. He can resign on moral grounds and let the law take its own course, or remain as President and tough it out. It appears that he has chosen the latter option with the backing of the PPP.

The PPP has resolved to stand behind all the affected ministers and has adopted a defiant stand. Prime Minister Gilani has gone on record in a spirited defence of President Zardari stating that reopening cases against the President would be tantamount to “double jeopardy” as President Zardari had already served twelve years in prison. There is a real risk now that saving the President may well come at the cost of the PPP’s political survival. It may well be a suicidal mission for the PPP to continue defending President Zardari who has lost popular support and is now squarely in the sights of the judiciary. The opposition has also not surprisingly called for the resignation of President Zardari. There is clearly a conflict of interest with President Zardari also the co-Chairman of the PPP. From a party perspective, it would appear to be in the party’s interest for it to distance itself from the President. Instead, at the PPP’s Central Executive Committee meeting held on 19 December 2009, President Zardari declared vehemently that the PPP would defend itself against its adversaries.

The Supreme Court judgment has clearly dropped a bombshell in Pakistani politics, but its implications may go beyond the mess of party politics. On the positive, one may view the

judgment as evidence of an independent judiciary upholding constitutionalism and the rule of law. At a time when Pakistan is struggling to re-establish its democratic credentials and international credibility, this development may be in Pakistan's long-term interest. It will certainly be welcomed by civil society in Pakistan which has been embroiled in a long and painful struggle for democracy. It is also likely to be welcomed by the international community, although there is a question whether this serves the US short-term interest. The paramount US interest in Pakistan is in fighting the *Taliban* and *Al-Qaeda*. President Zardari has been accommodating of US' needs and to that end the US may well prefer that he continues to remain in power.

On the other side of the coin, there is a possibility that the judiciary may have implicitly played politics by trying to determine not just the legal issues but to influence the preferred political outcome in Pakistan. For example, in delivering its judgment, the Court also called for the establishment of a Monitoring Cell within the Supreme Court of Pakistan to monitor the progress and proceedings of the cases under the purview of the National Accountability Bureau (NAB), which suggests a lack of confidence in the integrity of the NAB. It is no secret that Chief Justice Chaudhry is a highly political figure, having rallied the masses around him during his dismissal by General Musharraf and further consolidating his support base while President Zardari dithered on his reinstatement. Given this context, the Supreme Court will have to be very careful and walk a fine line in determining these constitutional cases while staying out of the political arena. Even if there is a perception that the judiciary is "playing politics" the delicate democratic balance found in the separation of powers doctrine could be upset. This would not be in Pakistan's interest.

The role of the army in Pakistan's political history is well-known. Immediately after the Supreme Court judgment, speculation was rife of another possible coup, especially after the Defence Minister, Mr Chaudhry Ahmed Mukhtar, was stopped from leaving the country as he was one of the beneficiaries of the NRO who might be called upon to answer charges. Also, in recent months, the army and President Zardari have been at odds on several issues, especially certain aspects of the Kerry-Lugar Bill, which require civilian control over the Armed Forces. However, it is unlikely that a coup is imminent given that it has not even been two years since the last military dictatorship. Pakistan's history suggests that the periods between coups are much longer. Also, the army is overstretched on the eastern and western fronts as well as dealing with Islamist insurgency within the country. General Kayani has also reiterated that the army would not impede civilian administration. Nonetheless, even if a coup is not on the horizon, the army may still have reasons to oust Mr Zardari as President if its differences with him became intolerable.

Conclusion

This judgment by the Supreme Court is an important milestone in Pakistan's path to democracy. The judiciary appears to have been restored and this decision is the clearest indication that it is acting independently and in the interest of the nation by tackling endemic political corruption. From a pragmatic point, one must be careful not to throw the baby out with the bathwater. There is a democratic process underway in Pakistan as the country has just emerged from ten years of military dictatorship. If the civilian leadership is crippled by corruption cases, there is a risk that the democratisation may be derailed. The challenge is in getting the balance right. The Supreme Court has shown the way and it is now up to all the key stakeholders, including the political parties, civil society and the army to resist the

temptation of indulging in one-upmanship for narrow selfish interest. Pakistan needs to find creative ways of putting the past behind it and keeping the bigger picture always in mind, namely the restoration of a vibrant democracy.