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Pakistan's Political Transition: One More Step Forward

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Abstract

On 26 April 2012, Pakistan took one giant step forward in its long struggle to erect a political structure supported by a legal system in which citizens have full confidence. That will happen when the people's elected representatives can exercise full authority and when there is respect for the rule of law. On that day, as helicopters hovered over the imposing structure that houses the senior judiciary, the Supreme Court decided to hold Prime Minister Yusuf Raza Gilani guilty for having committed contempt of court. The much anticipated verdict by the court was delivered not by a bench headed by Chief Justice Iftikhar Mohammad Chaudhry who has shaken up the Pakistani political system on more than one occasion. This time the sentence was read out by Justice Nasirul Mulk, presiding over a bench of seven men. (No woman is a member of the 19-man Supreme Court.) How will this verdict affect the political development of Pakistan? This "Insight" maintains that the decision to hold the prime minister to account – for contempt of the court – has enormous implications for the development of the Pakistani state.

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The National Reconciliation Ordinance

Pakistan's political development hit yet another speed-bump as a result of the involvement of the Supreme Court in the National Reconciliation Ordinance case. The NRO was passed in 2007 by the then President Pervez Musharraf as a part of a deal with political leader Benazir Bhutto and her husband, Asif Ali Zardari. This effort at reconciliation was sponsored by the United States and Britain. The Western powers wished to move Pakistan towards a democratic system of governance. The idea was that the highly popular Bhutto, who had twice served as prime minister, would return to the country from exile, contest and win the elections scheduled for January 2008, and keep General Musharraf as president but with vastly diminished authority. Such a political order will not only have the support of the citizenry. It will also bring to office a regime that would be able to direct the military to give up on its India obsession and concentrate on battling the non-state actors who were mounting lethal attacks on the NATO and American forces fighting in Afghanistan. These attacks were launched from the sanctuaries in Pakistan's tribal agencies. Rapprochement between Benazir Bhutto and President Musharraf, therefore, was critical for the American effort to defeat the Taliban in Afghanistan². But bringing Bhutto back to the country meant wiping her slate clean. There were pending cases of corruption against the former prime minister, her husband Asif Ali Zardari and hundreds of people who had worked in various capacities with the couple when they held the reins of power. The NRO was promulgated as a part of the plan to give the couple a new start. The rapprochement depended on forgiving hundreds of officials who had worked under Bhutto while she was prime minister.

But the plan did not work. The Taliban, perhaps fearing something like that was in the works, assassinated Bhutto on 27 December 2007 after she had addressed an election rally in Rawalpindi, a city next door to Islamabad, the capital. The elections were postponed by a month; held in February 2008, they produced a hung parliament with Bhutto's Pakistan People's Party winning the most seats but not a majority. In Bhutto's absence, the PPP now under the chairmanship of Zardari, her widower, did not have the political and moral authority it would have possessed had Bhutto been alive. In March the PPP chose Yusuf Raza Gilani, a minor political figure from central Punjab, to lead a coalition of parties as prime minister. Gilani's choice was to give more room to Zardari to operate the Pakistani state even though he was the head of the state in a parliamentary system of government. But he could rely on the powers that were bestowed on the president by the 17th Amendment to Pakistan's Constitution inserted by then President Musharraf as a part of his plan to allow some authority to the people's elected representatives.

² This story is well told in Ahmed Rashid, *Pakistan on the Brink: The Future of Pakistan, Afghanistan and the West*, London, Allen Lane, 2011.

It took Zardari another six months to get President Musharraf to give up his office. In this effort he aligned himself with Pakistan Muslim League (Nawaz), the second largest party in the National Assembly, but with control over the government in Punjab, by far the largest province in the country. The PML(N) was led by Mian Nawaz Sharif who, like Benazir Bhutto, was also twice Pakistan's prime minister. He bore a deep grudge against President Musharraf since his second tenure was cut short by the general in October 1999. Musharraf, after forcing Sharif from power, instituted a case against the deposed prime minister that could have resulted in a long jail term. But a deal was worked out with the help of Saudi Arabia. Sharif chose exile over imprisonment and also agreed to give up politics for a period of 10 years.

After Musharraf's resignation, Zardari managed to get himself elected president but he surprised the opposition by showing no hurry to rid the Constitution of the 17th Amendment that would have turned him into a head of state with few executive powers. That was the intention of the Constitution of 1973 before it was disfigured by the 8th amendment passed at the urging of President Ziaul Haq and the 17th amendment by General Musharraf. Zardari was also inclined to have a tame judiciary in place—certainly not the one headed by the strong-willed Iftikhar Mohammad Chaudhry who had refused to resign when asked to do so by President Musharraf. This was the beginning of the chain of events that included a movement by the legal community to restore Chaudhry and his colleagues to the Supreme Court. Ultimately, Zardari was pressured on both counts: he agreed to the passage of the 18th Amendment that restored the Constitution to its original form and also accepted the demand of the “Pakistani street” to bring Chaudhry back to the Supreme Court as its Chief Justice. However, the ever-innovative Zardari kept most of the executive authority in his hands by remaining the Chairman of the PPP and by opting for a politically weak prime minister. Initially the military did not lose its authority. But by extending the term of office of General Ashfaq Pervez Kayani by three years, from 2010 to 2013, he was able to secure the tacit support of the head of the armed forces.

It was in this political situation that the Supreme Court stepped in and disturbed the applecart by declaring the NRO unconstitutional.

With the NRO taken off the books, the court wanted the reopening of all the corruption cases which were deemed closed in the NRO context. Included in these was the case against Benazir Bhutto and Asif Ali Zardari that was filed by the Musharraf regime in a court in Switzerland. The couple was accused of stashing away tens of millions of dollars in a Swiss bank. This amount was alleged to have been paid by a Swiss company in return for winning a large contract in Pakistan during Bhutto's second tenure in office. The court ordered the government to write to the Swiss authorities to reinstitute the case. The government under Gilani demurred and the Supreme Court began contempt proceedings against the prime minister. The proceedings lasted for months. The first judgment came on 26 April 2012.

The Verdict

In giving its ruling about the prime minister, the Pakistani Supreme Court said that it was satisfied that “the contempt committed by him is substantially detrimental to the administration of justice and tends to bring this court and the judiciary of this country into ridicule.” The court promised a longer judgment to be provided later. For the moment it said “that the accused, Syed Yusuf Raza Gilani, Prime Minister of Pakistan/Chief Executive of the Federation, is found guilty for contempt of court, under Article 204(2) of the Constitution of Islamic Republic of Pakistan, 1973, read with Section 3 of the Contempt of Court Ordinance (Ordinance 5 of 2003) for willful flouting, disregard and disobedience of this court’s direction contained in Paragraph Number 178 of the judgment delivered in the case of Dr. Mubashir Hasan versus the Federation of Pakistan”³.

At first glance, it appears that the court displayed leniency towards the offending prime minister. It was generally believed that Gilani will be made to serve a six-month term in jail. This was something the prime minister was himself expecting. But the court took a different stance: “As regards the sentence to be passed ... we note that the findings and the conviction for contempt of court recorded above are likely to entail some serious consequences in terms of Article 63(1) (g) of the Constitution which may be treated as mitigating factors towards the sentence to be passed against him. He is, therefore, punished under Article 5 of the Contempt of Court Ordinance (Ordinance 5 of 2003) with the rising of the court today.” Since the court rose 37 seconds after announcing the judgment that was the amount of time served under “detention” by the prime minister. But there was agreement among most legal scholars that it was not the length of the detention that was of interest to the court but the “serious consequences” that will ensue from it. The court did not spell out what was meant by the “serious consequences” – at least not in the “short order”.

It was the use of the 2003 Ordinance that immediately drew the attention of the legal scholars. “For an astute politician like Prime Minister Gilani, a few months or even years in jail are part of the job description” wrote Zahid F. Ebrahim, a lawyer in a newspaper article. “In fact a prison sentence now would have held him in good stead – political martyrdom is an investment to encash when it comes to the next polls. However, the consequence of coming under the purview of Article 63 (1) (g) of the Constitution is much more lethal as the Supreme Court has suggested”⁴. It would disqualify the prime minister not only from his current position but bar him from holding public office for five years.

³ Dr Mubashir Hasan was one of the founding members of the Pakistan Peoples’ Party and had served as the Minister of Finance in the first cabinet headed by Prime Minister Zulfikar Ali Bhutto from 1972 to 1974. He filed a case in the Supreme Court challenging the constitutionality of the National Reconciliation Ordinance issued by President Pervez Musharraf in September 2007. The Supreme Court’s decision in that case is reported in *Pakistan Legal Decisions*.

⁴ Zahid F. Ebrahim, “Why didn’t the court jail the prime minister?” *The Express Tribune*, 27 April, 2012, p. 3. Also see Amir Wasim, “PM’s conviction generates debate on legal issues”, *Dawn*, 27 April, 2012, p. 3.

There was pressure on the prime minister to resign and not let the matter drag on for months. But more sober experts on the matter were inclined to let the matter run its course, thereby strengthening the legal foundations of the state. As one legal expert wrote, “once an order is passed by the Court it becomes binding on everyone it is addressed to, the legal flaws in the judgment are a ground for an appeal, not refusing to comply. However, it might also be useful to remind ourselves that courts draw their legitimacy and authority from the Constitution and equally significantly from a perception of fairness”⁵.

The Chaudhry court’s extreme caution in dealing with the Gilani contempt case was attributed by some analysts to a tussle between the “hawks” and the “doves” sitting on the bench. The Chief Justice is a consensus man and does not want split decisions. According to newspaper *Dawn*’s Cyril Almeida, the doves are for accepting “the limits of judicial power and [for] dropping the matter or else run the risk of system collapse”. The hawks on the other hand are “for violating their oaths of office by defying a categorical order of the Supreme Court, chucking out Prime Minister, Zardari and the law minister from politics forever”⁶. The court opted for the mid-course, indicating that it anticipated serious consequences once its orders were fully carried out. The carrying out, however, will have to be the parliament’s responsibility.

The Verdict’s Aftermath

The Constitution and the Contempt of Court Ordinance were clear as to the process that needed to be followed once a member of parliament was convicted of contempt. The first step was for the convicted member to decide whether he or she would file an appeal against the conviction. For that to happen, the court had to issue a full rather than a “short order” as was done by the Supreme Court in the case of Prime Minister Gilani. Within 30 days of the conviction including the decision on the appeal if one were filed, the Speaker of the National Assembly was required to refer the case of the offending member to the Chief Election Commissioner. The speaker would give his or her – in the current case “her” since the office was currently occupied by Dr. Fehmida Mirza, female legislator from the province of Sindh – opinion on the case. The power to unseat the member was with the Chief Election Commissioner, to whom the speaker had to refer the case. If the process were to be strictly followed, it could take months before the prime minister could be forced out of office.

That was the strategy the PPP decided to follow in case an unfavourable judgment was given by the Supreme Court. Right after the short order was issued, Aitezaz Ahsan, the council for the prime minister, announced his intention to appeal the decision to the Supreme Court which would have to constitute another bench to deal with the challenge. The government

⁵ Saroop Ijaz, “Should the heavens fall?” *The Express Tribune*, 29 April, 2012, p. 7.

⁶ Cyril Almeida, “Appeasing the hawks”, *Dawn*, 29 April, 2012, p. 7.

was inclined to use all means at its disposal to delay the case from reaching its logical conclusion: the departure of Prime Minister Gilani. On 28 April 2012, two days after the short order was passed, Law Minister Farooq Naek held a press conference and announced that his party was inclined to move a privilege motion against an official of the Supreme Court for having written to the National Assembly and the Chief Election Commissioner to take “further necessary action”. This move went beyond the power of the court, the minister maintained. He took the position that the Parliament under the Constitution was supreme while the role of the court was confined to facilitating the implementation of the parliament’s acts and orders, not directing the officers of the legislative body to carry out its wishes. “If the Supreme Court decides to disqualify Prime Minister Yusuf Raza Gilani, the government will be ready to comply with all its orders” he assured the press and through it the people⁷.

But in Pakistan there was no tradition of going by the book. The opposition was not prepared to give the prime minister and his political party the amount of time that they were inclined to take. Rather than allow the law to run its course, the PPP adopted a confrontational approach in response to the Supreme Court verdict. A day after the court announced its decision, the prime minister returned to the National Assembly as the opposition walked out of the chamber. He told the House that he would not cede his position as prime minister unless the parliament disqualified him from holding that position.

But the opposition was not in favour of giving the prime minister any time. “The prime minister should immediately step down without prolonging the crisis, dissolve the national and provincial assemblies and hold fresh polls” advised Mian Nawaz Sharif, president of the Pakistan Muslim League (Nawaz). He threatened to launch a movement if the prime minister chose to take the slow track. Similar sentiments were expressed by Imran Khan, a rising star of Pakistani politics and the president of Pakistan Tehrik-e-Insaf⁸.

Conclusion

The move by the Supreme Court of Pakistan should be viewed in the context of the political developments taking place in many parts of the Muslim world. Several large Muslim countries are going through a second thaw after the Arab Spring of 2011. Now many large countries, having dispensed with rule by military autocrats, are engaged in developing legal and political systems not dictated by religious ideology but by the demands of truly democratic societies. This transition is occurring not only in Pakistan but in several large Muslim countries including Egypt and Turkey.

⁷ Ahmad Hasan, “Govt objects to SC move in Gilani case”, *Dawn*, 29 April, p. 1.

⁸ Amjad Mahmood and Ahmad Hasan, “Nawaz, Imran ask Gilani to step down”, *Dawn*, 27 April, 2012, p. 1.

In Egypt, there are two on-going struggles: between the remnants of the political order from the days of President Hosni Mubarak and the developing political establishment and also between people espousing different ideologies. In Turkey where the process of political development has advanced the most in the Muslim world, the conflict between the powerful military establishment and a political party with Islamic roots has been settled in favour of the latter. The Islamic party has now ruled for more than 10 years and through its conduct while in office has demonstrated that it can operate a political system that separates faith from governance. This interpretation of a political system is acceptable to the majority of the population.

Pakistan has also been waging several battles. These have pitted ordinary citizens against some non-state actors who wish to establish an Islamic caliphate by destroying the political order before it has the time to establish itself. At the same time the Pakistan Peoples' Party is battling with the judiciary in suggesting that a political system in which people's elected representatives can and should govern without constraints is the only one that suits the country. While engaged in this quarrel, the party under President Asif Ali Zardari has succeeded in confining the military to the barracks.

What appears at this stage in the political evolution of the Muslim world is that most countries that are engaged in developing systems that will suit their situations will be able to devise orders in which Islam will have a role to play in defining some aspects of governance, the military will be kept at bay, the judicial system will keep watch on the people given the responsibility to govern, and ordinary people will be prepared to use the power of the street and the public square to keep check on the ruling establishment.

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