PLD 1973 SC 49

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STATE

Versus

ZIA-UR-REHMAN AND OTHERS

Per Hamoodur Rahman, J.

(a) Constitution of Pakistan (1973) Interpretation, Preamble, Arts. 2A & 185

As the learned Attorney-General has himself conceded, in the case of a Government set up under a written Constitution, the functions of the State are distributed amongst the various State functionaries and their respective powers defined by the Constitution. The normal scheme under such a system, with which we are familiar, is to have a trichotomy of powers between the executive, the Legislature and the judiciary. **[p. 66] A**

In all such cases, it will also be the function of the constitution to define the functions of each organ or each branch of an organ, as also specify the territories in which, the subjects in respect of which and sometimes even the circumstances in which these functions will be exercised by each of these organs or sub-organs. **[p. 66] B**

This takes me to the question as to what is a Constitution, the Constitution, as defined by K.C. wheare, for countries which have a written Constitution. **[p. 66] C**

So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution ; that it derives its powers and jurisdictions from the Constitution; and that it will even confine itself within the limits set by the Constitution which it has taken oath to protect and preserve but it does claim and has always claimed that it has the right to interpret the Constitution and to say as to what a particular provision of the Constitution means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court. **[p. 69] D**

This is a right which it acquires not de hours the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or super-natural right but this judicial power is inherent in the Court itself. It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself. **[p. 69] E**

In saying this, however, I should make it clear that I am making a distinction between “judicial power” and “jurisdiction”. In a system where there is a trichotomy of sovereign powers, then ex necessitate rei from the very nature of things the judicial power must be vested in the judiciary. **[p. 69] F**

It may well be asked at this stage as to what is meant by "jurisdiction"? How does it differ from "judicial power"? Apart from setting up the organs the Constitution may well provide for a great many other things, such as, the subjects in respect of which that power may be exercised and the manner of the exercise of that power. **[p. 69] G**

In exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will. Even when it declares a legislative measure unconstitutional and void, it does not do so, because, the judicial power is superior in degree or dignity to the legislative power; but because the Constitution has vested it with the power to declare what the law is in the cases which come before it. **[p. 70] H**

On the other hand it is equally important to remember that it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law if it has made it competently without transgressing the limitations of the Constitution. Again if a law has been competently and validly made the judiciary cannot refuse to enforce it even if the result of it be to nullify its own decisions. **[p. 70] I**

Having said this much about the constitutional position of the Courts and their relationship with the other equally important organ of the State, namely; the Legislature, it is now necessary to examine as to whether any document other than the Constitution itself can be given a similar or higher status or whether the judiciary can, in the exercise of its judicial power, strike down any provision of the Constitution itself either, because, it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of Government they wish to be established. I for my part cannot conceive of a situation, in which, after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country, the judiciary can claim to declare any of its provisions ultra vires or void. This will be no part of its function of interpretation. Therefore, in my view, however solemn or sacrosanct a document, if it is not incorporated in the Constitution or does not form a part thereof it cannot control the Constitution. At any rate, the Courts created under the Constitution will not have the power to declare any provision of the constitution itself as being in violation of such a document. If in fact that document contains the expression of the will of the vast majority of the people, then the remedy for correcting such a violation will lie with the people and not with the judiciary. It follows from this that under our own system to the Objectives Resolution of 1949, even though it is a document which has been generally accepted and has never been repealed or renounced, will not have the same status of authority as the Constitution itself until it is incorporated within it or made part of it. If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof. This does not, however, mean that the validity of no Constitutional measure can be tested in the Courts. If a Constitutional measure is adopted in a manner different to that prescribed in the Constitution itself or is passed by a lesser number of votes than those specified in the Constitution then the validity of such a measure may well be questioned and adjudicated upon. This, however, will be possible only in the case of a Constitutional amendment but generally not in the case of a first or a new Constitution, unless the powers of the Constitution-making body itself are limited by some supra-Constitutional document.

It is contended on behalf of the respondents that this Court has, in the case of Asma Jilani v. The Government of the Punjab (I), already declared that the Objectives Resolution adopted by the first Constituent Assemble of Pakistan on the 7th of March 1949, is the "grund norm" for Pakistan and,

therefore, impliedly held that it stands above even the Interim Constitution or any Constitution that may be framed in the future. I regret to have to point out that this is not correct. All that was said by me in my judgment in that case (page 182) was as follows:-

"In any event, if a grund norm is necessary for us I do not have to look to the Western legal theorists to discover one. Our own grund norm is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exerciseable by the people within the limits prescribed by Him is a sacred trust.

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This is an immutable and unalterable norm whish was clearly accepted in the Objectives Resolution passed by the Constituent Assemble of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the "cornerstone of Pakistan's legal edifice" and recognized even by the learned Attonry-General himself "as the bond which binds the nation" and as a document from which the Constitution of Pakistan "must draw its inspiration". This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or civil. Indeed, it cannot be, for, it is one of the fundamental principles enshrined in the Holy Qur'an." **[pp. 70, 71, 72] J and continuation**

It will be observed that this does not say that the Objectives Resolution is the grund norm, but that the grund norm is the doctrine of legal sovereignty accepted by the people of Pakistan and the consequences that flow from it. I did not described the Objectives Resolution as "the cornerstone of Pakistan's legal edifice" but merely pointed out that one of the learned counsel appearing in the case had described it as such. It is not connect, therefore, to say that I had held it, as Justice Ataullah Sajjad has said in his judgment, "to be a transcendental part of the Constitution" or, as Justice Muhammad Afzal Zallah has said, to be a "supra-Constitutional Instrument which is unalterable and immutable".

Similarly, all that my learned brother Yaqub Ali, J., said on the subject at page 235 was as follows:-

"Pakistan is an Islamic Republic. Its ideology is enshrined in the Objectives Resolution of the 7th April 1949, which inter alia declares wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah. We should, therefore, turn more appropriately to Islamic Jurisprudence for the definition of "law". One method of defining "law" is to know contained in the Holy Qur'an, and Hadith, namely precepts and actions of the Holy Prophet (peace be upon him). The other sources are Ijma: Consensus and juristic deductions including Qiyas; Analogy, Istihsan or Juristic Equity, Public Good, Istidlal; Reason and Ijtihad; Juristic Exposition. While Juristic Deductions are judge-made laws, Ijma' is based on the doctrine of Imam Shafi'I that "the voice of the people is the voice of God", and is the most fruitful source of law-making in Shari'at. In the present day context the Legislative Assemblies comprising of chosen representatives of the people perform this function. Thus, in Islamic Jurispurdence, the will of a sovereign, be he the monarch, the President or the Chief Martial Law Administrator is not the source of law. The people as delegate of the Sovereignty of the Almighty alone can make laws which are in conformity with the Holy Qur'an and Sunnah."

Sajjad Ahmad, J. observed at page 258 as follows:-

"Our grund norms are derived from our Islamic faith, which is not merely a religion but is a way of life. These grund norms are unchangeable and are inseparable from our polity. These are epitomized in the Objectives Resolution passed by Constituent Assembly of Pakistan on 7-3-1949, and were incorporated

in the first Constitution of the Islamic Republic of Pakistan of 1956 and repeated again the Constitution of 1962. Its basic postulates are that sovereignty belongs to Allah Almighty which is delegated to the people of Pakistan who have to exercise the State powers and authority through their chosen representatives on the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam wherein the fundamental human rights are to be respected and the independence of the judiciary is to be fully secured. Can it be argued that any adventurer, who may usurp control of the State power in Pakistan, can violate all these norms and create a new norm of his own in derogation of the same? The State of Pakistan was created in perpetuity based on Islamic ideology and has to be run and governed on all the basic norms of that ideology, unless the body politic of Pakistan as a whole, God forbid, is re-constituted on an un-Islamic pattern, which will, of course, mean total destruction of its original concept. The Objectives Resolution is not just a conventional preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan."

Salahuddin Ahmed, J. observed at page 264 to the following effect:-

"The cornerstone of the State of Pakistan is that the sovereignty rests with Allah and Pakistan is his delegatee in the matter of the Governance of the State. It is natural, therefore, that the delegatee or for the matter of that any ruler, single or collective, in Pakistan can never have unlimited power. If the present regime has legitimate credentials, as claimed by the learned Attorney-General the application of the doctrine of necessity does not arise. It must rely on its own source of law." **[pp. 72, 73] K and continuation**

There is no mention in these observations either of the Objectives Resolution being the "grund norm" for Pakistan. The "grund norm" referred to by us was something even above the Objectives Resolution which as Sajjad Ahmad Jan, J. put it "embodies the spirit and the fundamental norms of the constitutional concept of Pakistan". It was expected by the Objectives Resolution itself to be translated into the Constitution. Even those that adopted the Objectives Resolution did not envisage that it would be document above the Constitution. It is incorrect, therefore, to say that it was held by this Court that the Objectives Resolution of the 7th of March 1949, stands on a higher pedestal than the Constitution itself. The views of the minority of the learned Judges in the High Court, in so far as they have sought to read into the judgments of this Court something which is not there, cannot, therefore, be supported. **[p. 73] L and continuation**

In this connection, I would also like to point out that even if the Objectives Resolution is treated as a document from which the makers of the Constitution must draw inspiration and seek guidance, then, too, there is nothing in the Interim Constitution to show that any of the ideals laid down in this the Objectives Resolution has been violated. Indeed, the Interim Constitution itself more-or-less faithfully re-produces the Objectives Resolution of 1949 as its own preamble in the same manner as the Constitution of 1956 did. It cannot, therefore, be said that any provision of the Interim Constitution of 1972 is in violation of any of the principles of the Objectives Resolution of 1949. **[pp. 73, 74] M and continuation**

The next question that arises for consideration is as to whether the Interim Constitution is itself a valid document and whether it has been framed by a competent body. The first attack on the validity of the Interim Constitution is on the ground that the National Assembly, as now constituted, was an illegal body, because, the majority of its members, namely, 160 out of 300 elected from East Pakistan, had not participated in its proceedings. Alternatively, it is contended that even if this truncated body is allowed to function under the doctrine of necessity, it can function only within a limited field and for a limited purpose. It cannot, as at present constituted, claim the right to frame a Constitution for Pakistan, because, it would only be a Constitution framed by a minority of the members for a part of the Country.

It could, therefore, at best function as a National Assembly under the Constitution of 1962 and perhaps only make amendments to that Constitution in the manner laid down therein, because, the Legal Framework Order of 1970 (President's Order No. 2 of 1970), being an act of an usurper, has no existence in the eye of the law. It cannot even be condoned, because, an usurper cannot arrogate to himself the right to give to the country a legal Constitution. As a result furthermore of the decision of this Court, in Asma Jilani's case, the Constitution of 1962 must, therefore, be held to be still holding the field, and, thus even if the election of the members of the National Assembly is condoned on the basis of necessity, they can only function within the framework of the 1962-Constitution.

None of these contentions are, in my opinion, tenable. Firstly, because, after the abrogation of the Constitution of 1962 and the establishment of Military Rule, the Legal Framework Order was clearly an endeavour to restore the principles of democracy whereunder the State was to exercise it powers and authority through the chosen representatives of the people and frame a Constitution for the State of Pakistan wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah, as envisaged by the Objectives Resolution itself. This was clearly, therefore, a step towards achieving the goals set out in the Objectives Resolution and for making provisions for the orderly and the ordinary running of the Government of the country through the chosen representatives of the people. If there was any act of the usurper which could be condoned on the basis of the doctrine of necessity, then this was pre-eminently such an act. This was the first time that the representatives of the people had been chosen in the country by free and fair elections on the basis of adult franchise. The credentials of the people so elected were not, therefore, open to challenge on any principle of democracy, and since they had been elected under the Legal Framework Order, they had also been given a mandate by the people to make provision for the Constitution of Pakistan.

If all the 313 elected members had met and passed a Constitution for Pakistan, would anyone have been in a position to challenge the validity of such a Constitution? I think not. The question then arises as to whether the fact that 160 male and 7 female members could not or did not participate in the proceedings of the National Assembly would make a different either to the effective working of the Assembly or to the validity of the members had been forcibly prevented or otherwise wrongfully excluded from participating in its proceedings, there may have been some scope for contending that the Constitution produced was not a valid document. In the absence, however, of any evidence to show that anyone was so prevented, excluded or prohibited from attending the meeting of the National Assembly convened for the purpose of framing the Constitution, it cannot be said that the meeting of the National Assembly, which mustered the necessary quorum, required by Article 17 of the Legal Framework Order, and adopted a Constitution, was lacking in competence or was not a legally constituted body or that its acts were open to challenge on the ground that the majority of the members of the House were not present. Unless, of course, a special majority had been provided for the enactment of a Constitution and that majority was not present; no such objection can be validly raised. In the absence of any provision to that effect either in the Legal Framework Order or any other document the Interim Constitution adopted unanimously, by all the members present and voting in the House was validly and competently made. It cannot be invalidated merely on the ground that a large number of members were not present or did not participate.

The contention that the National Assembly, as at present constituted, had no authority to frame a Constitution for Pakistan, is also without any substance. This was the first purpose for which it was elected. It could perform other functions as a Legislature only after it had framed a Constitution and if it has framed a Constitution, it has performed its first function in accordance with the mandate given to it by the people. It is not for the Courts to question the mandate of the people.

The argument that as a result of the decision of this Court in the case of Asma Jillani the Constitution of 1962 was again restored because of the illegal abrogation thereof by the usurper, can also not be accepted after the condonation of the Legal Framework Order and the elections held thereunder. Once the representatives of the people are held to have been validly elected, it must follow that they had been validly elected for the purpose of framing of a Constitution in accordance with the provisions of the Legal Framework Order and then the abrogation of the Constitution of 1962 has also to be impliedly accepted as a fait accompli, for, unless the existing Constitution had been abrogated, a new Constitution could not be framed. **[pp. 74, 75, 76] O and continuation**

As indication of this altered situation was also given in the judgment of this Court in Asma Jilani's case at page 208 where it was pointed out that the fact that since the preparation of the judgment in that case the National Assembly had met and ratified the assumption of power by the present President, who is an elected representative of the people and the leader of the majority party in the National Assembly, as now constituted, as also ratified in Interim Constitution, may well have radically altered the situation. I did not then indicate how the situation was altered which I do now by holding that the National Assembly was validly constituted and it validly ratified the Interim Constitution and the assumption of power by the present President. The validity of these acts, as was conceded then by Mr. Manzur Qadir, was "derived from the will of the body politic. If the body politic gives an express answer, that answer is valid and it does not matter who puts the question." It was on the basis of this argument that my learned brother Yaqub Ali, J. too held that "the legality of the elections to the National and Provincial Assemblies under the Legal Framework Order cannot, therefore, be doubted on the ground that Yahya had no legal authority to promulgate this order."

If the Interim Constitution is a valid Constitutional document enacted by a competent body, then, as I have held, it has, like any other Constitution, the same force and validity. All organs of the State owe their origin to it, derive their powers therefrom and function under it subject to the limitations imposed by it. There can be no question, therefore, of any organ or functionary under the Constitution questioning the authority of the Constitution under which it is functioning or striking down any provision of the Constitution on the basis that it is repugnant to some other document, however important or sacred it might be, unless it also is a part of the Constitution itself. Even then, if there is conflict between two provisions of the Constitution, every endeavour must be made to give a harmonious interpretation so that both the provisions may be given their due place in the Constitutional framework. **[p. 76] P and continuation**

This does not, however, mean that the body having the power of framing a Constitution is "omnipotent" or that it can disregard the mandate given to it by the people for framing a Constitution or can frame a Constitution which does not fulfil the aspirations of the people or achieve their cherished objectives political, social or economic. This limitations on its power, however, are political limitations and not justiciable by the judiciary. If a Constituent Assembly or National Assembly so acts in disregard of the wished of the people, it is the people who have the right to correct it. The judiciary cannot declare any provision of the Constitution to be invalid or repugnant on the ground that it does beyond the mandate given to the Assembly concerned or that it does not fulfil the aspirations or objectives of the people. The endeavour to do so would amount to entering into the political arena which should be scrupulously avoided by the judiciary. With political decisions or decisions on questions of policy, the judiciary is not concerned. Its function is to enforce the Constitution and to see that the other organs of the State confine themselves within the limitations prescribed therein; but in doing so it must remember that it given too is subservient to the Constitution and its power to hear and determine is subject to the limitations contained therein and can be exercised only with regard to the subjects over which it is given jurisdiction and in the manner prescribed. By virtue of the fact that it has been set up as that organ of the State which

is to adjudicate upon disputes, it has the right to exercise its "judicial power" to hear and determine even in cases where its own jurisdiction is in question. If there is a dispute on the point as to whether it has or has not jurisdiction over a certain subject matter, it can certainly hear and determine that dispute, even if the result be that it had to hold that it has no jurisdiction. **[pp. 76, 77] Q and continuation**

It is well established rule that we have gather the intention of the law maker from the words used by it; and if it has in two clauses of the same Article used different words, then it follows that its intention is not the same, particularly, where such a conclusion also appears to be in consonance with reason and justice. **[p. 82] S**