

An Article by the Asian Human Rights Commission

And full text of Mr. Aitzaz Ahsan's interview

PAKISTAN: Supreme Court decision will be a serious blow to people who want to indulge in corruption and corrupt practices

Aitzaz Ahsan



The prominent jurist and former president of the Supreme Court Bar Association of Pakistan Mr. Aotzaz Ahsan was interviewed by the Asian Human Rights Commission on the detailed judgment of January 19, 2010 of Pakistan's Supreme Court regarding the issue of the National Reconciliation Ordinance (NRO). Issued by former military dictator General Musharraf, the ordinance provided legal amnesty to numerous government officials, businessmen and politicians who were faced of corruption charges.

Mr. Aitzaz Ahsan in his interview, while strongly supporting the judgment of 17 judges, discussed every aspect of the judgment including the articles 62 (f) and 227, pertaining to disqualification of a parliamentarian and Islamic criteria for the members of the parliament introduced by a former military ruler, General Zia Ul Haq, and says that both the above are very progressive caveats in the judgment. They rule out recourse to vague and unspecific concepts in the future.

About article 62 (f), Aitzaz says that judgment takes the teeth out of Article 62(f) for all times (being a ruling of 17 judges). Only a person finally convicted by the highest appellate forum can hence forth be presumed to be foul of Article 62(f).

He also explicitly denounces that the judgment was discriminative, against the politicians and biased and says that in many respects it is the first time such a strong judgment by a larger bench of as many as 17 judges, has come with respect to the issue of corruption.

About the possibility of elimination of corruption by the judgment of the court, Aitzaz was of the view that corruption will become a more prominent subject and no possibility that any judgment will eliminate corruption altogether, it will be a serious blow to people who want to indulge in corruption and corrupt practices.

About the judges who took oath under provisional constitutional order (PCO), Mr Ahsan said that the judges who took oath under the martial law imposed by General Musharraf came into a different category than judges who had previously endorsed military takeovers.

Following is the full text of Mr. Aitzaz Ahsan's interview:

Question: What are the effects of this NRO judgment on the overall human rights movement?

Aitzaz Ahsan: Well, basically, to determine the effect of the NRO, particularly in the light of human rights, we must first examine its scope and span. The National Reconciliation Ordinance (NRO) promulgated under Article 89 of the Constitution, which permits the president and head of the executive to pass and promulgate temporary laws and temporary legislation for a maximum of 120 days when the National Assembly is not in session, and there is an emergency requirement for legislation. This is legislation by the executive. It is temporary legislation, it is to be employed in the rarest cases, although it is frequently employed as a practice in Pakistan.

I will walk through the facts to clarify the position. Several ordinances had been passed by General Pervez Musharraf under Article 89 in exercise of the executive power to pass temporary legislation for 120 days when the National Assembly was not in session before he proclaimed the emergency on November 3rd 2007. Some more were promulgated during the Emergency (Martial Law). When he proclaimed the Emergency, Pervez Musharraf suspended the Constitution and he gave a permanent life to all these ordinances by inserting an Article 270AAA in the Constitution, declaring all Ordinances to be permanent laws and not liable to expiry after 120 days. The NRO had been promulgated on October 5, 2007, so its 120 days were still to expire when the emergency was proclaimed and Article 270AAA was inserted into the Constitution by the fiat of one man, General Musharraf, not by the fiat of Parliament.

In the judgment of July 31, 2009 in the Sindh High Court Bar Association petition, the Supreme Court held that everything that General Musharraf had done, - which included suspending the Constitution, amending the Constitution, providing a new oath for the judges, providing a provisional constitutional order known as the PCO, arresting judges, dismissing judges, - was illegal and all his steps were unconstitutional. This meant that the indefinite life given to Ordinances, which otherwise had the limited life of 120 days, by virtue of Article 270AAA was also struck down. Therefore, the NRO could also remain alive for only 120 days from October 5, 2007 to February 3, 2008, provided, that is, it was a valid law. Despite this ruling, the court, by an extra-constitutional measure, allowed Parliament four months starting from July 31, 2009, the date of its judgment to validate and enact these laws as Acts of Parliament. This was done in recognition of Parliament's right to legislate.

Now another significant event took place concerning the NRO. There are several laws, out of 37 affected Ordinances, that Parliament endorsed and enacted as permanent laws, but it did not enact the NRO as a permanent law. The NRO, therefore, even as per Parliament, and at best, had no life after 120 days ending on February 3, 2008.

Only one issue therefore remained: whether the NRO, for those 120 days also, was a valid law or was it ultra-vires of the Constitution and therefore void ab-initio? Did it conflict with the Constitution even for those 120 days and even at its very inception? If so, it would be non est, non existent, and a stillborn piece of law. That is what the Court has now held. In its short order on December 16, in Dr. Mubashar Hassan's Petition, specifically relating to the NRO, (and elucidated in the detailed judgement of January 19, 2010), it has struck the NRO down

completely. It has wiped it off the slate of legislated laws and from the statute books completely.

The question: what is the impact of the NRO, and what is the impact of its being struck down on the human rights situation can thus be addressed now in the above perspective.

Since the NRO had not been made permanent law by Parliament itself with retrospective effect the only issue that remained is: was it a good law even for the 120 days or not? If it was a good law, then how many people took benefit of it?

Out of 180 million people, 8041 individuals, maybe more individuals because 8041 cases were affected as in some there would be multiple accused. But 8041 prosecutions were stalled and were discontinued by the effect of the NRO. Details have not been provided, but what is known, and what has been stated by ministers and by the acting attorney general and the advocates general of the four provinces, is that these cases involve prosecutions for corruption, for murder, for Dacoity, for rape and in many cases, convictions had been accorded. The accused or the convicts were given immunity and indemnity by the NRO.

So the span of the effect of the NRO is only with respect to the cases decided under it from October 5th 2007 to February 3rd 2008 and if it had been valid law for that period, then 8041 cases would have been settled and finished under it. **By the NRO Short Order given on December 16th 2009, (and the detailed judgement give on January 19), the court has set aside and washed away completely the effect of the NRO, declaring it void ab-initio, and therefore, of no effect whatsoever.** So what happened between October 5th 2007 and February 3rd 2008 was that 8041 cases were withdrawn and now those 8041 cases have been revived. Many of these cases are of grievous offences.

If a convict is arrested again on grounds that he was proven guilty of murder or rape or gang rape or arson or such other offences, robbery, Dacoity, corruption, would it be a human rights matter? But if the victim's point of view is to be seen, then probably the revival of these 8041 cases do not really impinge on human rights. But each case would have to be taken up on its own facts without a general law of amnesty.

Question: Why is it said that the decision only targeted 25 politicians, whereas there were 8041 cases under the NRO?

Aitzaz Ahsan: Well, I believe that among the 8041 cases there are something like 45 or 46 allegations against politicians also; people who are or have been members of Parliament or ministers. So it is true that there are cases against parliamentarians or former parliamentarians that were compounded or terminated under the NRO, and these news been revived by the judgment of December 16th 2007, which declared that the NRO is void ab-initio. But the political element appears to be a small minority compared to the cases which have been withdrawn under the NRO for other crimes, some of which were very heinous crimes.

Question: What was the need to target politicians when there are so many other cases? Why hasn't the judgment discussed the criminal cases?

Aitzaz Ahsan: In the detailed judgment there are two categories of cases discussed by the Supreme Court: Cases (a) Within Pakistan and (b) Cases outside Pakistan. In the latter category there was only a few. These came under the focus of the Court primarily because of the incident in which 12 cartons of documents related to that one such case were removed from Geneva while the NRO petition was being heard by the Supreme Court in Islamabad. The other reason, perhaps, that it has been focussed upon in the Detailed Judgment, is the barrage of criticism that the Court came under after the Short Order. Judges also live in the same society and are exposed to media and press reports. The reason they probably went to some length in justifying attending to this aspect, and drew from precedents in which authorities in other jurisdictions had vigorously traced and chased proceeds of corruption, was this criticism that the Court had gone beyond its ambit and precedent. What is important is that a bold line on corruption, which is an element militating against due process, rule of law and human rights, has been drawn.

Question: And can we say that this decision could lead to the elimination of corruption or that corruption will be discussed more than other things, like political issues?

Aitzaz Ahsan: Well, corruption will become a more prominent subject and while I don't think any judgment will eliminate corruption altogether, it will be a serious blow to people who want to indulge in corruption and corrupt practices. It will greatly discourage corruption and is a striking blow on people who want to enjoy the proceeds of corruption and crime. So it's a positive step in many respects and it's the first time such a strong judgment by a larger bench of as many as 17 judges, has come with respect to the issue of corruption. Otherwise, there have been vague and non-authoritative observations, there have been prosecutions and convictions and appeals and convictions set aside in appeals, or sentences set aside in appeals by the subsequent executive order. In the absence of the will of executive authorities in the past six decades to suppress corruption, the court now appears interested in taking up not only the general precepts of the elimination of corruption, but wants to take hold of the nuts and bolts of the system and provide for mechanisms which will discourage the corrupt and corruption.

Question: Why are the cases only against politicians and not the judiciary, who we know are also corrupt, and people are unable to attain justice without paying bribes?

Aitzaz Ahsan: Except for judges of the superior court, that is the high court and the Supreme Court, and that is about 80 individuals who have their own method of accountability, whether good or bad, that is a constitutional matter, then under Article 209, they go before the Supreme Judicial council in case there are allegations of corruption against them.

The court is interested, it seems, to provide for mechanisms in the fight against corruption. Not just general broad principles, but the mechanism also. It's a step forward, not backwards, because corruption is one of the most primary elements in the suppression and destruction of human rights.

Question: so what about this Article 62F was also referred in Article 227? Why was there need for this coming at 227?

Aitzaz Ahsan: In our tradition the court has to advert to every argument and point submitted by

either party at the Bar. Whatever the counsel raise, the court has to address. These Articles form part of the judgment because vigorous reliance was placed upon them by the attorneys for the petitioners. The court could not avoid discussing matters raised, and raised with some passion, by M/s Hafiz Pirzada and A.K. Dogar, advocates, in their submissions.

Even otherwise there has been much discussion and debate on Art.s 62-f and 227 in the media recently. In fact for several decades now Courts too have been engaged in frequently hearing contradictory arguments relating to their effect. There is, accordingly, lengthy discussion on these Articles in the detailed judgement also. But what is reassuring is the way these controversies have been put to rest in this decision. In one way this is perhaps the first judgement that effectively shuts the door to the random, indeed any possible, use of both.

About the possible use of Article 62(f) in knocking out a Parliamentarian on the vague and unspecific notions that he is not “sagacious” or “ameen” the Court rules, despite these being express provision of the Constitution that:

"It is true that Section (sic) 62(f) of the Constitution cannot be considered self executory **but if a person involved in corruption and corrupt practices has been finally adjudged to be so, then on the basis of such final judgement**, his candidature on the touchstone of Article 62(f) of the Constitution can be adjudged to the effect whether he is sagacious, righteous, non-profligate, honest or amen." (para 114).

This takes the teeth out of Article 62(f) for all times (being a ruling of 17 judges). Only a person finally convicted by the highest appellate forum can hence forth be presumed to be foul of Art. 62(f).

Similarly, the Court had to address the issue of Article 227 at length only because prolonged arguments were addressed on behalf of Dr. Mubbashar Hassan by his attorney, Mr. Hafiz Pirzada. There was indeed lengthy discussion of Article 227 and recourse to Islamic criteria and yardsticks from the bar. The Court, as per practice, had to deal with these arguments in its detailed judgement. **And, refreshingly, 17 judges of the Supreme Court have unanimously and the first time, ruled out unspecific challenges on grounds of Precepts of Islam, the morality and conscience of the Constitution or any other principle except the strict letter of the Constitution itself.**

"We may add a word of caution since there is a tendency among some litigants to invoke such precepts of Islam as do not have universal acceptance even among the jurists and schools of Islamic Sharia, or who will invoke, on vague and unspecific grounds, recourse to the morality and conscience of the Constitution or to international conventions. **These cannot be invoked as a matter of course, and certainly not to strike down formal legislation or executive action which is otherwise found to be within the scope of the Constitution and the law.** The Constitution remains supreme and the primary reason for striking down the NRO has been its being ultra vires the express and stated provisions of the Constitution. The observations relating to the application of Article 227 and to the morality and conscience of the Constitution are only further supportive observations that can be construed as a reconfirmation of the essential and inherent invalidity in the light of the other express provisions contained in the Constitution. **The**

primary touchstones remain the other provisions of the Constitution specified in the judgment.” (para 139).

Both the above are very progressive caveats in the judgement. They rule out recourse to vague and unspecific concepts in the future.

Question: But it is generally said that the judgment has encroached upon the powers of the executives and disturbed the balance of institutions, particularly the executive and judiciary.

Aitzaz Ahsan: What is being said is that because it provides for a monitoring process of the judges and of the investigative machinery which is under the executive, therefore, it has encroached upon the executives’ domain. The superior courts in Pakistan have for the last 62 years been giving directions to the executive with respect to investigations and matters that related to prosecutions. Everyday, police officers are given directions and their progress is monitored, prosecutions are monitored. So this is not something unique that the Supreme Court has done. And moreover, it is in the interest of the accused.

In these cases, the main complaint **of the accused** was that prosecutions were inordinately delayed. And the court has probably taken this up on that ground also that prosecutions should not be delayed.

Question: The government says that it has started a reconciliation process, and the NRO is about political reconciliation. So how do we choose between corruption and reconciliation?

Aitzaz Ahsan: I don’t know what is meant by reconciliation in this context, it is titled Reconciliation Ordinance, but it relates only to prosecutions within a certain time period from January 1st 1986 to October 12th 1999. Anybody who has committed the same offence outside these dates is subject to criminal law. Anyone who has committed offences within this period are the beneficiaries of immunity. That is what it says really. It is difficult for me to comment on the area of reconciliation that it really spans.

Question: And you think that corruption is more important than reconciliation?

Aitzaz Ahsan: Well, reconciliation is very important in politics. But in my estimation, this law is not about political reconciliation, it is basically about the withdrawal of prosecution and the acquittal of people convicted of serious crimes. That is the matter of the law. It is called a reconciliation ordinance, but that is the obvious application of this law.

Question: The thing is this period of the NRO, which according to Justice Nasir Aslam Zahid that army generals take this period as the political era. And they think that whenever there was a military government, there was no corruption. So why was this period of time taken, and not other periods of time?

Aitzaz Ahsan: Well that is a defect in the law. It is one of the reasons the law was struck down. It is discriminatory. It discriminates between a convict or an accused who has committed a certain kind of offence outside these dates and a person who has committed the same offence

within these dates. So obviously, this was discriminatory. In fact, I had advised Mohtarma Benazir Bhutto at that time that it was likely to be struck down in a court of law, on the grounds that it favours people within a certain span of time and secondly, it favours only holders of public office. What about the ordinary citizen who has committed the same offence and is not a holder of public office? **The giver of bribes may be an ordinary citizen. He will be tried and the bribe he has given to the person who has received the bribe, in the same transaction will be exempt from trial because he is the “holder of public office”.** Actually, he should be more responsible and more liable to trial than the ordinary citizen, even though both have committed the same offence and both are jointly and equally responsible and liable. But the holder of public officer is held while the person who gives the bribe is considered a criminal.

Question: The judiciary has legalized martial laws. So why do they think that they only have amnesty and not the politicians? Is there any need to try those judges who have given sanctions to the military government?

Aitzaz Ahsan: Well, unfortunately, Parliaments have, (first) by the two-thirds majority in the 8th Amendment and (second) two-thirds majority in the 17th Amendment, legitimized military takeovers and legitimized therefore, judges supporting these military takeovers and taking oath under the military dictate. The military intervention of November 3rd 2007 is distinct only to the extent the Parliament did not validate or legitimize it and has not done so to this day. So the judges who took oath under the martial law imposed by General Musharraf came into a different category than judges who had previously endorsed military takeovers.

I personally think they should all be lumped together, but the Parliament and Constitution really discriminate and hold them apart because every military takeover that was legitimized and validated by the judges was also validated by Parliament in earlier times, except the November 3rd 2007 takeover which was not validated.

Question: there are millions of cases where the chief justice after restoration has announced judicial policy. But this judicial policy is not working, there were hundreds of thousands of cases this year, more added in the courts, so how will this judiciary provide justice to the common man?

Aitzaz Ahsan: In the judicial policy, a monitoring mechanism has been set up. And I think they are taking reports each month from every district and almost every time the Supreme Court registrar has been holding press conference and announcing how many cases have been decided, they run into hundreds of thousands of cases every month. So I personally think it is having an effect, particularly the monitoring mechanism, because the lower courts are not ready now to adjourn cases. There is certainly a speeding up of the judicial process. How far it can go is another matter. But there is certainly a visible speeding up of the judicial process because of the new judicial policy.

Question: The judiciary speaks so much, passing remarks in the cases of disappearances, not asking intelligence agencies to come, in spite of so many people saying they have been in military torture cells. What is the role of the judiciary? Just passing remarks?

Aitzaz Ahsan: It's also the media. The media picks up every word, every sentence that comes from the lips of a judge and makes a story out of it. So it's a mix of speaking judges and media activism.