

P L D 1992 Supreme Court 595

Present: Nasim Hasan Shah, Shafiur Rahman,
Saad Saond Jan, Abdul Shakurul Salam
and Muhammad Afzal Lone, JJ

- HAKIM KHAN and 3 others---Appellants

versus

GOVERNMENT OF PAKISTAN through Secretary Interior and others---Respondents

Civil Appeals Nos.28 and 39 of 1992, decided on 19th July, 1992.

(On appeal from the judgment dated 14-1-1992 of the Lahore High Court, Lahore in Writ Petition No.26 of 1989).

Per Nasim Hasan Shah, J.; Shafiur Rahman, Saad Saood Jan, Abdul Shakurul Salam and Muhammad Afzal Lone, JJ. agreeing-

(a) Words and phrases---

..... Substantive"---Means an essential part or constituent or relating to what is essential.

Black's Law Dictionary ref.

(b) Constitution of Pakistan (1973)---

---Art 2A---Object of insertion of Article 2A in the Constitution---Article 2A, Constitution of Pakistan is not a supra-Constitutional provision---Objectives Resolution having been made a substantive part of the Constitution by virtue of Art. 2A it became an essential or integral part of the Constitution possessing the same weight and status as other Articles of the Constitution which were already a substantive part thereof.

Since the Objectives Resolution has been made a substantive part of the Constitution it has undoubtedly become an essential or integral part of the Constitution possessing the same weight and status as other Articles of the Constitution which are already a substantive part thereof.

In other words 'the Objectives Resolution has become- from merely a preamble of the Constitution, declaring the objectives and ideals which the Constitution-makers were expected to reflect in the substantive part of the Constitution by framing appropriate provisions to carry into effect those objectives and ideals to a substantive, binding, integral provision of the Constitution. This is now its undeniable position.

Objectives Resolution exactly provides in its first clause:-

"Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust."

The above declaration epitomizes the belief of every Muslim regarding the true nature of an Islamic polity with regard to the extent of power exercisable by them in their State as also the mode in which this power shall be exercised.

The second clause declares:-

"This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan."

This clause refers to the resolve of the people of Pakistan to frame a Constitution for Pakistan.

In the context of a Constitution having been framed already namely the Constitution of 1973 of which Constitution the newly-added Article 2A is to form an integral part, a difficulty arises in comprehending as to what the true import and significance of this clause, in the present context is. Does it imply that a Constitution is yet to be framed for the sovereign independent State of Pakistan and that the said Constitution will be framed in the light of the principles enunciated in the Clauses of the Objectives Resolution that follow? Or can it be construed to mean that in the changed context these Objectives will be fulfilled by the provisions of the existing Constitution of the sovereign independent State of Pakistan? And in case the existing provisions thereof do not measure up to them or are repugnant to the principles and provisions set out in the Objectives Resolution, the said provisions can be declared' by the Courts to be inoperative to the extent of the repugnancy?

A. Constitution has to be read as a whole and that it is the duty of the Court to have recourse to the whole instrument in order to ascertain the true intent and meaning of any particular provision. And where any apparent repugnancy appears to exist between its different provisions; the Court should harmonise them, if possible.

This rule of interpretation does not appear to have been given effect to while holding the view that Article 2A is a supra-Constitutional provision. Because, if this be its true status then the above-quoted clause would require the framing of an entirely new Constitution. And even if Article 2A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution. According to the opening clause of this Resolution the authority which Almighty Allah has delegated to the State of Pakistan is to be exercised through its people only "within the limits prescribed by Him". Thus all the provisions, of the existing Constitution will be challengeable before Courts of law on the ground that these provisions are not "within the limits of Allah" and are in transgression thereof. Thus, the law regarding political parties, mode of election, the entire structure of Government as embodied in the Constitution, the powers and privileges of the President and other functionaries of the Government will be open to question. Indeed, the very basis on which the Constitution is founded namely the trichotomy of powers i.e. that the three great organs of the State have their own particular spheres of authority wherein they exercise their respective powers or the system of checks and balances could be challenged, alongwith all the ancillary provisions embodied in the 1973-Constitution in relation thereto. Thus, instead of making the 1973-Constitution more purposeful, such an interpretation of Article 2A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form. This presumably was not the intention of legislature while adding Article 2A in the Constitution under the Revival of the Constitution Order, 1985 (President's Order No.14/1985). It certainly was not the intention of the law-makers who enacted Article 270-A vide section 19 of the Constitution (Eighth Amendment) Act 1985 which provision affirmed and adopted, inter alia, P.O.14/1985 (whereby Article 2A was inserted in the Constitution). Their intention simply was that the Objectives Resolution should no longer be treated merely as a declaration of intent but should enjoy, the status of a substantive provision and become equal in weight and status as the other substantive provisions of the Constitution. In case any inconsistency was found to exist between the provisions of the 1973-Constitution and those of the Objectives Resolution would, they expected, be harmonised by the Courts in accordance with the well-established rules of interpretation of the Constitutional documents. Being creatures of the Constitution it was not visualised that they could not annul any existing Constitutional provisions (on the plea of its repugnancy with the provisions of Article 2A as no Court, operating under the Constitution, can do so.

It is not open to Courts to invalidate a provision of the Constitution, being creatures of the same Constitution.

Asma Jilani's case PLD 1972 SC 139; Dosso's case PLD 1958 SC 533; Zia-ur-Rchman v. The State PLD 1972 Lah. 382; State v_ Zia-ur-Rchman PLD 1973 SC 41) and Official Report of the Fifth Session of. the Constituent Assembly of Pakistan Debates, Vol. V, 1949 mentioned.

Black's Law Dictionary and "The Shariat Bill and. its Implications" by Sh. Aftab Hussain, former Chief Justice of the Federal Shariat Court PLD 1985 Jour. 327 ref.

(c) Interpretation of Constitution--

---Constitution has to be read as a whole---Court is bound to have recourse to the whole instrument in order to ascertain the true intent and meaning of any particular provision---Where any apparent repugnancy appears to exist between its different provisions, the Court has to harmonise them, if possible.

Reference by the President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan PLD 1957 SC 219 ref.

(d) Islamic Jurisprudence---

--- Islamic State---All three limbs of the State namely Executive, Legislature and Judiciary in Islamic Polity can exercise the delegated functions of the divine sovereignty within their respective spheres and the reference in the Holy Qur'an to the obedience of is equally applicable to the members of the judiciary.

Tafheemul Our'an by Maulana Maududi ref.

(e) Constitution of Pakistan (1973)--

---Art. 2A---Role of "Objectives Resolution" notwithstanding the insertion of Art.2A in the Constitution---When Objectives Resolution itself has been inserted in the Constitution of Pakistan as Art.2A as a mandatory provision of the Constitution, if any of the provisions of the Constitution exceeds in any particular respect, the limits prescribed by Allah Almighty (within which His people alone can act) and some inconsistency is shown to exist between the existing provisions of the Constitution and the limits to which the man made law can extend, such inconsistency will be resolved in the same manner as was originally envisaged by the authors and movers of the Objectives Resolution namely by the Parliament

itself by suitably amending such provision through the amendment process laid down in the Constitution itself--If the Court finds that any existing provision of the Constitution contravened the Injunctions of Islam in some respects it has to bring the transgression to the notice of the Parliament which alone was competent to amend the Constitution and could initiate remedial legislation to bring the impugned provision in conformity with the Injunctions of Islam.

The role of the Objectives Resolution, notwithstanding the insertion of Article 2A in the Constitution (whereby the said Objectives Resolution has been made a substantive part thereof) has not been fundamentally transformed from the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect ideals and the objectives set forth therein. Thus, after the adoption of the Objectives Resolution on 12th March, 1949, the Constitution-makers were expected to draft such provisions for the Constitution which were to conform to its directives and the ideals enunciated by them in the Objectives Resolution and in case of any deviation from these directives, while drafting the proposed provisions for the Constitution the Constituent Assembly, before whom these draft provisions were to be placed, would take the necessary remedial steps itself to ensure compliance with the principles laid down in the Objectives Resolution. However, when a Constitution already stands framed (in 1973) by the National Assembly of Pakistan exercising plenary powers in this behalf wherein detailed provisions in respect of all matters referred to in the Objectives Resolution have already been made and Article 2A was made a mandatory part thereof much later i.e, after 1985 accordingly now when a question arises whether any of the provisions of the 1973-Constitution exceeds in any particular respect, the limits prescribed by Allah Almighty (within which His people alone can act) and some inconsistency is shown to exist between the existing provisions of the Constitution and the limits to which the man made law can extend; this inconsistency will be resolved in the same manner as was originally envisaged by the authors and movers of the Objectives Resolution namely by the National Assembly itself. In practical terms, this implies in the changed context, that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself.

Now expressions like "the limits prescribed by Allah" or the principles Islam" which according to another clause of the Objectives form the basis of the Constitution are rather vague, general are interpretations. at -'of these cannot words.r modified" that making. the validity of _dependent on the result of the interpretations placed on these concepts by Courts law from time to time pursuant to controversies raised about them every now and they would render the Constitution unstable and make it uncertain. They, accordingly, opted for saddling the responsibility of giving effect to the true intent of these concepts on the chosen representatives of the people---as the chosen representatives were the ones who had to frame the Constitution and were also the ones empowered to amend it (subject, of course, to the Divine limitation). Indeed, no objection can be taken to adopting this course because the members of the Parliament (Majlis-i-Shoora) are equally accountable to God Almighty as are the members of the Court or any other body of persons falling under the category of (' SI I3 A) (Ulil-amr).

Accordingly, now if any question is raised in connection with the validity of any existing provision of the Constitution on the ground that it transgresses the limits prescribed by Allah Almighty (within which His people were competent to make laws) such a question can only be resolved by the Majlis-i-Shoora (Parliament), which can, if the plea is well founded, take the necessary remedial action by making suitable amendments in the impugned provision in order to bring it within the limits prescribed by Allah Almighty.

If the Court considered that the existing provision of the Constitution contravened the Injunctions of Islam in some respects it should have brought the transgression to the notice of the Parliament which alone was competent to amend the Constitution, and could initiate remedial legislation to bring the impugned provision in conformity with the Injunctions of Islam.

(f) Constitution of Pakistan (1973)--

transgression to the notice of Parliament which alone was competent to amend the Constitution, and could initiate remedial legislation to bring the impugned provision in conformity with the Injunctions of Islam.

Per Shafiur Rahman, J--

(g) Constitution of Pakistan (1973)--

----Art. 2A-- -Objectives Resolution-- -Interpretation.

Objectives Resolution has three separate distinct components. The first is purely structural feature of it that the sovereignty of Almighty descending on the people of Pakistan constituting State of Pakistan is to be exercised through their chosen representatives. So the people operating through their chosen representatives and the Almighty Allah at the apex exhaust the pristine devolution, distribution and sharing of Divine sovereignty. The individuals, the authorities, the institutions, the Courts, do not figure in this structure. They make their appearance on terms, with limitation, as a result of further delegation of authority expressly made or impliedly conferred.

The second is its qualitative feature. The sovereignty shared or enjoyed is delegated, capable of further delegation, is by its very nature a sacred trust and has to be exercised within the limits prescribed by the Almighty Allah.

The third is its normative feature. The norms, the goals, the ideals, -mostly mundane in nature are spelt out with particularity which have to be achieved through the Constituent Assembly and by the process of framing a Constitution.

Nowhere in the Objectives Resolution, either expressly or impliedly ` one finds either a test of repugnancy or of contrariety, nor empowering of an individual or of an institution or authority or even a Court to invoke, apply and declare Divine limits, and go on striking everything that comes in conflict with it by reference to Article 2A. Such an interpretation of Article 2A of the Constitution and appropriation of authority so to do amounts to usurpation. It would indeed be so when the amplitude of power reserved for the Parliament in the same Constitutional instrument is kept in view.

Apart from these broad features noted there are settled, classic, accepted principles of interpretation of Constitutional provisions. They should not be lost sight of, ignored or violated in euphoria for instant Islamization of Constitution, Government and society.

(h) Interpretation of Constitution-

---- Constitutional provision, nature of--- When Constitutional provisions are self-executing- --Question whether a Constitutional provision is self-executing is always one of intention, and to determine intent, the general rule is that Courts will consider the language used, the objects to be accomplished by the provision, and surrounding circumstances---Extrinsic nature may be resorted to where the language of it's Constitution itself is ambiguous.

A Constitutional provision is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced without the aid of a legislative enactment. It is within the power of those who adopt a Constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the Legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. Where the matter with which a given section of the Constitution deals is divisible, one clause thereof may be self-executing and another clause or clauses may not be self-executing. Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty imposed. That a right granted by a Constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self executing, nor does the self-executing character of the Constitutional provision necessarily preclude legislation for the protection of the right secured. A Constitutional provision which is merely declaratory of the common law is self executing. A Constitutional provision designed to remove an existing mischief should never be construed as dependent for the efficacy and operation on Legislature.

Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without applying the means by which such policy or principles are to be carried into effect, or if the language of the Constitution is directed to the Legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect. Provisions of this character are numerous in all Constitutions and treat of a variety of subjects. They remain inoperative until rendered effective by supplemental legislation. The failure of the legislation to make suitable provision for rendering a clause effective is no argument in favour of self-executing construction of the clause. Self-enforcing provisions are exceptional.

The question whether a Constitutional provision is self-executing is always one of intention, and to determine intent, the general rule is that Courts will consider the language used, the objectives to be accomplished by the provision, and surrounding circumstances. Extrinsic matters may be resorted to where the language of the Constitution itself is ambiguous.

Bindra's Interpretation of Statutes, 7th Edn., 1987 quoted.

(i) Constitution of Pakistan (1973)--

----Art. 2A---Provisions of Art.2A were never intended at any stage to be self executory or to be adopted as a test of repugnancy or contrariety and it was beyond the power of Court to have applied the test of repugnancy by invoking Art.2A of the Constitution for striking down any other provision of the Constitution---Duty of Court stated.

The ascertainment of the absolute principles of Islamic Law with regard to political power, its distribution and delegation and financial institutions is itself a matter requiring detailed study, thorough research and meaningful debate before acquiring concrete shape so as to be adopted as a test of repugnancy of the Constitutional provisions. It cannot summarily be done. Such an exercise can more appropriately be undertaken under the control and supervision of the legislature and the expert bodies like the Islamic Ideology Council and Islamic Research Institute. The provisions of Article 2A were never intended at any stage to be self-executory or to be adopted as a test of repugnancy or of contrariety. It was beyond the

power of the Court to have applied the test of repugnancy by invoking Article 2A of the Constitution for striking down any other provision of the Constitution.

The Court's primary duty is to adjudicate by reference to positive law in a manner to lend certainty, clarity and precision to the application of law to concrete questions of law and fact necessarily required to be decided. The Court should not undertake examination of theoretical and academic questions nor should ordinarily look for anomalies in the Constitution with a view to suggest to Parliament amendment or improvement in the Constitution. If the introduction of Article 2A of the Constitution as a substantive provision of the Constitution does not by itself authorise the Court to adopt it as a test of repugnancy with regard to the other Constitutional provisions it would be better for the superior Courts not to undertake this exercise or to record opinions on merits with regard to such repugnancy. That would be a commitment not conducive to the purely judicial function's that the Courts are required to perform under the Constitution.

(j) Administration of justice---

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(k) Constitution of Pakistan (1973)--

----Arts. 45 & 2A---Court has no power to apply the test of repugnancy by invoking Art.2A of the Constitution for striking down Art.45 of the Constitution of Pakistan.
Per Shafiur Rahman, J:

(1) Constitution of Pakistan (1973)--

----Art. 45---Power of President of Pakistan to grant pardon---President, has and continues' to have in respect of Tazir punishments the right of commutation, remission etc.

In the present case, the punishments of death awarded were not by way of Qisas. The sentences of death awarded were under Ta'zir. Just as a sentence of Ta'zir is imposed on State's command and not as a right of the individual under God's law, the State as represented by the President, has and continues to have in respect of Ta'zir punishments, the right of commutation, remission etc.

Per Abdul Shakurul Salam, J: The President of Pakistan had no such power to commute the death sentence awarded in matters of Hudood, Qisas and Diyat Ordinance. In this view of the matter the power of pardon in such cases only vests with the heirs of the deceased. Therefore, the cases in which death sentences have been awarded, the President had no power to commute, remit or pardon such sentences. However, the cases would be on different footings, if a person has been punished by way of Tazir as in such cases, the Head of the State has the power to pardon the offender and that too in public interest.

In the present case the President had commuted the sentences of death to imprisonment for life which were imposed not as Qisas but as Ta'zir under the ordinary criminal law before the enforcement of the Qisas and Diva[Ordinance. Therefore, there was no occasion per the formulation to annul the President's Order.

Per Abdul Shakurul Salam, J. agreeing with Nasim Hasan Shah and Shafiur Rahman, JJ.-

(m) Constitution of Pakistan (1973)---

----Art. 2A---If any Article of the Constitution is in conflict with Art.2A, the appropriate procedure is to have it amended in accordance with the prescribed provision of the Constitution for the purpose.

If any Article of the Constitution is in conflict with Article 2A the appropriate procedure is to have it amended in accordance with the prescribed provision for the purpose. However, it does not absolve the Courts of their duty to give effect to the provisions of Article 2A as it has been made "substantive part of the Constitution". A Constitution is an organic whole. All its Articles have to be interpreted in a manner that its soul or spirit is given effect to by harmonising various provisions.

Dr. Khalid Ranjha, Advocate Supreme Court instructed by MA. Qureshi, Advocate-on-Record for Appellants (in CA.No.28 of 1992).

Aziz A. Munshi, Attorney-General for Pakistan for Respondent No.1 (in C.A.No.28 of 1992).

Malik Maqbool Elahi, A: G. Punjab and Rao Muhammad Yousuf Khan, Advocate-on-Record for Respondents Nos.1 and 2 (in CA.No.28 of 1992).

Aziz A. Munshi, Attorney-General for Pakistan instructed by Ch. Fazal-i-Hussain, Advocate-on-Record for Appellant (in C.A.No.39 of 1992).

Dr. Abdul Basit, Advocate Supreme Court for Respondents (in CA.No.39 of 1992).

S.M. Zafar and Ijaz Hussain Batalvi: Amicus curiae.

Raja Muhammad Afsar, A: G. Balochistan and Hamid Saeed, Addl. A.-G., N.-W.F.P. for Respondents (in CA.No.39 of 1992).

Date of hearing: 26th February, 1992.